

# **Guidance on R(S) policy – Dealing with failed asylum claims which may have lost the benefit of an ELR policy as a result of delay**

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## **Table of Contents**

### **Introduction**

**Is the individual eligible for leave outside the rules under the R(S) policy criteria?**

### **Country Specific Four Year ELR Policies**

**Iraqi cases**

**Doubtful or disputed nationality cases**

**Hybrid cases**

**Policy background**

## Introduction

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This instruction explains how UK Border Agency Case Owners/Workers should deal with cases following the Court of Appeal judgment in R(S) [2007] EWCA Civ 546, where an individual appears to have lost the benefit of a four year country specific Exceptional Leave to Enter or Remain (ELR) policy unfairly as a result of a delay in deciding his case. The background to this instruction is set out in Policy background.

## Is the individual eligible for leave outside the rules under the R(S) policy criteria?

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### Stage 1

**Is the individual a national of a country where a policy to grant 4 years exceptional leave to enter or remain in the UK was in force at 1 January 2001?** (See Country Specific Four Year ELR Policies, and if the individual is Iraqi, also Hybrid cases)

- If yes, proceed to stage 2
- If no, the individual does not qualify under the R(S) policy criteria.
- If unclear because the individual is a disputed nationality case, refer to Doubtful or disputed nationality cases for further information

### Stage 2

**Has the asylum application been refused, or if not previously decided, does the application now fall to be refused?**

- If yes, proceed to stage 4
- If no, proceed to stage 3

### Stage 3

**Was the individual granted ELR under a subsequent country ELR policy but the grant of ELR was for less than four years?**

- If yes, proceed to stage 4
- If no, the individual does not qualify under the R(S) policy criteria.

### Stage 4

**Was the initial asylum application made prior to the expiry date of the relevant ELR policy including on the actual date the ELR policy expired?** (Dates listed in Country Specific Four Year ELR Policies.

- If yes, proceed to stage 5.
- If no, the individual does not qualify under the R(S) policy criteria.

### Stage 5

**Had the case not been decided before the four year ELR policy expired, or had it been decided and the decision was withdrawn prior to the expiry of the four year ELR policy?**

- If yes, proceed to stage 6
- If no, the individual does not qualify under the R(S) policy criteria.

### Stage 6

**Was the benefit of the ELR policy lost as a result of the individual's own actions, such as where the delay to reach a decision was caused by his failure to co-operate with the asylum process?**

- If no, proceed to stage 7
- If yes, the individual does not qualify under the R(S) policy criteria.

## Stage 7

**Does the individual pass character and background checks?** Refer to the [AI Exceptional Leave to Remain - Circumstances in which it will not be appropriate to grant settlement](#).

- If yes, proceed to stage 8
- If no, the individual does not qualify under the R(S) policy criteria.

## Stage 8

**The individual meets the R(S) policy criteria. Any removal action should be suspended and a grant of ILR should be implemented.**

## Country Specific Four Year ELR Policies

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Country specific four year ELR policies were only in place for the following countries for a limited period from January 2001 to February 2003.

<b>COUNTRY</b>	<b>FOUR YEAR ELR POLICY ENDED</b>
Angola- <b>non-Luandan claimants only</b>	31 <sup>st</sup> October 2002
Afghanistan	18 <sup>th</sup> April 2002
Burundi	7 <sup>th</sup> October 2002
Iraq- <b>Government Controlled Iraq (GCI) claimants only</b>	20 <sup>th</sup> February 2003
Liberia	7 <sup>th</sup> October 2002
Rwanda	27 <sup>th</sup> August 2002
Sierra Leone	6 <sup>th</sup> September 2001
Somalia	10 <sup>th</sup> September 2001

### Iraqi cases

If the individual is Iraqi, Case Owners/Workers should also refer to the Iraq policy bulletin of 1 August 2006 POISE / INDIGO. The Iraq policy bulletin sets out the circumstances under which certain Iraqi cases should have been granted four years ELR between 1991 and 2003. From 20 October 2000, in light of the improved conditions in the Kurdish Autonomous Zone, only claimants from Government Controlled Iraq were granted four years' ELR. A number of Iraqi cases during this time were not granted ELR on the erroneous ground that they were able to relocate internally, so they should have been granted ELR. The remedy for cases falling under this policy is also ILR.

## **Doubtful or disputed nationality cases**

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Where the Case Owner/Worker is satisfied the individual is a national of a country other than those listed in Country Specific Four Year ELR Policies, he should not benefit under the ELR policy of the claimed country and the claim must be assessed with regard to both countries in line with disputed nationality Asylum Instructions.

## Hybrid cases

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An individual may apply for ILR under both the R(S) policy and in line with the Iraqi cases section above. Cases that do not meet the basic R(S) policy criteria or the criteria for Iraqi cases in the [Iraq Policy Bulletin](#) should be refused.

## Policy background

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In considering whether the benefit of an ELR policy was lost unfairly, Case Owners/Workers should consider the ruling in R(S) [2007] EWCA Civ 546.

'S' was an Afghan asylum claimant whose application was made in 1999 and refused in 2004. The Court of Appeal found that the introduction of new Public Services Agreement (PSA) targets from 2001 (to decide 60% of new decisions within 61 days) had resulted in UK Border Agency (formerly Immigration and Nationality Directorate (IND)) prioritising new casework to meet those targets at the expense of older cases. On 19 June 2007 the Court of Appeal ruled that this was unlawful, not because of the delay, but because the effect of a blanket backlogging of cases was to unlawfully fetter the Secretary of State's discretion.

The unlawful fettering of discretion meant that some individuals, including S, lost out on the benefit of a policy to grant failed asylum seekers from Afghanistan four years ELR. The judgment indicated that the appropriate remedy would be reconsideration by the UK Border Agency (formerly IND) and, where the ELR would have led to Indefinite Leave to Remain (ILR) (i.e. where the ELR policy in question was a four year policy), a grant of ILR should be made.

There are certain groups of individuals who may fall within the R (S) judgment. The groups potentially caught by the judgment are those who lost the benefit of a four year country specific ELR policy because of the specific decision taken by the Home Office after January 2001. Only a small number of nationalities are affected and even then only in certain circumstances.

Individuals do not have to apply under the R(S) criteria. When working on a file of an individual who is accepted to be a national of a country for which a four year ELR policy was in place on 1<sup>st</sup> January 2001, Case Owners/Workers need to check the details of the individual's case against the criteria listed above to identify whether the case falls to be granted ILR.

If, having considered the case in accordance with this guidance, the individual is not eligible for ILR and removal action will follow, Case Owners/Workers should refer to the guidance for considering other extenuating circumstances.

# Document Control

## Change Record

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