AG and others (Policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 20 February 2007

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge King TD
Senior Immigration Judge Grubb

Between

First Appellant
Second Appellant
Third Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the First Appellant:	Mr J Hamilton, instructed by G K Associates
For the Second Appellant:	Ms Veloso, instructed by Edward Ismail Solicitors
For the Third Appellant:	Mr Raja, of Independent Law Partnership
For the Respondent:	Mr M Blundell, Senior Home Office Presenting Officer

(1) If human rights are argued, they should be determined in advance of any argument based on discretion: if the claimant's human rights entitle him to enter or remain in the United Kingdom any discretionary power to allow him to do so is otiose. (2) A policy that in all the circumstances of the case would apparently be exercised in the claimant's favour and contains no elements that genuinely would leave the decision open is relevant in the assessment of proportionality because it goes to the issue of the importance of maintaining immigration control in similar cases. (3) If the claimant fails to establish that his human rights compel the remedy he seeks, but is able to show that there was at the date of the decision a policy in force that governed his case but was not taken into account, he may win an appeal on the ground that the decision, having been made not in accordance with published policy, was 'otherwise not in accordance with the law' within the meaning of s 84(1)(e). (4) If the policy was taken into account and the claimant can show that the terms of the policy and the facts of his case are such that there was no option open to the

decision-maker other than to grant him the remedy he seeks, his appeal should be allowed with a direction. (5) But where within the terms of the policy the benefit to the appellant depends on the exercise of a discretion outside the Immigration Rules, the Tribunal has no power to substitute its own decision for that of the decision-maker.

DETERMINATION AND REASONS

Introduction

1. These appeals were listed for reconsideration on the same day and were heard together, with a view to our giving guidance on the question whether, and if so, in what circumstances the Tribunal in entitled or bound to apply policies declared by the Secretary of State. The issue is not untried: but recent experience in the Tribunal suggests that it may need revisiting following the decision of the Court of Appeal in Baig v SSHD [2005] EWCA Civ 1246.

The three cases before us

2. The appellant in the first case, AG, is from Kosovo. He is now therefore presumably a citizen of Serbia. He arrived in the United Kingdom on 5 November 1997. He claimed asylum then. His wife and four children were with him on his arrival and their claims are dependent on his. Within less than two weeks of his arrival Greece agreed to take responsibility for the assessment of his claim, under the Dublin Convention. His application was therefore formally refused on 5 December 1997. He sought judicial review of that decision, unsuccessfully. He then made an application for leave to remain on the grounds that his human rights would be infringed by his removal. When that application was refused, he appealed. The appeal was dismissed and the Immigration Appeal Tribunal refused leave to appeal. He unsuccessfully sought judicial review of the decision to refuse him leave to appeal. He then made further applications for leave to remain in the United Kingdom. The present appeal is against the Secretary of State's decision on 4 July 2006 refusing leave (and repeating the intention to remove him to Greece).

3. Before the Immigration Judge it was accepted that the appellant could not meet the requirements of the Immigration Rules. The Immigration Judge noted as follows:

> "The appellant's claim rests principally on his submission that he and his family meet all the requirements of the Home Office Policy or concession DP5/96 in that his younger child has been resident in the United Kingdom for more than seven years and is still under the age of 18. He also relies on the Convention on the Rights of the Child, to which the United Kingdom is a signatory, which provides among other things, in Article 3, that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child should be a primary consideration'.".

The Immigration Judge went on to say that he regarded it as important that all the criteria set out in DP5/96 were considered. In his determination he then purported to consider them and concluded as follows:

> "For all the above reasons I have been satisfied on the evidence that the decision of the Secretary of State is contrary to his declared policy DP5/96 and cannot be permitted to stand. The appeal is therefore allowed."

4. The appellant in the second case, EB, is a citizen of Jamaica. He came to the United Kingdom as a visitor in December 2000. He was granted leave to remain as a student until 30 September 2002 but has had no subsequent leave. In 2003 he married here and applied for leave to remain as a spouse. That application was refused and it is clear that the appellant has no claim under the Immigration Rules. The decision refusing his application, dated 10 July 2006, refers to the Secretary of State's policy on marriage applications by overstayers, DP3/96, and gives the Secretary of State's reasons for refusing to apply that policy in the appellant's favour. Before the Immigration Judge the appellant's representative asked merely for the decision to be set aside as not in accordance with the law if the Immigration Judge was satisfied that the policy had not been correctly applied. A Presenting Officer appears to have asserted, by some means after the hearing, that a challenge to the Secretary of State's decision in this case had to be by judicial review.

5. In his determination the Immigration Judge notes that "I have come to the conclusion that both advocates were wrong in their submission". He refers to s86(3)(b) of the 2002 Act as giving him jurisdiction to allow the appeal if he concludes that the discretion exercised by the respondent should have been exercised differently. He makes no reference to s86(6) (we set out both of these provisions below). The Immigration Judge goes on to refer to Baig "which appears to be authority for the proposition that an Immigration Judge has jurisdiction to consider the policy decision of the Secretary of State and to allow an appeal if that policy has been misapplied." The Immigration Judge then found as facts that the appellant and his wife were married; that the marriage was genuine and subsisting; that no enforcement action was taken against the appellant in the two years after his marriage; that the appellant's wife had long-standing commitments in this country and that it would be extremely difficult for her emotionally, financially and practically to leave this country and go to Jamaica. He concluded as follows:

> "I find therefore that it would be unreasonable to expect her to accompany the appellant to Jamaica. The respondent therefore had no good reason for departing from policy DP3/96."

He therefore allowed the appeal.

6. The appellant in the third case, PB, is a national of Bangladesh. She claims to have come to the United Kingdom illegally in the autumn of 1999. She contracted a marriage with a British citizen who, she says, had no interest in having her with him in the United Kingdom. But she is here, and their child, who is said to be a

British citizen, is said to have arrived here before her, in September 1999. In March 2000 she submitted an application for leave to remain as the dependant of her brother. It is, we understand, accepted that that application was misleading in that she did not mention her child. The appellant and her husband were divorced in or about 2002. She was awarded a lump sum of £200,000 and maintenance of £250 per calendar month for the child. The present appeal is against a decision on 18 December 2004 to give directions for the appellant's removal from the United Kingdom. She appealed on human rights grounds. But at the hearing before the Immigration Judge it was asserted that the appellant was entitled to the benefit of the Secretary of State's policy DP5/96, because the child had been in the United Kingdom for seven years.

7. The Immigration Judge's determination poses some challenges for those who, on behalf of the appellant, assert that it is a sound judgment containing no material errors of law. It begins as follows:

> "1. [The appellant appeals] against the decision of the secretary of state dated 27 February 2004 to refuse her application for leave to enter on the grounds that her removal would breach the UK in breach of its obligations under the Human Rights Act 1998 and to refuse her leave to enter the UK.
>
> 2. In immigration appeals the burden of proof is on the appellant and the standard of proof is the balance of probabilities. The relevant date is the date of decision although I may take into account later evidence where it appertains to the date of decision."

8. In the first paragraph the date of the decision and the nature of the decision are misstated; further, the decision as described appears to be a legal impossibility: leave to enter or remain is granted or refused by immigration officers, not by the Secretary of State, save in cases where there has been an asylum or human rights claim, which at that stage there had not (although the decision is said to have been made on human rights grounds). In the second paragraph, the interaction between ss85(4) and 85(5) of the 2002 Act is misstated, and the statement of the standard of proof is, to say the least, somewhat sweeping. The determination concludes as follows:

> "23. I found that the appellant's daughter had been in the UK for the last seven years. I am aware that the Secretary of State has a policy dealing with children and their parents who have been in the UK for seven years or more. I understand that the Secretary of State applies the policy consistently in such cases; there is no evidence before me why he has not applied the policy in this case. I am guided by the case of Baig, (Fouzia) (2005) EWCA Civ 1246 that I can apply the policy directly if I wanted to. I find that the policy does apply in this case and that a failure by the Secretary of State to apply the policy must be disproportionate
>
> 24. In summary, the decision of the ECO was not in accordance with the law or human rights grounds."

Paragraph 23 is not entirely easy to understand. The word "had" is particularly puzzling. At the date of the decision the daughter had not been in the United Kingdom for seven years. At the date of the hearing before the Immigration Judge she had been in the United Kingdom for perhaps a few weeks more than seven years, assuming that the evidence of her undocumented arrival in September 1999 is accepted. There does not appear to have been any evidence before the Immigration Judge on the matters relating to the Secretary of State's policy or its consistency of application. The sentence about Baig is, on its face, unlikely to be a correct statement of law. In paragraph 24, we note that there is no reference to any discretion; and the respondent decision-maker has changed again.

9. The Secretary of State sought and obtained orders for reconsideration in all these appeals. In the first case the grounds were simply that, on the basis of D S Abdi v SSHD [1996] Imm AR 148, the Immigration Judge ought not to have purported to exercise the Secretary of State's discretion himself: if the Immigration Judge was persuaded that the decision was not in accordance with the law he should have so decided, leaving the Secretary of State to make the new, lawful, decision. In the second case the same point is put at somewhat greater length, accompanied by an assertion that neither Baig nor HC v SSHD [2005] EWCA Civ 893 suggest anything different. In the third case the grounds for reconsideration are similar to those of the first case and are accompanied by an assertion that the Immigration Judge gave no reasons for allowing the appeal on Article 8 grounds.

10. We heard submissions from Mr Blundell in all three appeals, and from Mr Hamilton on behalf of the appellant in the first appeal, Ms Veloso in the second and Mr Raja in the third. Reference was made to the decisions of the Court of Appeal in D S Abdi v SSHD [1996] Imm AR 148, Huang & others v SSHD [2005] EWCA Civ 105 (see now [2007] UKHL 11), HC v SSHD [2005] EWCA Civ 894, Rashid v SSHD [2005] EWCA Civ 744, Tozlukaya v SSHD [2006] EWCA Civ 379 and HB (Ethiopia) & others [2006] EWCA Civ 1713, as well as Baig, and the decisions of the Tribunal in SS [2005] UKAIT 00167 and IA [2006] UKAIT 00082.

The legislative framework

11. Section 19 of the Immigration Act 1971 was, so far as material, as follows:

> "19(1) Subject to sections 13(4) and 16(4) above [neither of which is material here], and to any restriction on the grounds of appeal, an adjudicator on an appeal to him under this Part of this Act –
>
> (a) shall allow the appeal if he considers -
>
> (i) that the decision or action against which the appeal was brought was not in accordance with the law or with any immigration rules applicable to the case; or
>
> (ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently; and

(b) in any other case, shall dismiss the appeal.

(2) For the purposes of subsection (1)(a) above, the adjudicator may review any determination of a question of fact on which the decision or action was based; and for the purposes of subsection (1)(a)(ii) no decision or action which is in accordance with the immigration rules shall be treated as having involved the exercise of a discretion by the Secretary of State by reason only of the fact that he has been requested by or on behalf of the appellant to depart, or to authorise an officer to depart, from the rules, and has refused to do so."

12. Paragraph 21 of Schedule 4 to the Immigration and Asylum Act 1999, which replaced these provisions on 2 October 2000, was to the same effect.

13. The present appeals provisions are those in Part 5 of the Nationality, Immigration and Asylum Act 2002. The possible grounds of appeal against an immigration decision (as defined) are set out in s84(1) as follows:

> "84(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds –
> (a) that the decision is not in accordance with immigration rules;
> (b) that the decision is unlawful by virtue of section 19B of the Race Relations Act 1976 (c. 74) (discrimination by public authorities);
> (c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;
> (d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;
> (e) that the decision is otherwise not in accordance with the law;
> (f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;
> (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

14. Section 86 of the same Act is headed "Determination of appeal" and includes the following provisions:

> "…
> 86(3) The Tribunal must allow the appeal in so far as it thinks that –
> (a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or

(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.

…

(5) In so far as subsection (3) does not apply, the Tribunal shall dismiss the appeal.

(6) Refusal to depart from or to authorise departure from immigration rules is not the exercise of a discretion for the purposes of subsection (3)(b)."

The authorities

15. In Abdi, the appellants claimed that, in refusing them entry clearance, to which they were not entitled under the Immigration Rules, the Secretary of State had failed to take into account the terms of a published policy in which he had said that he would give special consideration to applicants in the appellants' position. In the course of the leading judgment in the Court of Appeal, Peter Gibson LJ said this (at pp 156-157):

> "To my mind the only substantial point taken on behalf of the [claimants] was that the decision of the Secretary of State was 'not in accordance with the law' within the meaning of s19(1)(a)(i) in that the Adjudicator and the Tribunal found that he had ignored or acted in contravention of the Somali family reunion policy in reaching that decision. [He then cited a passage from the speech of Lord Bridge in R v IAT ex parte Bakhtaur Singh [1996] Imm AR 352 at 360 and continued:] These remarks are only *obiter dicta* and it is not obvious that Parliament by s19(1)(a)(i) intended Adjudicators to have the power to examine the validity of the Home Secretary's decision by reference to all the matters that would be relevant for a judicial review of the decision. But Mr Singh [for the Secretary of State] did not suggest that Lord Bridge's remarks were wrong and they are supported by similar comments by Mustill LJ in SSHD v Malhi [1990] Imm AR 275 at 283. I shall therefore proceed on the footing that if it can be shown that the Home Secretary failed to act in accordance with established principles of administrative or common law, for example if he did not take account of or give effect to his own published policy, that was not 'in accordance with the law'."

Peter Gibson LJ went on to examine both the terms of the policy and the findings of fact by the Adjudicator. He concluded his judgment (with which the other members of the Court agreed) as follows (at pp 159-160):

> "I therefore agree with the Adjudicator and the Tribunal that … the Home Secretary did not properly take the policy into account and so did not give effect to it. That was an error which made his decision not in accordance with the law for the purposes of s19(1)(a)(i).
>
> What follows? I cannot accept Mr Macdonald's submission [for the claimants] that this is one of the rare cases where it is appropriate that the Court should substitute its own decision for that of the decision-taker. It is not inevitable that the [claimants] will be given entry clearance. Nor do I accept Mr Singh's submission that a remission of the matter to the Home Secretary would make no difference. If the Home

> Secretary reconsiders the application as one relating to dependants of Mrs Abdi, it is not inevitable that the application will be refused. To my mind the Tribunal was correct in saying that on the footing that the decision was not in accordance with the law the matter must go back to the Home Secretary for him to reconsider the application in the light of the true facts. It falls to him 'to consider exceptionally extending the Refugee Family Reunion Provision to cover [the claimants]' in accordance with [the policy]."

Those observations by Peter Gibson LJ have been cited in a multitude of appeals before the Appellate Authorities and the AIT and have not to our knowledge previously been the subject of any serious questioning either here or in the higher courts.

16. We need next to mention Huang. As is well known, in that case the Court of Appeal decided that it was for an Immigration Judge to assess all issues of proportionality in an appeal raising grounds based on Article 8 of the European Convention on Human Rights: that is to say, that in such cases there is no area of the assessment of proportionality in which the executive has exclusive jurisdiction. The decision of the House of Lords in the same case on this point, which is now available, is to the same effect.

17. Baig is a case in which the applicant had a long and dreadful immigration history, and it is fair to say that she found little sympathy in the Court of Appeal. In agreeing with Buxton LJ (who gave the leading judgment, with which Maurice Kay LJ also agreed) Ward LJ said "It would be scandalous not to dismiss this application". There can be no real doubt that the Court was anxious to ensure that it dealt in the alternative with all the points that had been raised on behalf of the applicant, in order to show that she simply had no prospect of success. One of the arguments raised was that she was entitled to succeed on the basis of what for present purposes we may describe, as the Court described it, as the seven-year policy. That is a policy, originally formulated in March 1996 and subsequently the subject of a number of more and less well-publicised amendments, relating to whether enforcement action should be taken against parents of young children who have spent a considerable part of their lives in the United Kingdom. At the time with which Baig (and also Tozlukaya) were concerned, the policy related to those parents who had children who had been in the United Kingdom for seven years or more, either having been born here or having arrived here at an early age.

18. The Adjudicator had refused to consider any issues relating to that policy on the basis of the material that was before him. The Immigration Appeal Tribunal thought that he should have considered it (a position which was conceded by the Secretary of State before the Court of Appeal) but said that he would have dismissed the claim under this head if he had been aware of the true facts.

19. After setting out that position, Buxton LJ continued as follows:

"28. There are, however, some technical difficulties about that. First, we have already noted that effectively the adjudicator declined to consider the seven-year policy at all because of the state of the pleadings; and it is conceded that that was a mistake. Secondly, I myself certainly had originally thought that the complaint in this case and in this appeal before this court was that both the special adjudicator and the Immigration Appeal Tribunal should, consistently with Abdi, have considered whether the Secretary of State had properly applied his own policy. Mr Drabble this morning says that that is not the point; the objection to the special adjudicator's determination which the Immigration Appeal Tribunal did not even appreciate, let alone correct, is that under the authority of Huang the question of the application of such a policy to an individual case was a matter for the adjudicator and not simply a matter for review of a decision of the Secretary of State. The latter error (if it was an error) - that is to say the failure to consider the matter substantively - would be, in my judgement, an error of public law; and it is now well decided that errors of public law fall within the jurisdiction of the Immigration Appeal Tribunal, and therefore the jurisdiction of this court under section 101(1) of the 2002 Act. Any doubts on that point, which are ventilated at some length in the skeleton before us, have been put to rest by the decision of this court in HC [2005] EWCA Civ 893.

29. To have dealt with that matter would have involved a certain degree, to put it mildly, of intervention of its own motion by the Immigration Appeal Tribunal, in view of the difficulty of extracting that point at all from the pleadings before it, and the almost certainty that it was never raised by the applicant's representative. However I am content, for the purpose of discharging this application, to assume that there was that omission on the part of the Immigration Appeal Tribunal, and that prima facie, therefore, the correct remedy, and the remedy which Mr Drabble seeks, is for the matter to be remitted to an adjudicator so that he can properly apply himself, which so far the adjudicator has not done, to the seven-year policy.

[The policy is then identified and the relevant parts set out.]

33. … . That, then, if this matter were to be remitted, would be the policy that the adjudicator would have to apply.

34. I have no hesitation in saying that on the facts of this case a rational adjudicator could reach only one conclusion when applying that policy; that is, that it should not apply to this family. …

…

38. In all these circumstances, an adjudicator could only come to one conclusion. Mr Drabble very fairly accepted that if that was this court's view the matter should not be remitted. I therefore would not remit it. I would not grant permission for this application to proceed."

20. Tozlukaya was an application by the claimant for judicial review of a decision of the Secretary of State under s93(2)(b) of the Nationality, Immigration and Asylum

Act 2002 to certify his claim as "clearly unfounded". The respondent appealed to the Court of Appeal against the judge's quashing of the certification. In paragraph [43] of his judgment, Richards LJ (with whom Lloyd LJ and Buxton LJ agreed) set out, by reference to the authorities, the test the court has to apply in such a case. A claim is clearly unfounded if it "cannot on any legitimate view succeed", "must clearly fail", or is "so clearly without substance that the appeal would be bound to fail". If, on the other hand, there is an "arguable case", or if on at least one legitimate view of the facts the claim might succeed, it should not be certified. As the purpose and effect of certification is to remove the right of appeal, the question at issue in Tozlukaya is closely allied to the jurisdiction and process of the Tribunal. The quashing of the Secretary of State's decision to certify is a decision not merely about the substance of the claimant's claim, but necessarily indicates also that there would be available to the claimant arguments which might succeed on a statutory appeal. The decision of the Court of Appeal in Tozlukaya is, therefore, rightly seen as being, in substance, a decision about the appellate process.

21. The claimant was a Turkish national who had been in the United Kingdom since 1998. There had been an attempt to remove him to Germany under the Dublin Convention (as it then was) but that had been unsuccessful because the claimant failed to report in accordance with removal directions. In November 2001 there were further representations, which were rejected by the Secretary of State in the form of an appealable decision. The claimant appealed to an Adjudicator and to the Immigration Appeal Tribunal, in each case without success. Removal directions were set for June 2004, but the claimant was not removed because of his wife's complaint of illness and her statement that she was four months pregnant. Shortly thereafter, further representations were made to the Secretary of State on the basis of the claimant's wife's "mental health problems". Further representations were made across the summer of 2004. On 2 September 2004 the Secretary of State rejected the claimant's claims under Articles 3 and 8 and certified the claim as clearly unfounded.

22. In the judicial review proceedings there were two live issues. The first was under Article 3 of the European Convention on Human Rights. The claimant's claim was based on his wife's health and Richards LJ records at [68] that it was common ground that the claimant himself was entitled for those purposes to rely on the effect of removal on his wife's mental health. Richards LJ took the view that the claimant's claim under Article 3 was bound to fail and therefore that the Secretary of State was entitled to certify the claim in that respect. Insofar as the claim under Article 8 also relied on the claimant's wife's health, therefore, it too failed.

23. There was, however, a separate strand to the Article 8 claim. It was based on the Secretary of State's policy on removal where there were children with long residence in the United Kingdom. In the present case the position was that the claimant's eldest child, born in February 1997, had been here with her parents since June 1998. Richards LJ said this:

"77. The deputy judge held that, in view of the length of time they have been in the United Kingdom and the ties they will have established during that period, removal of the children would arguably constitute an interference with their right to private life under article 8(1). I agree.

78. The Secretary of State contends that any such interference is justified under article 8(2) by the need to maintain firm and effective immigration controls. This engages the issue of proportionality. As Lord Bingham expressed it in *Razgar*, 'decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis' (para 20)." [Richards LJ then set out the relevant part of the decision of the Court of Appeal in Huang.]

79. In deciding whether the case is truly exceptional an immigration judge is entitled to have regard to statements of policy by the Secretary of State as to the exercise of his discretion to grant leave to remain outside the Immigration Rules. If a policy tells in favour of the person concerned being allowed to stay in this country, it may affect the balance under article 8(2) and provide a proper basis for a finding that the case is an exceptional one. In Shkembi v SSHD [2005] EWCA Civ 1592 the court allowed an appeal on a procedural ground but considered the relevance of a policy when rejecting an argument by the Secretary of State that it should decline to remit the case because the claim was doomed to fail. The policy in question was the Secretary of State's concession, announced in October 2003, in respect of families who came to this country prior to October 2000. Having pointed out that the Tribunal has an independent assessment to make, Latham LJ stated (paras 14-15):

> '… The consequence is that the Tribunal in the present case would have been entitled to consider, and if the matter is returned to the Tribunal will have to consider, what the true policy is and decide whether it does or does not apply to the appellant [on] the facts as we understand them ….
>
> The policy does not strictly apply to the appellant but, nonetheless, [counsel for the appellant] is entitled, it seems to me, to argue that if and insofar as a rationale can be discerned for the policy the Tribunal can consider whether or not as a consequence the Adjudicator was wrong to conclude that this was merely a concession which the Secretary of State is entitled either to depart from or require strict adherence to, but goes further than that and justifies the conclusion that his is an exceptional case'."

24. Richards LJ referred to the difficulties, partly apparent from the decision of the Court of Appeal in Baig, in discovering precisely the terms of the policy in question. He continued as follows:

"88. All this places the Secretary of State in a most uncomfortable position. In 1999 the Under-Secretary of State made in Parliament what was clearly intended to be a statement of policy. The way in which the statement described the existing practice and the change to 7 years instead of 10 years strongly suggested a presumption against enforcement action in such cases ('save in very exceptional

circumstances', 'will not normally be appropriate'). Yet it is now said that none of this forms any part of the policy and that the actual policy is limited to one under which each case is considered on its merits but a number of factors may be of particular relevance (something which is barely more than a statement of considerations relevant in *any* discretionary decision of this kind). Moreover this position is now adopted despite the absence of any action over the intervening years to correct the false impression created by the text of Butterworths *Immigration Law Service* on which practitioners will have relied, and despite the concession made by counsel for the Secretary of State in Baig.

89. All this is contrary to basic principles of good administration. It also has potentially important legal consequences. From the information we have been given it is apparent that decisions concerning children with long residence are taken without any regard to the Parliamentary statement on the subject by the Under-Secretary of State. There is a strong argument not only that the Parliamentary statement is a relevant consideration, but that there is a legitimate expectation that it will be applied. If, therefore, the issue before us were a direct challenge to the decision of 20 June 2005 purporting to deny the family 'the benefit of the concession', I have little doubt that the challenge would succeed.

90. The actual issue before us is of course different. It is whether there is an arguable case that, in the light of the policy and Parliamentary statement to which we have referred and their application in the circumstances of the case, the Tribunal might find that this was an exceptional case in which removal would be disproportionate under article 8. On that question the decision of 20 June 2005 would carry no weight since it was taken without regard to the Parliamentary statement. The Tribunal would be entirely free to form its own judgment on the matter.

91. I think that there is force in the views expressed by the deputy judge on this question. He proceeded on the basis that the policy expressed in, or as amended by, the Parliamentary statement "tilts in favour of the grant of leave" (para 83(4)). He assumed, understandably, that the Secretary of State's actual decision had been taken by reference to the Parliamentary statement. But even on that basis he considered there to be an arguable case… ."

So far as the claimant's claim under Article 8 was concerned, therefore, the Court of Appeal agreed with the judge that the claimant had an arguable case.

25. We do not need to set out in any detail the other authorities to which were referred.

Discussion

26. We confess to have had considerable difficulty in interpreting precisely the impact of the decisions in the Court of Appeal in Baig and Tozlukaya on the process by

which Tribunal reaches or is to reach its decisions. It may assist if we begin by setting a number of principles and rules that we cannot imagine the Court meant to undermine. Some of them have high authority; others are, we believe, self-evident.

27. First, a claim based on the asserted human rights of the claimant is, even if it depends on an assessment of proportionality, different in nature from one based on an assertion that the claimant should have benefited from an exercise of discretion in his favour. If authority is needed for this proposition it can be found in Edore v SSHD [2003] EWCA Civ 716 at [18].

28. Secondly, although as a result of the decisions of the House of Lords in Razgar v SSHD [2004] UKHL 27 and SSHD v Huang [2007] UKHL 11 the assessment of proportionality in human rights claims is a matter for the Tribunal, it does not follow that the exercise of a discretion is a matter for the Tribunal in a case where the claimant has not shown that a decision adverse to him is incompatible with his Convention rights.

29. Thirdly, the Tribunal is a creature of statute and has only the powers given to it by statute. Like any other public authority its decision-making is governed by the Human Rights Act 1998 but, subject to that, an Immigration Judge is bound to observe the statutory restrictions on jurisdiction. One of them is in s86(6), which we have set out above. If any were needed, the existence of that subsection in the appeals provisions of the 2002 Act is confirmation that there are areas of discretionary judgment where a claimant's search for a beneficial outcome is not an assertion of his human rights.

30. Fourthly, as a matter of principle and logic, claims based on human rights ought to be assessed in priority to claims based on the hope of a favourable exercise of a discretion. It makes little sense to consider whether the Secretary of State may (or indeed ought to) *choose* to give the claimant a benefit that he already has as a *right*. Having said that, there are of course cases where judicial economy allows a judge to go straight to the end of a process omitting earlier steps. And we recognise that there are good grounds in legal theory for recognising the continued existence of a discretion even where, in the circumstances of the case, it can be exercised only in one way. But the order must generally be: rights, first then possibilities.

31. Fifthly, within the category of rights, issues relating to the assessment of proportionality ought to yield priority to specific provisions of national law. This is the thinking underlying Razgar and Huang. One looks first at the legal rules that appear to govern the case. It is only if those rules do not give the claimant the result he seeks, that there is any need to consider whether his Convention rights are such that he is entitled to the result despite the rules. This is also the principle underlying the European Court of Human Rights' jurisdiction under the Convention, as set out in Article 35.1.

32. Sixthly, the phrase "in accordance with the law" in Article 8.2 of the ECHR does not import the whole of the national legal order into the assessment of proportionality (see MA [2005] UKIAT 00090). The phrase does not make disproportionate (and therefore a breach of Article 8) every governmental act that can be the subject of a successful legal challenge. Rather, the phrase requires that "the impugned measure should have some basis in domestic law, and it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, and foreseeable as to its effects" (Slivenko v Latvia 48321/99, [2003] EWHR 498 at [100], which is a summary of the position explored in greater detail in earlier cases such as Klass v Germany (1978) 2 EHRR 214, Silver v UK (1983) 5 EHRR 347 at [86], and Sunday Times v UK (1979) 2 EHRR 245 at [49]).

33. In the face of all this we are asked to say that, where the Secretary of State had published a policy, incorporating a discretion that may be exercised in favour of a person who does not meet the requirements of the Immigration Rules, the Tribunal is not merely to decide whether the Secretary of State has acted in accordance with the law in dealing with the matter. It is to go on to make the discretionary decision for itself. No clear distinction was drawn, in the submissions before us, between cases in which the Secretary of State has failed to consider whether to exercise his discretion in accordance with his declared policy, and cases in which he has considered whether to, but has decided not to. Thus it appears to be argued that the Tribunal may be the primary decision-maker in exercising a discretion outside the Rules, or may be the reviewer of the exercise of such a discretion. It is further asserted that the Court of Appeal decisions to which we have referred provide authority for these views; and it is implied that the operation of the Human Rights Act 1998 requires the Tribunal to take, or to recognise that it has, the jurisdiction outlined in this paragraph.

34. This is surprising. The argument as a whole runs counter to the third principle set out above. Section 86(3) gives no reason to suppose that the Tribunal has power to exercise a discretion which has not previously been exercised, and s86(6) removes from the Tribunal's jurisdiction the review of the exercise of a discretion outside the Rules. The implication that a review of a discretion, or the exercise of the discretion itself, by the Tribunal, is demanded by the Human Rights Act 1998, runs counter to the first, second and fourth principles: for if the exercise of discretion in favour of a claimant is in issue at all, that must be because the claimant has *failed* to show that human rights arguments require a decision in his favour. Further, the argument that the investigation of the Secretary of State's discretion and its exercise are inherently matters of human rights runs counter to the first, fifth and sixth principles. If the Tribunal's jurisdiction enables or requires a decision to be set aside as "otherwise not in accordance with the law" on the basis that an applicable discretion has not been considered, human rights jurisprudence requires no more: the threat of a human rights breach carried by the (unlawful) decision is removed, even if the claimant fails to show that his human rights demand a decision in his favour. On the other hand, if the claimant cannot establish that, in the circumstances of his case, he is entitled, as a matter of human rights, to remain in

(or be allowed to enter) the United Kingdom, there is no reason why human rights arguments should play any further role in the analysis of the Secretary of State's decision-making. For these reasons it would appear unlikely that the decisions of the Court of Appeal to which we have been referred, or indeed any decisions of that Court, could carry the meaning for which the appellants argue.

35. On the other hand, it is not difficult to find in both Baig and Tozlukaya sentiments that, at first sight and taken in isolation, seem to support the appellants' submissions. Paragraphs [28] and [33] of Baig seem to make the exercise of a discretion outside the Rules (a) a matter for the Tribunal, (b) an issue of human rights and (c) to be determined on Huang principles. In Tozlukaya Richards LJ recognises that the difficulty in identifying precisely the terms of the policy mean that the Tribunal might have to decide that the decision was unlawful. But he goes on to say at [90] that the result would be that "the Tribunal would be entirely free to form its own judgment on the matter"; and, moreover, this view is expressed in the course of an analysis specifically limited to the discussion of issues under Article 8.

36. The danger lies in taking these few sentences out of context. Neither in Baig nor in Tozlukaya was the Court concerned to analyse a decision on this issue that had actually been made by the Tribunal. In Baig the Court was concerned to show that the claim could not possibly succeed; in Tozlukaya it was concerned to show that it was wrong to say that the claim could not possibly succeed. In such a context of extremes, it would not be surprising if less attention were given to the middle ground.

37. It is quite evident that Buxton LJ's judgment in Baig ignores any restriction that might be imposed by s86(6) or any of the principles set out above. To treat it as an injunction to ignore them, however, misses the point. What the Court is doing in that case is showing the claimant's difficulties on *a fortiori* basis. The force of the decision consists in its conclusion that even ignoring any such restraints the claim could not succeed; and for that purpose it was entirely unnecessary – indeed undesirable – to set out or discuss the restraints that would in fact apply if the claim were to be the subject of a new hearing. Nothing in Baig should, in our view, be treated as authority on the appropriate procedure in a case which is not doomed to failure.

38. Tozlukaya is, as we have said, essentially about the Tribunal's process. But, again, it is important not to lose sight of the context. The question was whether the claimant's claim was to be seen, as the Secretary of State had seen it, as one which could not succeed. It was not necessary (or, again, perhaps, desirable) for the Court to set out exactly how it could succeed. The process of certification meant that, until the Secretary of State's decision to certify the case was set aside, the claimant could not appeal to the appellate authorities. So, of course, at the time of the Court of Appeal's consideration of the case, there was no notice of appeal and no indication of the grounds that would be relied on in any such appeal. The

claimant's case against certification was based on Articles 3 and 8: that does not imply, however, that any appeal that might follow the quashing of a certification would be confined to Articles 3 and 8.

39. On Article 8, the claimant's claim depended in essence on the fact that his children (particularly the elder) had spent a long time in the United Kingdom. The claim was that in such circumstances the family's removal would be disproportionate. That is a claim about the family's circumstances and about the individual rights of members of the family: it is not a claim about the Secretary of State's decision-making *process*. The question whether the family could be removed (or whether, on the contrary, removal would be contrary to their Convention rights) was a matter for the proportionality assessment demanded by Razgar. Part of that assessment is the importance, in general and in the individual case, of maintaining effective immigration control. All this is clear from paragraph [77] and [78].

40. It is in that context that a judicial decision-maker has to take into account any applicable policy, because if the policy itself "tells in favour of the person concerned being allowed to stay in this country" it is a factor that has to be incorporated into an assessment of the argument going to the importance of immigration control. The decision-maker is not said at paragraph [79] to be concerned with exercising any discretion under the policy. Rather, the task is to ascertain whether the terms of the policy tell generally in favour of non-removal, because that finding, if made, has an impact on the proportionality of the particular proposed removal.

41. That that is what was being said at paragraph [79] is in our view further clarified by the discussion of, and the observations about, the seven-year policy itself. It is at paragraph [88] that the Secretary of State's difficulties are set out. The dispute or doubt is precisely over whether the policy told (generally) in favour of non-removal in that it "strongly suggested a presumption against enforcement action", or whether it merely set out the "considerations relevant in *any* discretionary decision of this kind". At paragraph [89] it is recognised that the failure to make the decision in accordance with declared policy would cause an appeal on "not in accordance with the law" grounds to succeed. In paragraph [90], however, Richards LJ returns to the question at issue, which is that of proportionality in the light of a policy apparently *not* giving the Secretary of State a general discretion, but instead telling in favour of non-removal by suggesting a presumption against enforcement action. And the last sentence of that paragraph is not an indication that in the absence of a lawful decision under the policy it is for the Tribunal to exercise a discretion. It is a statement that the Tribunal always has to assess proportionality and that, *if* there is a policy that presumes non-removal, a decision *ignoring* that policy ought not to be regarded as setting out the Secretary of State's position on the importance of maintaining immigration control *for the purposes of assessing proportionality*.

42. Nobody reading the judgment of Richards LJ in Tozlukaya would suppose that it was intended to herald a dramatic change in the jurisdiction of the Tribunal or any inroad into the principles we have set out above. Read carefully, with an eye always to context, it is clear that it does no such thing. Indeed, the principle underlying the remarks about the assessment of proportionality, in a case where a declared policy shows the Secretary of State's usual or presumed practice, is to be found in the judgment of the Immigration Appeal Tribunal chaired by the President, Ouseley J, in DM [2004] UKIAT 00024. Albeit in the context of a general view that the appellate authorities have no power to displace on proportionality grounds a decision that was lawfully open to the Secretary of State, the Tribunal said this at [28]:

> "However, when the Secretary of State, e.g. through a consistent decision-making pattern, or through decisions in relation to members of the same family, has clearly shown where in the range of reasonable responses his own assessment would lie, it would be inappropriate to assess proportionality by reference to a wider range of possible responses than he in fact uses."

There is no mention here of policies: but there can be no doubt that a policy creating a presumption in favour of non-removal would have been seen by the DM Tribunal in precisely the same light: it has the effect of narrowing the range of decisions that the Secretary of State "in fact uses".

General conclusions on jurisdiction and process

43. For the foregoing reasons we reject the argument that the Tribunal is bound or entitled to consider or review the exercise of a discretion outside the Immigration Rules. Both principle and statute are against it; and the decisions to which we have been referred do not support it. The Tribunal is bound to consider whether a particular decision is proportionate, and in so doing has to assess the force of the Secretary of State's claim that the decision is necessary in order to maintain immigration control. When making that assessment it takes into account any declared policy that incorporates a presumption that immigration control will not be enforced against persons of a category into which the claimant falls. The reason for taking such a policy into account is that it throws light on the needs of immigration control and so helps to assess the proportionality of the decision in the individual case. If there is no policy that creates a presumption, or if the claimant is not, on the facts, entitled to a benefit of any presumption in a policy, the policy is not likely to be of relevance in assessing proportionality and hence the claimant's Convention rights.

44. If the claimant does not establish (whether by reference to a policy or otherwise) that his Convention rights prohibit his removal, then the Secretary of State has (whether by reference to a policy or otherwise) a discretion to allow him to stay: but, because of s86(6), the exercise of that discretion is not reviewable by the Tribunal. Where, however, the Secretary of State has declared a policy in relation to a category into which the claimant falls, a decision that on its face fails to apply

the policy may found a successful appeal on the ground that the decision "was not in accordance with the law". In such a case (subject to an observation we make below) the effect of allowing the appeal would not be to grant the appellant the substantive relief he seeks but merely to set aside the unlawful decision so that a lawful decision (whether in favour or against the appellant) may in due course be made.

45. Although the assessment of proportionality under Article 8 may and often will raise issues similar to those to be considered when ascertaining whether the Secretary of State properly applied any relevant policy, it is important to keep the issues separate, because they are not the same. Human rights are to be considered at the date of the hearing; but the argument that the decision is "otherwise not in accordance with the law", being an argument about the decision-making process, looks back to the time when the decision was taken, and to the responsibility of the person taking it then. Between the date of the decision and the date of the hearing the facts may have changed, and the policy may have changed. The human rights argument has to be made and assessed on the basis of today's facts; and issues of proportionality have to be determined on the basis of the application of today's policy to today's facts; but it is unlikely that the decision can be attacked on process grounds except by reference to yesterday's policy as applied to yesterday's facts (indeed possibly only by reference to yesterday's appreciation of the facts).

46. There are two further points we should add in the interests of completeness. The first relates to "near misses". We have formulated our conclusions above as applying to those who come within a category to which a policy applies. It is sometimes said that a person who very nearly meets the requirements of the Rules, or very nearly comes within the ambit of (or of the presumption-creating part of) a policy, should be treated as though he did come within the Rules or the policy. The argument is that to do otherwise would be disproportionate.

47. This argument is incoherent. It is in the nature of rules (and there is no reason why it should not be in the nature of policies relied upon as creating legitimate expectations) that they draw distinctions between those who do, and those who do not, meet their requirements: KP [2006] UKAIT 00093 at [43]-[45]. That, as a result, some applicants or claimants fall outside the requirements of the rule cannot of itself be the basis of an attack on the rule unless for some reason the rule itself is said to be unlawful (in which case presumably the claimant would not be particularly interested in making his claim by reference to it). Further, one cannot say that those just outside a rule or a policy are treated disproportionately if they are not treated as though they were within it: if that argument were successful, it would follow that those a little further outside would have the same argument on the ground that they only just missed being given the benefit given to the first group; and so on. As the Tribunal has remarked in KL [2007] UKAIT 00044 (published since we heard argument at these appeals) in analysing the authorities on this point (R (Shkembi) v SSHD [2005] EWCA Civ 1592; Mongoto v SSHD [2005] EWCA Civ 751; SB (Bangladesh) v SSHD [2007] EWCA Civ 28) at [46]:

"… . None of them is authority for the proposition that the immigration rules or policies can be rewritten by judges. Integral to each of them is the distinction between (1) cases in which the rationale for a rule or policy applies fully to the case in question although the rule or policy does not technically cover it; and (2) cases in which the rationale for such a rule or policy does not apply or applies only loosely. Even if a case comes within (1) all three higher court decisions recognise that at most a "near miss" is a factor which has to be taken into account. Just because a case comes within (1) does not mean that that a decision amounts to a disproportionate interference with legitimate public ends. … ."

48. Our second additional point is in relation to cases where the policy does not incorporate a discretion, or where on the facts of the case there is no proper opportunity, by the application of the policy, to make a decision unfavourable to the claimant. This is not the usual position. In SS [2005] UKAIT 00167 the Tribunal said this:

> "30. … . Most published policies are not in the absolute terms of the Immigration Rules. Most policies contain words like '*normally*'. Many policies do not declare that a particular relief will be granted: they provide that the Secretary of State will consider whether it should be. A claimant who has not obtained the substantive grant that he seeks can succeed on the policy only if he shows that the policy itself was not (or was not properly) applied. If the policy says that the Secretary of State 'will consider' his case on certain terms, he cannot succeed unless he can show that the Secretary of State did not consider his case on those terms. If the policy says that something will '*normally*' be granted, he is likely to be in some difficulties if the Secretary of State refers to any consideration that shows that the case is less than normal.
>
> 31. In any event, unless the policy is expressed in terms that are absolute or have to be regarded as absolute in the individual facts of the case, the effect of a successful appeal will be merely that the decision is found to have been an unlawful one, so that there is outstanding an application before the Secretary of State. … ."

49. That decision, however, clearly envisages that where a policy *is* expressed in absolute terms, a claimant may be entitled to succeed substantively. IA [2006] UKAIT 00082 was such a case. The one reason given by the Secretary of State for refusing to apply a policy that would otherwise have operated in favour of the appellant was found by the Immigration Judge to be factually wrong. For procedural reasons the Tribunal was content, on reconsideration, to affirm the Immigration Judge's decision to allow the appeal on human rights grounds; but it did so only after saying that, in the circumstances of the case, it would have been difficult to criticise him if he had allowed the appeal on the ground that, given the facts, the reason for the decision and the terms of the policy, an adverse decision was not "in accordance with the law".

50. For ourselves we have little doubt that – contrary to the submissions on behalf of the Secretary of State before us – there are cases in which a finding that a decision is

"not in accordance with the law" on the ground of failure to apply a policy should lead to a substantive decision in the claimant's favour, with a direction that leave be granted. There will be no need to base such a decision on human rights grounds, because it is demanded by the more detailed provisions of the 2002 Act. But the cases in question are unusual. They are those in which (1) the claimant proves the precise terms of the policy, which (2) creates a presumption, on the facts of his case, in favour of granting leave, and (3) there is either nothing at all to displace the presumption, or nothing that, *under the terms of the policy*, falls for consideration. If all those factors apply to the case, the appeal should be allowed, with a direction as indicated.

51. If (2) or (3) do not apply, and if the Secretary of State has not yet considered the claim within the terms of his policy, the appeal should be allowed with a direction that he do so. But if the appellant fails to establish the terms of a policy, or if the Secretary of State has already properly considered the claim within the terms of any applicable policy, then (given that none of these considerations apply at all unless the appellant's removal would not breach his Convention rights) the appeal should be dismissed.

52. We now apply these principles to the individual cases before us.

AG

53. In his determination, the Immigration Judge set out a summary of the relevant policy, which nobody has suggested was inaccurate.

> "2. The Home Office policy DP5/96 sets out the criteria to be considered when deciding whether to pursue enforcement action against the families of minor dependant children who have been living continuously in the UK for seven years of more. In such cases the following criteria are to be considered:
>
> (i) The length of the parents' residence without leave.
>
> (ii) Whether removal has been delayed through protracted (and often repetitive) representations by the parents going to ground.
>
> (iii) The age of the children.
>
> (iv) Whether the children were conceived at a time when either of the parents had leave to remain.
>
> (v) Whether return to the parents' country of origin would cause extreme hardship to the children or put their health at serious risk.
>
> (vi) Whether either of the parents has a history of criminal behaviour or deception."

The Immigration Judge's decision is not made on human rights grounds: there is no suggestion in his determination that he thought that the removal of the appellant and his family from the United Kingdom would be incompatible with their Convention rights. He allowed the appeal solely on the basis that the decision of the Secretary of State was, as he put it, "contrary to his declared policy". He gave full reasons for his conclusion to that effect.

54. We do not need to set those reasons out in full. The Immigration Judge observed that the Secretary of State's correspondence with the appellant did not show consideration of all the issues referred to in the policy. In summary, the reasons for the Secretary of State's decision not to apply the policy in the appellant's favour were as follows:

> "(i) The family has never have leave to enter or remain in the United Kingdom and were informed within two weeks of their arrival that they would be returned to Greece under the provisions of the Dublin Convention.
>
> (ii) The lengthy stay of the family in the UK has been as a direct result of the child's parents' failure to cooperate with the United Kingdom's immigration authorities. The Home Office letters state that the protracted challenges to the Home Office decision that the family be sent to Greece have all been dismissed and the appellant could have had no legitimate expectation that he and his family would permitted to remain in the United Kingdom once the judicial process have been completed."

55. The Immigration Judge described the second reason as "the main reason". He pointed out that the parents had not at any stage gone to ground, and said he did not agree with the "submissions of the Home Office" that the parents had made protracted or repetitious representations. He said "every application that they have made to the Court or to the Tribunal has been in accordance with the rights given to them by Statute under the law of this country". That is probably right, and we are not asked to disagree with the Immigration Judge's view that none of the applications was frivolous, vexatious or repetitive. It is, however, undoubtedly the case that the appellant had no leave at the time he made his application for discretionary leave on 26 March 2004. He was at that time aware that all his appeal rights had been exhausted. The Immigration Judge noted that the appellant applied for judicial review of the decision to remove him to Greece immediately after that decision was made in 1997, and further noted that it had taken four years before the Court made its decision: "an extraordinary long period", as the Immigration Judge described it. The Immigration Judge does not, however, indicate any evidence relating to the appellant's attempts during that period to secure judgment.

56. Looking at the period of time as a whole during which the appellant had been in the United Kingdom without leave, the Immigration Judge said this:

> "They have been here without leave for nine years. Particularly having regard to the ages of all the children that, in my judgment, is a very long period of time."

57. It appears to us that each of these sentiments discloses an error of law by the Immigration Judge. It is clear, first, that he failed to take into account the appellant's decision to remain without leave after the exhaustion of his appeal remedies; secondly that he took the four years delay in securing judgment in the judicial review proceedings as a matter over which the appellant had no control, without there apparently being any evidence to justify that conclusion; and, thirdly that he considered the question of the length of time the appellant had been in the United Kingdom without leave as one to be assessed on the basis that the longer the period, the better for him. If the application of the Secretary of State's policy were a matter for the Immigration Judge, therefore, we should on that basis have found that he materially erred in law in his application of it. We reach that conclusion without considering a number of other points, which were not the subject of submissions before us, including the Immigration Judge's assumption that, because there is in the policy no mention of the Dublin Convention, it was wrong for the Secretary of State to give that Convention (which is part of EU, rather than merely of international, law) priority over his policy.

58. The question for the Immigration Judge was whether a decision was lawfully made under the policy, not whether he would have reached the same decision himself. Because of the process adopted by the Immigration Judge, we do not know whether he found that the policy tells in favour of the claimant, or in ordinary circumstances creates a presumption in his favour. As we have indicated, the Immigration Judge's decision should have depended on such a finding. If he had found that, in the appellant's own circumstances, the policy created a presumption in his favour, he would need only to identify whether the Secretary of State was right in declining to apply it in this case. If, on the other hand, his finding was that in the circumstances of the case no presumption in the appellant's favour arose from the application of the policy, he should have considered only whether the Secretary of State had acted in accordance with the law in his decision-making process.

59. We have considered whether it would be proper for us to proceed immediately to substitute a determination in this appeal. We have concluded that it would not be right to do so on the basis of the information before us. There are a number of reasons. One is that to which we have already referred: we do not know why the judicial review proceedings took so long to resolve. We note that in Tozlukaya there is reference to the need to establish principles by a lead case, but we do not know whether the same difficulty applied to the whole or part of the period in this case. Secondly, we note that after the failure of the judicial review application, the claimant did not persist with his asylum claim. We do not know why that was. It may be that if his history shows a series of attempts to remain in the United Kingdom for different reasons, that would be a point to be taken into consideration

in deciding whether his applications and appeals were frivolous or vexatious, and whether his removal has been delayed by "protracted" representations.

60. There is another factor. After setting out his reasons for considering that, as he put it, "the appellant and his family do (as they claim) meet all the requirements of the Home Office policy or concession DP5/96", the Immigration Judge points out, at paragraph 24(xiii) that the respondent appears to have taken no account of the Convention on the Rights of the Child, to which the United Kingdom is a signatory. The application of that Convention to an individual case is not a matter for the Tribunal, but the failure to take it into account might render a decision "not in accordance with the law" where a policy apparently centred around the interests and needs of the children of the family is applied against the family by reference to the conduct of the parents. We heard no argument on this particular issue. We cannot say that the parents' conduct cannot be taken into account, nor that a decision cannot be made by reference to it: but if the policy is structured around the perceived needs of young children, it may perhaps be thought that the decision would necessarily be in influence and by those needs.

61. For the foregoing reasons we find that the Immigration Judge materially erred in law. We shall adjourn this appeal for further reconsideration in the light of the principles set out above.

EB

62. In EB's appeal the relevant policy was that called DP3/96. The respondent's statement of it in the letter accompanying the notice of refusal is as follows:

> "Guidelines have been laid down for dealing with marriage applications from over-stayers (a document commonly referred to as DP3/96). These guidelines state that it will normally be appropriate to consider granting leave to remain, exceptionally, on the basis of a marriage if we are satisfied that, (i) the marriage is genuine and subsisting; and (ii) that it pre-dates the service of an enforcement notice by at least two years; and (iii) that it is unreasonable to expect the settled spouse to accompany his/her spouse on removal."

The letter states that the appellant's case does not fall within "this general rule", because the Secretary of State had insufficient evidence that the appellant was co-habiting with his wife or that the marriage was subsisting as claimed. It goes on to say that even if the marriage is genuine and subsisting, the Secretary of State considers that "there are insufficient compassionate circumstances to justify a concession on the grounds of the marriage". The letter continues by saying that both parties would have been aware that "the persistence of their marriage within the United Kingdom would, from the outset, be uncertain". The Secretary of State also states that the appellant's wife could reasonably be expected to live in Jamaica and that their child, being only 1 year old, could live in Jamaica with them. The relevant part of the letter concludes as follows:

> "In these circumstances we are not persuaded that the position of your client's family constitutes a sufficiently compelling reason for making an exception to the normal practice of removing those who have remained in the United Kingdom illegally."

63. We have to say that we find that letter somewhat difficult to understand. The policy is set out, and then an entirely different policy appears to be applied. The policy as set out gives no indication that leave will only be granted if there are compelling reasons. The policy as set out gives no indication that there is a "normal practice of removing those who have remained in the United Kingdom illegally" although one might have expected to see that. The policy as set out appears to indicate that a person who shows that the three numbered factors apply to him will have the benefit of a policy expressed as that it "will normally be appropriate to consider granting leave to remain".

64. We have already set out the process by which the Immigration Judge decided that, in a case where the policy gave the Secretary of State a discretion, he had a power and a duty to review the exercise of that discretion. For the reasons set out earlier in this determination, he was wrong to take that view. We agree with those who appeared before him that, as expressed in the letter accompanying the notice of refusal, the policy incorporates a discretion. The conjunction of "normally" and "consider" tends to have that effect; and the additional element of judgment needed for the purposes of the third consideration confirms rather than undermines the effect. Even on the basis of the facts as found by the Immigration Judge, that there was a valid and subsisting marriage, which pre-dated enforcement action by at least two years, and that the appellant's wife had considerable ties in the United Kingdom, it seems to us that the question of whether the appellant was to be removed or allowed to remain remained an open one for the Secretary of State. Because of his declared policy, however, he was obliged to determine the appellant's application by reference to that policy, rather than by reference to considerations which appear to have no role in the policy.

65. The Immigration Judge erred in law in failing to consider first whether the appellant's removal would be incompatible with his Convention rights and purporting to substitute his own exercise of discretion in relation to a policy importing a discretion on the facts of the appellant's case. We substitute a determination allowing the appellant's appeal on the ground that the Secretary of State's decision was not in accordance with the law. The appellant's application of 16 August 2005 accordingly awaits a lawful decision.

PB

66. In PB, the policy in question was again the seven year policy, DP5/96. We have already set out the Immigration Judge's conclusions on her jurisdiction. In our view, and for the reasons we have given, she was wrong to say "I can apply the policy directly if I wanted to". That was a material error of law.

67. As we have also pointed out, it is not at all easy to understand the precise factual basis on which she made her decision. The appellant's daughter is said to have come to the United Kingdom in 1999. The decision was made on 18 December 2004. At that time the appellant's daughter had not been in the United Kingdom for seven years. An appeal on the ground that the decision "is otherwise not in accordance with the law" in a case of this type is an attack on the decision-making *process* and so cannot succeed except by showing that there was a fault in that process. Despite s85(4), therefore, insofar as the appeal was based on the policy, it needed to be directed to the circumstances as they were at the date of the decision, because the complaint is that the Secretary of State ought at that date to have applied the policy as it was on that date. The fact that since the date of the decision the child's age, and the time she has spent in the United Kingdom, have both increased, is not a matter "relevant to the substance of the decision" in the context of an attack on the decision-making process, and is not a matter on which any evidence could add to the position as it is accepted to have been at the date of the decision. The Immigration Judge was wrong to consider that terms of the seven year policy showed that the decision in December 2004 should have been in the claimant's favour. So far as the policy was concerned, she should have dismissed the appeal on the grounds that, even by reference to the policy, the decision was not shown to have been "not in accordance with the law".

68. As we have noted, the grounds of appeal to the Immigration Judge were concerned with human rights. Despite her error in her approach to the policy, her determination is formally one relating to the human rights grounds, as the last sentence of her paragraph 23 (which we have set out above) indicates. She was right to consider the existence of the policy as part of her assessment of proportionality, for the reasons set out earlier in this determination. Unfortunately, however, she appears to have failed to appreciate the importance of the fact that this case was not one in which the application of the policy to the facts created a presumption in favour of the appellant. The appellant entered illegally, as did her child. She made an application in February 2000 which was deceptive in not mentioning the child. These factors are sufficient to displace any presumption created by the policy. The result of that is that this was a case where the discretion remained with the Secretary of State: in the context of the assessment of proportionality, there simply was no reason to suppose, as the Immigration Judge appears to have done, that the Secretary of State consistently allows those with such an immigration history to remain in the United Kingdom under this policy. The Immigration Judge accordingly erred in her assessment of proportionality. We do not think it is quite right to say, as the Secretary of State's grounds for reconsideration do, that the Immigration Judge has failed to give any reasons for allowing the appeal on Article 8 grounds. It does appear to us, however, that the reasons she gives demonstrate a flawed approach to her task. Her error was material: it cannot be said that she would have been bound to reach the same conclusion if she had not made it.

69. We must therefore substitute a determination of our own. The Immigration Judge, at paragraph 18 of her determination, referred to the decision of the Court of Appeal in R (Mahmood) v SSHD [2000] EWCA Civ 315 and said:

> "I am satisfied and it was accepted by the respondent that the appellant has established a family life in the UK and it is clear that her removal to Bangladesh will, albeit perhaps for a short time, interfere with her family life. The question is whether that interference is proportionate."

We do not understand that comment in the circumstances of this case. The appellant's application to remain in the United Kingdom as a dependant of her brother, in which she did not mention the existence of her child, has been refused, and dependence on her brother is not advanced in this appeal as a reason for concluding that the appellant's removal to Bangladesh would be incompatible with her Convention rights. The child is a British citizen; but if the appellant went to Bangladesh, whether or not her child accompanied her, it is difficult to see that she would have any claim under the Immigration Rules for readmission to the United Kingdom for settlement. This makes the present case rather different from Mahmood. What is said is that the appellant and her child are well-circumstanced financially and that they now have firm links in the United Kingdom with relatives here. The principal submission made in the grounds of appeal is that removal to Bangladesh would interfere with the appellant's private and family life: but there appears to be no dispute about that. The question is whether any interference would be proportionate.

70. The appellant has, we understand, sole care of her daughter, who is a British citizen. They have ample resources to live in the United Kingdom, which would clearly be more than ample in Bangladesh. The only reason advanced in the grounds for supposing that the child cannot go to Bangladesh is that "the risk of health hazard in respect of the child is extremely high, because the child is used to adequate hygienic facilities in the UK". That submission is not supported by any relevant evidence and, in particular, there can be little doubt that a wealthy child in Bangladesh has full access to "adequate hygienic facilities" there.

71. So far as the appellant is concerned, the argument that it would not be proportionate to remove her because of the general application of the seven year policy fails, for the reasons we have given. She arrived in the United Kingdom illegally and she has always known that her presence here was precarious. If she goes to Bangladesh there is, so far as we are aware, no reason why her child should not accompany her and be brought up by her there. There are no factors in her case that would make it disproportionate to apply immigration policy to her; and we are accordingly not persuaded that her case is so strong that she be allowed to remain despite the provisions of the Immigration Rules and immigration law generally. For the foregoing reasons we substitute a determination dismissing her appeal.

Conclusions

72. In summary we find material errors of law in all three determinations. In the case of the first appellant we direct a further hearing of this reconsideration. In the case of the second appellant, we substitute a determination allowing the appeal to the extent only of setting aside the Secretary of State's decision as not having been in accordance with the law and directing that he make a new decision in accordance with the law. In the third appellant's case we substitute a determination dismissing her appeal.

C M G OCKELTON
DEPUTY PRESIDENT
Date: