C/2002/2308

Neutral Citation Number: [2003] EWCA Civ 580
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MRS JUSTICE RAFFERTY)

Royal Courts of Justice
Strand
London, WC2
Monday, 7 April 2003

B E F O R E:

LORD JUSTICE SIMON BROWN
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE LAWS
LORD JUSTICE SEDLEY

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IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

THE QUEEN

on the application of

(1) KRYSTIAN DABROWSKI
(2) DAMIAN DBROWSKI
(3) URSZULA KASPAROWICZ

Claimants/Applicants

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant/Respondent

- - - - - - -

(Computer-Aided Transcript of the Stenograph Notes of
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MR B ALI (instructed by Noden & Company, London W10 5LJ) appeared on behalf of the Applicants
MR T EICKE (instructed by the Treasury Solicitor) appeared on behalf of the Respondent

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J U D G M E N T
(As Approved by the Court)

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1. LORD JUSTICE SEDLEY: This case raises an issue of some importance. Does the Home Secretary's announced policy of not necessarily proceeding with removal or deportation of parents of young children who have seven or more years of continuous residence in the United Kingdom apply to port cases -- that is to say, cases where no more than temporary admission has been granted to persons who have claimed asylum at the port of entry?

2. The applicants in the present case are a mother and her two young sons. Their country of origin is Poland, where the mother was born in 1965. She was married in 1984 and the two children were born in May 1990 and June 1993. All four arrived as a family in the United Kingdom in January 1995 and claimed asylum, essentially on the ground that as Roma they had been subject to severe persecution by skinheads, against which the state was either unwilling or unable to protect them. The claim was made in the father's name, treating the other three as his dependants, and in the event it failed. In September 1999 they therefore returned to Poland.

3. Three months later, just before Christmas 1999, the mother and the two sons returned to the United Kingdom, making a fresh claim for asylum on the ground that persecution had been renewed and that, even if there had not been before, there was now an insufficiency of protection. That claim was refused, first administratively and then judicially by an adjudicator in December 2000. The Immigration Appeal Tribunal refused permission to appeal. In April 2001 the three claimants made a human rights application in support of an application for leave to remain. That was refused in the October, and an appeal under section 65 of the 1999 Act was dismissed in March 2002. In the interim, in January 2002, the seven-year point from the family's first arrival in the United Kingdom had been reached.

4. All avenues of recourse having failed, removal directions were set for 18 June 2002. Four days before the removal date, an application was made on behalf of the mother and the two boys for leave to enter or remain on the basis of the Home Secretary's long residence policy. The application was refused the following day but removal was suspended while the propriety of the refusal was canvassed by solicitors who were commendably active on the applicants' behalf.

5. Finally, on 18 June 2002, a letter before claim was written and on 19 July a reply came over the signature of a chief immigration officer explaining the reasons for refusal. It was followed on 13 August 2002 by a slightly fuller letter from the Home Office, again explaining the refusal. I will come in a little while to the content of those letters. The letter before claim was followed by an application for permission to apply for judicial review of the refusal of exceptional leave to enter or remain, which was dismissed on the papers by Silber J and in October 2002 by Rafferty J upon renewal in open court, when the matter was argued on both sides.

6. An application for permission to appeal came before me as a desk application and I granted it in the form -- since the case had not so far proceeded beyond refusal of permission to seek judicial review -- of a grant of permission to apply for judicial review. Since the application before Rafferty J had been argued on both sides and a reserved judgment, clearly the product of careful consideration, had been delivered, I directed that the substantive application was to proceed in this court, as it has done.

7. What I wrote by way of reasons for the grant of permission was this:

> "The single question which merits this court's attention is whether policy DP 069/99 applies to port entry cases. If it does, a CIO [Chief Immigration Officer]

cannot determine that it does not.

The essential arguments are (a) that nothing in the policy excludes these cases and (b) that to exclude them puts lawbreakers in a better position than entrants who declare themselves.

If the policy does apply to the claimants, it is not necessarily an answer that it is 'only a policy': the law expects reasonable consistency of treatment. There seems no reason why such a policy cannot accommodate a 3-month break in residence such as occurred here, though that will not be a matter for the court."

8. We have had today the advantage of well-directed and concise submissions from Mr Ali (in contrast, I have to say, to his skeleton argument which roved over a great deal of terrain lying beyond the grant of permission to appeal) and from Mr Eicke for the Home Secretary.

9. The policy which the applicants submit ought to have been, but was not, applied is a policy known as DP 5/96, as modified first by a Parliamentary written answer of 24 February 1999 and secondly by a letter dated 19 April 1999. Together these have been re-coded as DP 069/99; hence the reference in my reasons for granting permission. DP 5/96, as promulgated in March 1996, read:

"Deportation in cases where there are children with long residence.

Introduction

The purpose of this instruction is to define more clearly the criteria to be applied when considering whether enforcement action should proceed or be initiated against parents who have children who were either born here and are aged ten or over or where, having come to the United Kingdom at an early age, they have accumulated ten years or more continuous residence.

Policy

Whilst it is important that each individual case must be considered on its merits, the following are factors which may be of particular relevance:

(a) the length of the parents' residence without leave;

(b) whether removal has been delayed through protracted (and often repetitive) representations or by the parents going to ground;

(c) the age of the children;

(d) whether the children were conceived at a time when either of the parents had a leave to remain;

(e) whether return to the parents' country of origin would cause extreme hardship for the children or put their health seriously at risk;

(f) whether either of the parents has a history of criminal behaviour or deception.

3. When notifying a decision to either concede or proceed with enforcement action it is important that full reasons be given making clear that each case is

considered on its individual merits."

The Parliamentary answer of 24 February 1999 was given by Mr Mike O'Brien and read as follows:

> "For a number of years, it has been the practice of the Immigration and Nationality Directorate not to pursue the enforcement action against people who have children under 18 living with them who have spent 10 years or more in this country, save in very exceptional circumstances.
>
> We have concluded that 10 years is too long a period. Children who have been in this country for several years will be reasonably settled here and may, therefore, find it difficult to adjust to life abroad. In future, the enforced removal or deportation will not normally be appropriate where there are minor dependent children in the family who have been living in the United Kingdome continuously for 7 or more years. In most cases, the ties established by children over this period will outweigh other considerations and it is right and fair that the family should be allowed to stay here. However, each case will continue to be considered on its individual merits."

The letter of 19 April 1999 which followed (and it was, one has to say, an odd way to promulgate a policy, since it was addressed by Immigration Service Headquarters to one firm of solicitors in south London) said:

> ."The concession announced by Mr O'Brien on 24 February applies to enforcement cases [ie] those where one or both of the parents is subject to action to remove them from the United Kingdom, either by deportation or removal as an illegal entrant. It applies to all cases irrespective of whether a deportation order has been signed.
>
> Enforcement cases involving children with seven or more years residence will be reviewed as and when they come to light."

10. To these policy materials Mr Eicke adds the Immigration and Nationality Instructions issued to Home Office decision-makers, which in paragraph 5 of chapter 18 set out tests for continuity of residence. These instructions are self-evidently internal documents but we are told that they are publicly available on the Home Office website. On this footing Mr Ali has not objected to our considering the material as a further element of ministerial policy. It provides in its material part:

> "Continuity of residence should be considered as being broken if the applicant:
>
> • was removed or deported from the United Kingdom;
>
> • at the time of his departure there is evidence to indicate that he had no intention of returning or there was an absence of strong ties to the United Kingdom; or
>
> • a lengthy absence which can be considered to have severed ties with the United Kingdom."

11. It is convenient to turn next to the defendant's case before this court. It is based principally upon the evidence of Denis Ross Grey, a Senior Executive Officer in the Home Office's Enforcement Policy Unit. It gives a history of the not entirely uncomplicated succession of

policies and policy documents which may be of interest to practitioners and which will therefore form an addendum to this judgment.

12. In paragraph 26 of the witness statement, Mr Grey says this:

> "Having said this, the Home Office recognises that it is appropriate, even in a case which is strictly beyond the scope of the policy concession, to have regard to that policy and the considerations to which it calls attention. My understanding is as follows: that colleagues dealing with on-entry work are well aware of the 7-year concession expressed in DP 5/96; and that their practice in a port case where there are children with 7 years' residence is to have regard to the policy in addressing what action to take in the circumstances of the individual case."

What precedes that paragraph and explains its opening three words is a justification of the proposition that the policy in all its forms applies only to removal and deportation cases and not to port cases.

13. The effect of this evidential concession made by Mr Grey has been that Mr Eicke on behalf of the Home Secretary has accepted that, sitting as we are as a court of judicial review, we should decide the case on the footing that DP 5/96, as modified in 1999, applies to port cases such as the case now before us.

14. It seems to me, speaking for myself, that this new stance on the Home Secretary's part helpfully represents the previously unacknowledged logic of the situation. It addresses the issue upon which I gave permission to appeal, and it seems to me that it does so appropriately and fairly. It recognises the validity of the applicant's argument that to treat families whose stay, albeit without a right of entry, has exceeded seven years differently depending on whether they are port cases or deportation or removal cases may be unfair; and particularly so where the differential would operate in favour of wrongdoers and to the disadvantage of people who have declared themselves on entry.

15. This initial convergence of the applicants' and the defendant's cases makes it unnecessary to do more than mention the existing body of authority on the issue, practically none of which, it should be said, was placed before Rafferty J.

16. In the case of Comfort Henry [1995] IAR 42, Harrison J held that the marriage policy DP 2/93, one of the forerunners of DP 5/96, which was expressed to relate to deportation and removal cases, had no application to refusals of leave to enter following temporary admission upon an application for asylum. In Abu Shahed [1995] IAR 303, this court followed Harrison J's decision and gave it its imprimatur. If therefore it were held to govern the present case, it would be an end of the argument. In Magdalena Jackson [1996] IAR 243, another division of this court, presided over by Lord Justice Simon Brown, said as much. All these cases were based upon policy DP 2/93; but in due course, in the case of Kadi (unreported, 10 May 2001) Sir Oliver Popplewell, sitting as a Deputy Judge of the High Court, held that they were equally applicable to DP 5/96. A reading of his judgment, however, indicates that a very respectable case to the contrary had been argued by Mr de Mello, and it might well have been necessary, but for the Home Office's concession before us, to look again at Sir Oliver's conclusion. Certainly one notes (and Mr Ali has been at pains to remind us) that Moses J in the case of Jagot [2000] INLR 501 had, in dealing with a vulnerable child rather than a contracted marriage, assumed, without overtly deciding, that DP 069/99 applied to port cases such as the one then before him.

17. I am therefore entirely content to decide this appeal on the basis that whatever the literal ambit of policy DP 5/96, the Home Secretary now accepts that its purpose -- which is essentially to prevent the lawful implementation of immigration and asylum policy, after a certain point of time, from unnecessarily uprooting children or inducing family break-up -- is as relevant in those (hopefully few) port cases in which, for one reason or another, a family is still here seven years on as it may be also in deportation or removal cases.

18. Mr Eicke reminds us even so that every case must be examined on its own factual merits. While he does not submit that port cases carry any generic differences from removal or deportation cases, it may well be a recurrent distinction between one case and another that some children are themselves liable to removal or return, while others have a right to remain here. In the latter class of case, the dilemma of taking the children to a strange country or letting the family break up by leaving them here may be truly intolerable. This is not to say that in other cases the fact that the children cannot remain here in their own right -- and the present is such a case -- is enough in itself to warrant removal of the family: everything will depend on the circumstances appraised in the light of the policy.

19. In this new light, the single remaining question is whether the two letters to which I have referred adequately reason out the appropriateness of returning the three applicants in the light of the policy which is now accepted as applicable.

20. In so far as they are material, the two letters read as follows:

> "19 July 2002.
>
> ....
>
> The seven year concession applies only to after-entry, enforcement cases. It does not apply to on-entry port cases. It is not appropriate, therefore, to rely on the seven year concession as a ground for leave to enter. That said, consideration has nevertheless been given to whether, in view of the family's circumstances, there is a case for granting leave to enter exceptionally, outside of the Immigration Rules.
>
> As you state, Mrs Kasparowicz first arrived in the United Kingdom in January 1995 with her son Damian. Her other son Krystian had arrived in December 1994 with his father. Following the refusal of their asylum applications Mrs Kasparowicz, her husband and the children all returned to Poland in 1999. Mrs Kasparowicz returned to the United Kingdom three months later with her two children and again applied for asylum. This application was refused and her appeal against refusal has been dismissed.
>
> The chief immigration officer on 14 June did not consider that it was appropriate to grant leave to enter to Mrs Kasparowicz and her children on the basis of the representations you made about the length of the children's residence in the United Kingdom. In reaching this decision, it was noted that Mrs Kasparowicz was first refused asylum in February 1998 and left the United Kingdom with her children the following year. When she returned with her children in 1999 she did so with the knowledge that there could be no expectation that there would be a different outcome to her fresh application for asylum. Mrs Kasparowicz has never been granted leave to enter and never had any expectation that she would be granted leave to enter. It was not accepted that her children would suffer hardship if they were returned to Poland, nor was

it accepted that their presence in the United Kingdom in two separate periods totalling over seven years was sufficient to cause the decision to refuse leave to enter to be reversed."

The letter of 13 August 2002 says, materially:

"The Secretary of state has now considered your letter of 14th June, 2002, as an application for leave to enter on human rights grounds.

In relation to Article 8, the Secretary of State has examined whether, in seeking to remove your clients from the United Kingdom, there is any interference with their right to respect for family life; if so, whether such interference is in accordance with the law; and finally whether any such interference is proportionate in the circumstances.

He notes that you claim in your application of 14th June, that 'many of Ms Kasparowicz's relatives are living in the United Kingdom. Many members of her mother's family are reportedly present, some of them settled, in the United Kingdom.'

He further notes that you claim in your application of 14th June, that both Ms Kasparowicz's brother Adolf (K508088) and her sister Nina (K474725) have been granted indefinite leave to enter. Indefinite leave to enter was granted to an Adolf Kasparowicz (born 18th May 1961). However, in the basis of claim which was submitted as part of Ms Kasparowicz's asylum claim in 1999 she stated, 'I have four sisters, two of whom are asylum seekers in the UK,' but mentions no brother. She stated, however, that her father is called Adolf, but he is said [to] be 'living now in Poland.' Similarly, in your client's SEF form, the box where brothers' names were to be listed was struck through.

He further notes that Adjudicator H Mitchell QC took into account the fact that Ms Kasparowicz had two siblings in the UK with a proper immigration status, as is mentioned.

Article 8 does not have the effect that an individual may, in all circumstances, choose where he or she wishes to enjoy his or her private or family life, where there is not real obstacle to his or her establishing a private or family life elsewhere (see *Abdulaziz* 7 EHRR 471). Moreover, your clients' claimed right has arisen over a period when their immigration status was at all times precarious, and during which they were potentially liable to removal.

Your clients have also claimed that their return to Poland would disrupt their family life with Ms Kasparowicz's sisters and brother. Your clients have provided no evidence as to the extent of family life with Ms Kasparowicz's sisters and brother. Even if the Secretary of State were to accept, therefore, that there is family life between them, that would be limited. The Secretary of State also notes that other family members, including Ms Kasparowicz's parents, remain in Poland.

The Secretary of State notes that your client is a 36 year old woman who is not dependent on her family. He is of the view that your clients could return to Poland without undue difficulty. He considers she would be supported by other family members, and within the close Roma community which exists.

> He notes that Ms Kasparowicz's children have spent the majority of their lives in the United Kingdom, since 1995. However, having considered the matter, he remains of the view he took in October 2001, namely that the children are still young enough to adapt to a way of life in Poland which will not be detrimental to their health or well-being. He does not accept that their presence in the United Kingdom acts as a bar to your clients' removal.
>
> All representations in your application have been carefully considered. However, the Secretary of State remains of the view that there would be no interference with your clients' family life were they removed to Poland.
>
> In any event, the Secretary of State has the right to control the entry of non-nationals into the United Kingdom. Although he maintains that Article 8 is not engaged for the reasons set out above, the Secretary of State takes the view that any interference with family life which could be said to flow from your clients' removal is proportionate to address the need for legitimate immigration control.
>
> Overall, there is nothing in the application of 14th June which indicates any real change in your clients' circumstances from the situation which was placed before the Adjudicator, such as would materially assist a claim under Article 8 ECHR.
>
> In reaching his decision in this case, the Secretary of State has also noted the timing of this human rights claim. He notes in particular that the claim was made on 14 June 2002, at a time when Removal Directions had already been set on 4 June 2002 for 18 June 2002. Given the timing of this claim in relation to the Removal Directions, the Secretary of State is satisfied that one purpose of making the application was to delay the removal from the United Kingdom of the applicant or a member of his family. Moreover, given all the circumstances of this case, and the matters covered in this letter, the Secretary of State is satisfied that your client had no legitimate purpose for making this human rights claim."

21. The first thing that can be said is that, as reasoning in support of the exercise of a simple discretion -- that is, whether to give exceptional leave or not -- no fault can be found with these letters. If Mr Ali has an argument, it has to be that the reasoning has started from the wrong point: rather than take the matter at large, he says, it should have begun from a policy presumption in favour of leave to remain because this was family which had been here for full seven years and which had young children.

22. Mr Eicke submits that this is factually wrong. Before the expiry of seven years the family had returned to Poland, not for a brief visit -- a family event, say -- but because their first asylum application had failed and they had no further entitlement to be here. They returned three months later, as the second adjudicator accepted, because there had been further violence, this time against one of the children. The claim failed because there was held to be, even so, a sufficiency of protection.

23. In accordance with the Instruction which I have quoted earlier, the Home Office's approach to such a history would be, and legitimately be, that the continuity of the family's residence had been broken. They had returned home in the expectation of remaining there and the fact of renewed intimidation and flight could not repair the discontinuity.

24. Accepting, therefore, as I do, Mr Ali's argument that sound reasoning is of no avail if it starts from the wrong place, I nevertheless accept Mr Eicke's submission that the Home Office has not started from the wrong place in the present case. It has rightly taken the view that the facts do not bring this family within the policy and it has rightly gone on to consider, without any policy presumption, whether, even so, to let them stay. That the answer has been negative is a misfortune for them, but it is not vulnerable, in my judgment, to legal challenge.

25. I wish to add this. There was until the later 1990s an unhappy history of Home Office policies for the exercise of important statutory and prerogative discretions becoming known only by leakage. Since that time increasing openness has been the much healthier practice. We are told by Mr Eicke that the concession which has been made to this court is to be promulgated as policy or as rules or as law (he cannot at the moment say which) in the near future. Welcome as this is, it seems to me a pity that a matter of such significance, albeit to a limited number of people, was initially kept in issue almost to the door of the court, then conceded by a paragraph of evidence which recorded not policy but practice, and adopted by counsel for the Home Secretary only when on his feet in court as the appropriate basis for the appraisal of a port application such as the one before the court.

26. For the reasons I have given, however, I would dismiss this application for judicial review of the Home Secretary's refusal to the three applicants of exceptional leave to enter or remain.

27. LORD JUSTICE LAWS: I agree that this application for judicial review should be dismissed for the reasons given by my Lord, Lord Justice Sedley. It is, with great respect, plain from my Lord's judgment that the evidence given by Mr Grey in paragraph 26 of his statement has been of some importance for the proper direction of this judicial review, as has Mr Eicke's consequent concession for the Secretary of State that DP 5/96, as modified in 1999, is treated as applicable to port cases.

28. I wish to make it clear, not least in light of earlier authority (in particular Abu Shahed [1995] IAR 303 and Jackson [1996] IAR 243 in this court, and Sir Oliver Popplewell's decision in Kadi [2001] EWHC Admin 375) that absent this evidence and Mr Eicke's concession, I would by no means necessarily have been persuaded that the limitation on the face of the policy to deportation and illegal entry cases was legally objectionable.

29. As regards the particular facts here, it is of course elementary that every case must be looked at by the decision-maker on its own facts. Here there were circumstances, in particular relating to the family's departure from this country in 1999, which in my judgment entitled the Secretary of State to treat the case as one not falling within the seven-year concession.

30. LORD JUSTICE SIMON BROWN: I also agree. Policy DP 5/96 is a policy with regard to deportation in cases concerning children with long residence here. The children need not have been born here; they may instead have come to the United Kingdom at an early age and since their arrival "have accumulated [seven] years or more of continuous residence", as the policy puts it. Although the case law clearly establishes that this policy strictly applies only to cases of deportation and the administrative removal of illegal entrants, the Home Office has for some time past very sensibly and properly applied it by analogy also to port refusal cases.

31. As is well known, those refused leave to enter the UK may nevertheless be temporarily admitted here under the second schedule to the Immigration Act 1971, sometimes for a period of years. That is precisely what has happened here. When first the applicants came to the UK in January 1995, then with Mr Dabrowski, they were temporarily admitted and stayed here for four years and eight months. On the applicants' return in December 1999 after an absence of some three months (this time without Mr Dabrowski, from whom by then the third claimant

was separated) they again obtained temporary admission and have remained, pursuant to it, to this day. It is in these circumstances that they now seek the benefit of the policy, having made their application for leave to enter and remain on that basis on 14 June 2002, seven years and five months after their initial entry into this country.

32. Two questions arose for the Secretary of State's decision upon his receipt of that application. First, did the policy apply, albeit in this case, of course, being a port refusal case, by analogy; secondly, if so, did the presumption it raised in favour of leave apply, or was it nevertheless proper to refuse leave? Like my Lords, I agree that on the particular facts of this case, the Secretary of State was entitled to answer the first question as he did, against the claimants, so that the second question in the event never arose. Since the policy did not apply, the application fell to be refused; so too does the present application for judicial review. It is accordingly dismissed.

ADDENDUM

Extracts from the witness statement of Denis Ross Grey, Senior Executive Officer of the Enforcement Policy Unit, the Immigration Service, dated 5 March 2003.

"3. DP 5/96 was modified in line with the announcement of Mr O'Brien (24 February 1999) - hence the reference in Sedley LJ's grant of permission to Policy 069/99. See DRG/1, p 29. It is sensible, in setting out the background to DP 5/96, to start with the predecessor policies from which it (and other related policies) arose.

4. DP 5/96 was one of three notices of guidance issued in March 1996. They concerned:

a. marriage policy (DP 3/96) [see DRG/1, p 14]

b. children (DP 4/96) [see DRG/1, p 21]

c. deportation in cases where there are children with long residence (DP 5/96 itself).

Previous to this, the relevant policy statement was DP 2/93 [see DRG/1, p 1], which concerned 'marriage and children', as supplemented in 1995 by DP 4/95 [DRG/1, p 8] which concerned deportation and removal of children whose parent or parents are subject to deportation action. It makes sense to start by considering DP 2/93.

DP 2/93

5. DP 2/93 contained 'guidance on cases involving marriage and children'. It used the phrase 'enforcement action' throughout. It made clear at the outset what was meant by this. Paragraph 1 explained that the guidance was concerned with 'deportation' and 'illegal entry' cases. Deportation was a reference to powers under s 3(5) and (6) Immigration Act 1971 ('the 1971 Act') (see eg paras 2 and 8). The reference 'DP' in 'DP 2/93' stood for 'Deportation Procedures', to signify that it was an instruction to those sections dealing with 'deportation'. The fact that illegal entrant removal was being included was reflected in the fact that the guidance was also an 'instruction to IES ('Illegal Entry Sections').

6. DP 2/93 was therefore concerned with two categories of action (deportation and illegal entry). That was 'enforcement' work, and related to 'in-country' cases. It was not concerned with a different, third area, namely port ('on-entry') cases. I shall now explain the three categories in some further detail, together with the organisational and structural background.

Enforcement: deportation and illegal entry ('in-country' cases)
Deportation cases

7. This was the category in which the grounds for action fell within section 3(5) or 3(6) of the 1971 Act. In summary, action could be taken against overstayers or those otherwise in breach of conditions of their stay, (from October 1996 onwards) where leave to remain had been obtained by deception, where the Secretary of State considered deportation to be conducive to the public good and where, on conviction, a court recommended deportation. There was also provision for the deportation of the immediate family of a person being deported. In the great majority of cases, such action was taken against a person who had 'entered' the UK lawfully. There is one exception to this, and therefore to what follows below: deportation action on conducive grounds or following a court

recommendation can also be taken against both illegal entrants and 'on-entry' cases. These kinds of case were covered by DP 2/93.

8. Since October 2000 (on the coming into force of Part IV Immigration and Asylum Act 1999) new arrangements have applied to some of the cases which were previously 'deportation' cases under section 3 of the 1971 Act. Section 3(5) was amended so that only two grounds remain (action on conducive grounds and against the immediate family of someone being deported). The other grounds previously within section 3(5) are now covered by section 10 of the Immigration and Asylum Act ('the 1999 Act'). Such action is normally referred to as 'administrative removal' or 'section 10 removal'. Under section 10 there is no deportation order signed by a Minister, but rather directions by an immigration officer. Nor is there a suspensory right of appeal (ie from within the United Kingdom). Section 10 applies to overstayers, those in breach of conditions, those who obtained leave to remain by deception, and the immediate family of a person being removed under section 10 powers. They are all cases where the person has either 'entered' the UK lawfully in the first instance or has at some point been granted leave to remain. These types of case were always covered by DP 2/93.

Illegal entry cases

9. Illegal entrants are those who enter or seek to enter the UK without gaining permission from an immigration officer or by deceiving an immigration officer (as to their identity or nationality or something material to their claim to enter). Such individuals are liable to be removed as illegal entrants (1971 Act, Sch 2 para 9 or 10). These too are cases where the persons concerned have 'entered' the UK, albeit without leave. They were always covered by DP 2/93.

10. All of the cases which I have so far described are aspects of what is known as 'in-country' work. Of course, not all 'in-country' casework is about removing people. For example, there is 'in-country' work which is concerned with leave to remain being granted to students.

11. 'In-country' work involving removal was known as 'enforcement.' It comprised deportation and illegal entry casework. As at 1993, and before that date, it was being dealt with by the 'Enforcement Division' of the Immigration Service. Within Enforcement Division, there were casework sections. Deportation cases were handled by deportation sections (Dl, D2 and D3). Illegal entry cases were handled by illegal entry sections (IE(1) and IE(2), later simply Illegal Entry Section (IES)). There were also local enforcement officers, who could deal with straightforward enforcement cases (deportation or illegal entry) but did not handle work involving families and children. Later, there was restructuring, and the Enforcement Division was renamed the 'Enforcement Directorate'.

12. At the end of 1998, IND underwent further, more fundamental, restructuring which saw the creation of the Integrated Casework Directorate (ICD). This umbrella brought together the enforcement (deportation and illegal entry) casework previously dealt with by the deportation groups and IES, the other 'in-country' work (eg the student example to which I have referred), nationality casework and the substantive consideration of all asylum cases. When section 10 came into force on 2 October 2000, those section 10 removal cases which, because of their circumstances, would formerly have been referred to the ICD for consideration continued to be dealt with by the ICD.

13. There has since been a further restructuring, which meant that in April 2002 this work - and the staff dealing with it - transferred back to the Immigration Service.

Port cases (ie 'on-entry' work)

14. This is the third category. It was never regarded as falling within the scope of DP 2/93. In a port case the applicant for leave to enter never in law 'enters' the United Kingdom: see section 11(1)of the 1971 Act. Rather, they are given temporary admission but remain liable to be detained: see Schedule 2 paragraphs 2, 16 and 21. The person is liable to be 'removed' if, ultimately, leave to enter and remain is refused (Schedule 2 paragraph 8). These are known as 'on-entry' cases, because they are seeking entry but have not entered. The present case is a port case.

15. Port cases are not an aspect of 'in-country' work. They were not an aspect of 'enforcement' work dealt with by the 'Enforcement Division' and later the 'Enforcement Directorate'. They were not handled by Dl, D2 and D3 (deportation) nor IE(1) and IE(2) (later IES) (illegal entry). Nor with the exception of asylum cases, which, because of the specialist nature of the work are reserved to trained caseworkers, were they part of the work of the ICD.

16. Rather, port cases were in 1993 (and before) being dealt with by the Ports Division of the Immigration Service. It later became the Ports Directorate. It was separate from the Enforcement Division/Directorate during the period the latter was responsible for handling complex (ie not straightforward) enforcement casework, and, subsequently, from the ICD. In mid-2000, the former Ports and Enforcement Directorates of the Immigration Service were merged to form a single Directorate, but, as stated above, following this merging of the two parts of the Immigration Service, responsibility for complex enforcement casework remained with the ICD until April 2002.

<u>The later policy concessions</u>

17. I have already described DP 2/93. It was concerned with 'enforcement action', which was explained to mean 'deportation' (the then section 3(5) and (6) cases) and 'illegal entry' cases. It was headed 'DP ('Deportation Procedures') but also directed to 'IES(l) and (2)' (the 'Illegal Entry Sections').

18. I return to the related changes in policy, following on from DP 2/93. The first was DP 4/95. This supplemented DP 2/93 and was concerned with deportation action under section 3(5). It was concerned to communicate the policy of considering deportation action separately in relation to children whose parent(s) were to be deported. Previously, the practice had been simply to allow the child to accompany the deported parent on departure at public expense. Being only concerned with the 'deportation' aspect of enforcement action, there was no need for DP 4/95 also to be addressed to the IES.

19. Then there were the three policies of March 1996:

(1) DP 3/96 superseded DP 2/93 (see paragraph 1). Like its predecessor, it was concerned with 'illegal entrants' and 'deportation cases' (see paragraph 1). Accordingly, it was both a 'DP' (Deportation Procedure notice) but was also an instruction to 'IES' (illegal Entry Section). It used the phrase 'enforcement action' (eg paragraph 4) in that context. Nothing in its content suggested that the scope of the concession was being extended to deal with port cases. It was not an instruction to the Ports Directorate.

(2) DP 4/96 explained (paragraph 1) the close interrelationship between the three notes (and the remaining DP 4/95). Once again, the note was in the context of illegal entrants and deportation cases (see paragraph 1). It too was a 'DP' notice and also an instruction to 'lES'. It used the phrase 'enforcement action' (eg paragraph 2) in that context, as in the other notes.

(3) DP 5/96 used the same concept of 'enforcement action'. It too was a 'DP'

(Deportation Procedure) notice and an instruction to 'IES'. It did not purport to be new or expanded guidance in terms of its scope. Its function was not to deal with new categories of cases, rather, it was 'to define more clearly the criteria to be applied' in considering the 'enforcement action' which was the subject of previous and related guidance.

20. In early 1999 it was announced by the then Home Office Minister Mike O'Brien that the 10-year concession contained in DP 5/96 was to be modified to a 7-year concession. The following materials refer:

a. Written Parliamentary Answer dated 24 February 1999 [DRG/1, p 29];

b. Letter dated 19 April 1999 [DRG/1, p 30].

These documents can also be seen in the context of DP 5/96 and what had gone before. What was being announced was a modification, namely a change in the qualifying period, from 10 years to 7 years.

....

23. As I have already explained, there was a statutory amendment in October 2000 by which certain 'deportation' cases were dealt with separately (section 10 of the 1999 Act). These remained 'in-country' cases, and cases raising complex issues continued to be dealt with by the ICD. They were cases where the grounds were those previously falling within section 3(5) deportation. It was regarded as proper that the policy concessions, introduced to deal with cases of removal of such cases and on such grounds, should continue to do so. There was, so far as I am aware, no further announcement of policy. I mention this for completeness. The present case is, of course, a port case not one of administrative removal under section 10."

ORDER: Application refused. Detailed assessment of the applicants' costs.

(Order not part of approved judgment)