Neutral Citation Number: [2008] EWCA Civ 906

Case No: C5/2007/1042

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM AND IMMIGRATION TRIBUNAL
SIJ WARR AND IJ BROWN
IM/12825/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2008

Before :
LORD JUSTICE LATHAM
LORD JUSTICE RIX
and
LORD JUSTICE LONGMORE

- -

Between :

NF (GHANA)	**Appellant /Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent /Defendant**

- -
- -

Mr Michael Harris, Miss Roxanne Frantzis (instructed by **Messrs Abbot Denton**) for the **Appellant**
Mr Jeremy Hyam (instructed by **The Treasury Solicitors**) for the **Respondent**

Hearing dates : Friday 29th February 2008
Tuesday 15th April 2008
Wednesday 23rd July 2008

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Judgment

Lord Justice Rix:

1. This is the judgment of the court. This appeal concerns the relevance, to a case on article 8 of the European Convention on Human Rights, of the non-statutory policy of the Secretary of State for the Home Department whereby parents without leave to remain in this country but whose children have resided here for more than 7 years might for the sake of their children be allowed to remain here, rather than be removed. The policy, originally known as DP 5/96 and originally speaking to 10 year residence, was amended in 1999 to refer to the current 7 years. It has sometimes been said that the amended policy was redesignated as "DP 69/99" or "DP 069/99" ("DP 69/99"). DP stands for "Deportation Procedure". Over and above the specific issues that arise in this appeal, an important question has arisen as to the true content and expression of this policy.

2. The criteria laid down in DP 5/96 are neutrally expressed, and DP 5/96 merely states that it is important that a decision either to concede or proceed with enforcement action should be accompanied by full reasons making clear that each case is considered on its individual merits. Save for the amendment replacing 10 years with 7 years, the terms in which what has been described as "DP 69/99" was introduced are a matter of some uncertainty. One version of "DP 69/99" which the Secretary of State originally put before us speaks in terms of enforcement action "not usually" proceeding in the case of a family with a child with 7 years residence in the UK. A press release issued by the Home Office on 1 March 1999 headed "069/99", referred to (erroneously) as policy "069/99" itself by Moses J in *R v. Secretary of State for the Home Department, ex parte Jagot* [2000] INLR 501 at paras 29/30, states that "A child who has spent a substantial, formative part of life in the UK should not be uprooted without strong reason". Moreover, when the so-called "DP 69/99" policy modification was announced by the then Under-Secretary of State for the Home Department, Mr Mike O'Brien MP, in a written answer to a parliamentary question on 24 February 1999, his parliamentary statement included language to the effect that DP 5/96 had been applied so as not to pursue enforcement action "save in very exceptional circumstances" and that a similar policy would continue in relation to the amended period of 7 years so that "In most cases, the ties established by children over this period will outweigh other considerations": see *R (Tozlukaya) v. Secretary of State for the Home Department* [2006] EWCA Civ 379, [2006] INLR 354 at para 83.

3. At the close of the hearing, we requested the Secretary of State to provide us with full, original texts of DP 5/96, "DP 69/99", Mr O'Brien's parliamentary statement and any other explanatory material relevant to the 7-year policy and its exercise by the Secretary of State. Certain documents were subsequently produced which went quite far to elucidate the position but also raised further questions. In the light of those further questions we did not hand down the draft judgment which we had then prepared and distributed, and directed the Secretary of State to explain by affidavit the material discussed in our draft judgment. This the Secretary of State did by means of an affidavit dated 2 May 2008 filed on her behalf by Julia Dolby, a Senior Executive Officer of the Operational Enforcement Policy section of the United Kingdom Border Agency. It is with the help of Ms Dolby's affidavit that the current status of DP5/96 can now be clarified: see below. Full or more substantial texts of these materials appear below.

4. The present appeal raises the single ground of appeal whether the AIT decision of SIJ Warr and IJ Brown dated 27 February 2007 gave proper consideration in the context of article 8 to policy DP 5/96 (and its associated materials) and thus focussed properly on the case of the appellant NF's daughter, Obiagaeli (known as "Obi"), who was born in the UK on 24 December 1998, has lived continuously in this country since then, and was 8 at the time of the hearing before the AIT.

5. There is no disguising the fact that NF, Obi's mother, has an extremely poor immigration history. We take the facts in the main from the AIT decision, which itself incorporates large parts of the findings of an earlier AIT decision of Immigration Judge Beg dated 21 June 2006.

The facts

6. NF was born in Ghana on 24 January 1962. She first arrived in this country on 8 February 1986 and was granted leave to remain for one month. She was then granted further leave to remain as a student until 30 June 1988. A further application for an extension was refused on 27 April 1989. An appeal against that decision was withdrawn by NF on 22 February 1991, and she disappeared from the view of the immigration authorities. In the meantime, she had given birth to her three older children in the UK, Richard, born 16 February 1988, now 20, Rachel, born 16 June 1989, now 18, and Roxanne, born 19 December 1990, now 17. In 1992, they went with their father, a UK citizen of Ghanaian extraction, to live in Ghana. From that time until July 2007 (in circumstances referred to below) she had neither seen them nor had any contact with them.

7. On 9 March 1997 NF attempted to enter France (on route to Canada) using a fraudulent British passport and was deported to Ghana on the same day. Her evidence that she was shocked to discover that her passport was fraudulent was rejected: she had failed to put forward any credible reasons for thinking that it was genuine. She knew that it was not.

8. In June 1997, NF returned to the UK illegally, using an agent to do so. NF met the man who is now her husband, Mr Ogbuehi, in March 1998. He was a Nigerian by birth, and was married at the time to someone else. NF almost immediately became pregnant by Mr Ogbuehi, and on 24 December 1998 Obi was born. There is some uncertainty about Mr Ogbuehi's immigration status in March 1998. He told IJ Beg that he had an outstanding application for leave to remain as the spouse of a person present and settled in the UK, and that that application was granted in 1999. However, the Secretary of State now says that that was not so. Certainly IJ Beg found that he had probably deceived the Home Office in relation to his marriage, in that it was already at that time in difficulties.

9. NF then married a Mr da Costa Moniz: her witness statement that she did so for love was undermined by oral evidence that she had married him so that she could remain in the UK. When she discovered that his Portuguese identity card was a forgery, she divorced him, in 2002. In the meantime she had applied on 15 March 2000 for leave to remain on the basis of this marriage. It was this application which brought her back to the notice of the Home Office. Leave was refused. Her appeal was dismissed.

10. In January 2003 NF married Mr Ogbuehi, who had divorced his former wife in 2002. NF then made a further application to remain, now on the basis of this marriage. This is the application which has given rise to this litigation. The application was refused by the Home Office on the basis that it did not fall within the applicable policy, and also in the light of NF's immigration history: see its letter dated 7 September 2004. NF lodged an appeal.

11. While her appeal was pending, Obi turned seven on 24 December 2005, and on 19 January 2006 her solicitors wrote to the IND to bring this to its attention. The letter ended:

> "In the light of your policy on children, we request that you reconsider the whole case on the bases of our client's marriage, long residence and the 7 year policy on children so that if you refuse the application then all matters can be dealt with by the Court at the same time."

12. The reply is not in our bundles, but the AIT records that the response in March 2006 was negative. Apparently, the Home Office rested on its previous decision letter. On that basis, no specific consideration was given to the position of Obi.

The litigation

13. NF's appeal came before IJ Beg on 12 June 2006. She and her husband gave evidence. NF repeatedly denied that she or her husband had any children other than Obi. In truth, she had the three children who then had long been in Ghana; and Mr Ogbuehi also had a daughter (who lived in Hull) from his former wife, as well as two other daughters in Nigeria. IJ Beg found that NF's blatant lies had cast serious doubt over her overall credibility. NF apologised, saying that she did not think it relevant to mention her older children since she had not seen them in years.

14. Mr Ogbuehi gave evidence about his situation, and his extended family, many of whom were in the UK. He is a solicitor.

15. IJ Beg rejected NF's appeal. She found that her marriage was genuine and subsisting, but that it did not predate the service of an enforcement notice by two years; also that it would not be unreasonable for NF to return to Ghana (to make an out-of-country application) and for Mr Ogbuehi to return with her, if he so wished. She considered the position under article 8 (of the European Convention of Human Rights) with regard to the right to a private and family life. She reminded himself of the decision in *Huang* (*Huang v. Secretary of State for the Home Department* [2005] EWCA Civ 105, [2006] QB 1 at that time at its court of appeal stage), to the effect that exceptional circumstances were required for successful reliance on article 8. She found no such exceptional circumstances, and that any interference in NF's private and family life in the UK would not be disproportionate in all the circumstances.

16. In this connection, she gave no consideration to DP 5/96 or "DP 69/99" or to the fact that Obi was by then more than 7 years old. She had correctly referred to her as "about 5" at the time of the Home Office refusal letter. She simply said that Obi was young enough to adapt to life in Ghana, where she could resume schooling, for which Mr Ogbuehi would be able to pay. It is not clear why the matter proceeded in this

way, especially in the light of NF's solicitors' letter of 19 January 2006 (to which IJ Beg made reference).

17. On 12 July 2006 SIJ Gleeson refused NF's application for reconsideration by the AIT. The reasons for decision included reference to NF's reliance on DP 5/96 and the 7 year concession, but erroneously stated that Obi "is only five". It may be that both SIJ Gleeson and IJ Beg believed that the relevant time for taking the age of the child is the date of the refusal letter. If so, it is now conceded on behalf of the Secretary of State that, although the policy is for application by the Secretary of State as at the time of their decision under appeal, and thus at that time did not apply because Obi was then under seven and only five, nevertheless it is a relevant matter to take into account at a later appeal stage for the purpose of the consideration of a claim under article 8.

18. Also in July 2006 NF's children contacted her from Dover, or at any rate such was her evidence to the AIT in February 2007. She then told the AIT how this had happened. The children had come with their father in January 2006 and stayed in Dover. She claimed not to know of this at the time. Then in July 2006 her son had called her from Dover. He had heard his father speaking to someone about her. He redialled the number and spoke to an uncle who had given him her number. She and her husband had picked up the three children from Dover, and they had been living with them ever since. Their father had called a few times but had not maintained contact. He was happy with the situation, and his wife had never wanted the children in the first place. She said that her first husband had left with the children in 1992 because their marriage had broken down, at a time when she was depressed and vulnerable. She had not known where they had gone, despite trying to find them when she had visited Ghana. The AIT said that it approached this evidence "about the new circumstances with great circumspection…It appears to us [NF] will do virtually anything to achieve her objectives and that includes lying to the court…All we will accept is that the three children are now with the claimant and her husband."

19. But before we deal with the AIT reconsideration, it is necessary to mention how the matter got before it. On 5 October 2006 there was an application by NF to the Administrative Court for reconsideration of NF's case by the AIT. Burton J ordered reconsideration, briefly observing that: "It is unclear whether DP 69/99 has been considered in relation to the circumstances of the child born 24 December 1998, and if so to what effect."

20. On 20 November 2006 the matter came before the AIT for a first stage reconsideration. Their reasons for finding an error of law and transferring the case for full consideration were set out in the AIT's decision itself:

> "The appellant's British-born daughter was under 6 years of age when the decision under appeal was taken in December [*sic, sc* September] 2004, but she was over 7 when the appeal came before Miss Beg in June 2006. The possible eligibility of the appellant to take advantage of the '*seven-year concession*' for the families of children who have lived here at least seven years was something which the immigration judge ought to have considered, even though the policy was not applicable at the date of the decision. This follows from the principle enunciated in *LS* Gambia* [2005] UKIAT 85. Although an immigration judge may not be able to allow an

> appeal outright under a policy (on the principle in *Abdi* [1996] Imm AR 148), the potential applicability of the policy is a factor to be taken into account when performing the Article 8 balancing exercise: see *Tozlukaya* [2006] EWCA Civ 379.
>
> On the other hand any countervailing factors which are expressed in the policy document as militating against the application of the policy are also to be taken into account, since if they are present in the appellant's case they may reduce or nullify the weight to be given to the policy in the assessment of whether removal would be lawful. For example, in *Baig* [2005] EWCA Civ 1246, Lord Justice Buxton held that the '*seven-year concession*' was not to be applied at all in a case where the appellant and her husband had an appalling history of deceiving the authorities and absconding.
>
> The present case is transferred for a full reconsideration of the proportionality of removal, taking account of the policy for which the appellant is potentially eligible, and of any countervailing factors which may arise on the facts of the case."

21. *Tozlukaya* (referred to in that extract) contained at that time the most recent, and possibly the fullest, account of the "seven-year concession". The reasons for reconsideration were plainly focussed on that policy. It is therefore convenient to break off from our account of the litigation at this point to set out the material concerning DP 5/96 and "DP 69/99" on which the AIT on full reconsideration was invited to focus. We observe that in the present case there never has been any consideration by the Home Office of its policy in relation to NF and Obi – presumably because, despite NF's solicitors request in their letter of 19 January 2006, Obi was only five at the time of its original decision.

The DP 5/96 policy

22. With the help of Ms Dolby's affidavit it is now possible to set out the history of DP 5/96 as follows.

23. The original policy document DP 5/96 (headed "DP 5/96 and instruction to IES" ie Illegal Entry Section) was written in terms of children aged 10 or over. In 1999 it was reissued in identical terms save that "7" was substituted for "10" in manuscript. We have not seen an original copy of the amended version, but it appears that the original "10" was snow-paked over and that "7" was then written on top. In this amended version, a copy of which is exhibited to Ms Dolby's affidavit, the policy reads as follows:

> "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 7 or over or where, having come to the United Kingdom at an early age, they have accumulated 7 years or more continuous residence.

> Policy
> Whilst it is important that each 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 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."

That amended document still bears the date of the original policy's issue, March 1996.

24. Pausing there, we observe that there is nothing in that policy statement that comments on how the decision maker should lean in the exercise of the discretion afforded by that policy. Although six factors are mentioned as of particular relevance in the consideration of an individual case on its merits, the policy is otherwise presented entirely neutrally. Apart from the six factors, two matters alone are stressed: one, that each case must be considered on its own merits; the other, that full reasons should be given for a decision. The wording cited above is reproduced in the AIT's decision. Identical wording can be found in *Tozlukaya* (at para 81, where reference is made to a "document headed 'DP 5/96 and instruction to IES'"). The same wording is reproduced in *Butterworths' Immigration Law Service* at para 651. As stated above, we have now received a copy of that document, the original DP 5/96 amended to refer to "7" years, which was before the court in *Tozlukaya*.

25. At the time of the 1999 amendment to the DP 5/96 policy the following documents were also brought into existence.

26. First, on 24 February 1999 there was the written Parliamentary answer made by Mr O'Brien as follows:

> "For a number of years, it has been the practice of the Immigration and Nationality Directorate not to pursue enforcement action against people who have children under the age of 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 Kingdom 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."

That statement appears among "Written Answers" in *Hansard* for 24 February 1999 at columns 309/310. It is accurately quoted by Richards LJ at para 83 of his judgment in *Tozlukaya*.

27. Secondly, the Home Office issued a press release dated 1 March 1999. That was headed "069/99" and is presumably the notation given to that press release. It appears that that notation may be the source of the mistaken impression that DP5/96 was reconfigured as "DP 69/99" or "DP 069/99" when it was amended in 1999. It is now clear to us that it was not. The press release read as follows:

> "IMMIGRANT FAMILIES WHO HAVE LIVED IN THE UK FOR 7 YEARS WILL BE ALLOWED TO STAY
>
> The Home Office has changed the time limit under which immigrant families with young children can be forcibly removed from the country.
>
> Home Office Immigration Minister, Mike O'Brien, said:
>
> "A child who has spent a substantial, formative part of life in the UK should not be uprooted without strong reason and that is why we are changing the time limit from ten to seven years for families with young children who have been unable to establish a claim to remain.
>
> We are committed to delivering a system of immigration control which is firm but also fair. Those who are not entitled to be here should be removed.
>
> However for those who have been in this country for a long time we need to recognise that they will have become established in their community."
>
> The change was announced in response to a written Parliamentary Question from Ms Linda Perham, MP for Ilford North on 24 February 1999."

28. Most of this press release was cited by Moses J in *Jagot* (at para 30). He refers there to his citation as "policy 069/99" and says that it amended DP 5/96 (see at para 29). It is now clear that Moses J was misinformed about that. However, the effect of Mr O'Brien's parliamentary answer and of the press release on the status and context of DP 5/96 will be considered below.

29. Thirdly, the Home Office released a "policy modification statement" as Ms Dolby described it in her affidavit. It was undated, but she says that it was issued following Mr O'Brien's parliamentary answer. We have seen a copy of this document. It does not refer to DP 5/96 in terms, but it is described in its heading as a "Policy Modification". It reads as follows:

> "**Deportation in Cases where there are children with long residence: Policy Modification announced by the Under-Secretary for the Home Department Mr O'Brien on 24 February 1999.**

> Whilst it is important that each individual case must be considered on its merits, there are specific factors which are likely to be of particular relevance when considering whether enforcement action should proceed or be initiated against parents who have children who have lengthy residence in the United Kingdom.
>
> For the purpose of proceeding with enforcement action in a case involving a child, the general presumption is that we would not normally proceed with enforcement action in cases where a child was born here and has lived continuously to the age of 7 or over, or where, having come to the UK at an early age, they have accumulated 7 years or more continuous residence.
>
> However, there may be circumstances in which it is considered that enforcement action is still appropriate despite the lengthy residence of the child, for example in cases where the parents have a particularly poor immigration history and have deliberately seriously delayed consideration of their case. In all cases the following factors are relevant in reaching a judgment on whether enforcement action should proceed:
>
> - the length of the parents residence without leave: whether removal has been delayed through protracted (and often repetitive) representations or by the parents going to ground;
>
> - the age of the children
>
> - whether the children were conceived at a time when either of the parents had leave to remain
>
> - whether return to the parents' country of origin would cause extreme hardship for the children or put their health seriously at risk;
>
> - whether either of the parents' has a history of criminal behaviour or deception.
>
> It is important that full reasons are given making clear that each case is considered on its individual merits."

30. This document *as such* has not previously figured in the jurisprudence. However, it has appeared in *Butterworths' Immigration Law Service* (at para 1121). As an extract from *Butterworths* it was set out both by Buxton LJ in *Baig v. Secretary of State for the Home Department* [2005] EWCA Civ 1246 (unreported, 5 October 2005) at para 33 and by Richards LJ in *Tozlukaya* at para 84.

31. It will have been observed that the additional documents issued by or on behalf of the Home Office in 1999 have added materially to the neutral form in which the original or 7 year amended DP 5/96 policy was drawn up. Thus it would seem to be clear from Mr O'Brien's parliamentary answer that the policy in fact exercised by the Home Office is not to remove children within the policy "save in very exceptional circumstances". The essence of the press release is that "strong reason" is needed to exclude a policy in favour of non removal. The policy modification statement speaks

of "the general presumption… that we would not normally proceed with enforcement" in a 7 year case.

32. In *Baig* the Secretary of State appeared to concede, at any rate for the purposes of that particular case, that the extract from *Butterworths* (which we now know to be the Home Office's 1999 policy modification statement) encapsulated a fair reading of both the original policy DP 5/96 and Mr O'Brien's parliamentary answer. Thus in *Tozlukaya* Richards LJ said this:

> "[84] In *Baig v Secretary of State for the Home Department* [2005] EWCA Civ 1246 (unreported) there was an issue as to the effect of that statement. Counsel for the applicant contended that it introduced a significant shift in the policy, in that it made it clear, which the original document did not, that the assumption was that children falling within the stated period of years should not be removed from this country, and that an exceptional case would need to be demonstrated before they were removed. After some discussion counsel for the Secretary of State accepted, albeit for the purpose of the particular case, that a fair reading of the original document and the parliamentary answer was to be found in a passage in Butterworths' *Immigration Law Service*, at para 1121, which reads…."

33. However, the court in *Tozlukaya* sought confirmation of the position from the Secretary of State, and the answer appears to have repudiated both the parliamentary statement and *Butterworths* extract, ie what we now know as the policy modification statement. In the words of Richards LJ:

> "85…At the court's request, the Secretary of State's stance was confirmed in a letter from counsel following the hearing. Counsel stated on instructions that the Secretary of State's policy is set out in the original document DP 5/96 as amended by the substitution of '7' for '10', and that the ministerial statement by Mr O'Brien is not part of the policy. The Secretary of State does not accept that the summary in Butterworths' *Immigration Law Service* is an accurate reflection of the policy…
>
> 87. The court also sought confirmation of the terms of the policy actually applied by the decision-maker. In a further letter sent after the hearing, counsel for the Secretary of State stated on instructions that the policy considered and applied by the official who took that decision on behalf of the Secretary of State was the policy set out in the document DP 5/96 as amended by the substitution of '7' for '10', and that caseworkers do not have access to Mr O'Brien's statement or to the summary set out in Butterworths' *Immigration Law Service*."

34. Richards LJ 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 the principles of good administration. It also has potential legal consequences. From the information we have been given it is apparent that any 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."

35. We agree with those remarks about the principles of good administration. It is now clear and confirmed on behalf of the Secretary of State herself that the *Butterworths* text, albeit repudiated by the Secretary of State in *Tozlukaya*, derives from the Home Office itself: see para 29 above. It is also clear that there is no document actually worded "DP 69/99". However, the policy modification statement comes as close to being a modified DP 5/96 (in a sense the missing "DP 69/99") as any put before the court. On that basis, the Secretary of State's concession in *Baig* made for the purposes of that case (see para 32 above), albeit repudiated in *Tozlukaya* (see para 33 above), appears to us to be the nearest one comes to an identification of the current policy. It is accepted by Ms Dolby that the repudiation in *Tozlukaya* of the *Butterworths* extract as an accurate reflection of the policy was in error.

36. For the sake of completeness we refer to *R(On the application of Dabrowski) v Secretary of State for the Home Department* [2003] EWCA 580, [2003] Imm AR 454. *Dabrowski's* Addendum (extracts from a written statement of a senior executive officer of the Enforcement Policy Unit of the Immigration Service, dated 5 March 2003) refers to the modification of DP 5/96 by Mr O'Brien's statement and by a "Letter dated 19 April 1999". We have now received a copy of that letter. In *Dabrowski* at para 9 Sedley LJ says that DP 5/96, as modified by those two documents, was "recorded as DP 069/99". At para 10 the letter is cited. It is merely a letter from Immigration Service Headquarters to a single firm of solicitors. As Sedley LJ observes, it is "an odd way to promulgate policy". It is now accepted on behalf of the Secretary of State that reliance on such a letter as containing any modification of policy was erroneous, as was reference to "DP 069/99". It follows that reference to "policy DP 069/99" in *MacDonald's Immigration Law & Practice*, 7th ed, 2008, at para 11.124 (citing *Jagot* and *Dabrowski*) is also in error.

37. The Secretary of State, by Ms Dolby's affidavit, now accepts that the DP 5/96 policy does operate in terms of a presumption. She draws attention to caseworker guidance dated 11 July 2007 (entitled "The scope of DP 5/96 (The 7 Year Child Concession)")

and to training material (dated December 2006) where that presumption is referred to. For instance the following passage occurs in the former document:

> "The correct approach when considering whether DP 5/96 should apply is to start from the presumption that, in the absence of any countervailing considerations, where the qualifying residence requirements are met it would be appropriate to enforce removal, but then to proceed to consider whether in all of the circumstances of the case removal remains the appropriate course of action."

38. In sum there is no "DP 69/99", there is only a modified DP 5/96, modified not only by the substitution of 7 years for 10 years, but also in the terms of the 1999 policy modification statement. In our draft judgment we wrote, pending clarification by the Secretary of State:

> "We would, however, suggest, suggest, in line with what this court said in *Tozlukaya*, that the Secretary of State may well be bound by Mr O'Brien's formal parliamentary answer, and that none of the other material discussed in this judgment detracts from that. Indeed, on the material before us at present, we would be disposed to hold that DP 69/99 is to be found (a) in the document set out in para 25 above [ie in the policy modification statement now set out in para 29], and (b) to the extent that Mr O'Brien's parliamentary statement goes beyond that, in that statement, set out in para 26 above, by which the Secretary of State is also bound."

The Secretary of State now accepts that (save for the reference to "DP 69/99" as such) that provisional conclusion is correct, and that she is bound not only by the original DP 5/96, as amended to refer to 7 years, but also by the policy modification statement (see para 29 above) and, for the reasons set out in *Tozlukaya*, also by Mr O'Brien's parliamentary answer (see para 26 above).

39. For the future it seems to us inevitable that tribunals considering the impact of the Secretary of State's policy in relation to the passing of seven years residence on the part of a child of the family should:

> (1) start from the position (the presumption) that it is only in exceptional cases that indefinite leave to remain will not be given, but
>
> (2) go on to consider the extent to which any of or a balancing of all the factors mentioned in the 1999 policy modification statement makes the case an exceptional one.

It is only in such a way that the various documents can be reconciled into a single policy.

The AIT decision

40. It is now necessary to return to the AIT decision of SIJ Warr and IJ Brown. That set out the reasoning of the tribunal on its first stage reconsideration, with its reference to *Tozlukaya* and *Baig*. It also set out the DP 5/96 policy (amended by substituting "7" for "10") in full (ie what is cited at para 23 above), but it did not set out in terms or

even refer to the other material cited in *Tozlukaya*. It did, however, refer (at paras 27/28) to *Jagot* as follows:

> "The policy under consideration in that case was set out at paragraphs 29 to 30 of the judgment of Moses J. However that is not the complete policy which we were given by Miss Lonsdale (Home Office Presenting Officer and which Counsel [for NF, then Mr Pipi] accepted represented the policy under consideration. We have set it out in full above…We do have the advantage which the Tribunal [in *MD* [2004] UKIAT 00208] and Moses J did not have of a full agreed statement of the policy."

41. It appears, therefore, that, despite the potential assistance given by *Tozlukaya* to which the tribunal's reasons for ordering full reconsideration may be thought to have directed the AIT (see at para 20 above), the matter proceeded on the basis that the original DP 5/96 as amended by substitution of "7" for "10" was all that was needed to be consulted. If so, it would seem that all concerned, namely Miss Lonsdale representing the Secretary of State, Mr Pipi representing NF, and the AIT itself, were governed by an error. That is unfortunate.

42. There is a single ground of appeal before us, namely that "the AIT erred in failing to consider the 8 year old separately, both in respect of Article 8 and DP 69/99". Therefore it is appropriate to consider the AIT decision from the point of view of that complaint.

43. In his helpful and realistic submissions on behalf of the Secretary of State, Mr Hyam has sought to persuade us that, although, as he accepts, the AIT decision does not properly focus on Obi, nevertheless it plainly takes account of her, among many other considerations as well, and that on any view of the case its decision was inevitable and NF's appeal bound to fail.

44. Thus Mr Hyam points in particular to paragraphs in the AIT decision which refer to Obi. Such passages include (i) para 14, where NF's evidence about Obi is set out: removal "would disrupt her education…She had friends here…her child had lived in the United Kingdom for eight years and she would have to start all over again in a different environment which would affect her socially and emotionally"; (ii) paras 24/25, where Mr Pipi's submissions are recorded by reference to the DP 5/96 factors, in particular his submission that "The focus should be on the child and the disruption that removal would cause", and "The policy was to prevent terrible disruption to the child's life"; (iii) para 39, where a letter from Obi's school is taken into consideration; (iv) paras 40/41, where a psychologist's report which was in large part about Obi was considered, but found to be unpersuasive and of "the most limited weight"; and (v) paras 46/48, where the DP 5/96 factors (a) to (f) were specifically addressed, perhaps inevitably in a manner not favourable to NF.

45. In our judgment, however, these passages are outweighed by others in which the AIT considered all four children as a whole: see paras 15/18, 21, 23, 26, 37/38, 49/52, 54/55, and 57. It may be that this reflects the way in which the argument on behalf of NF was advanced before the AIT. It would seem that she was relying on the recent arrival of her three older children as amounting to new circumstances which should influence her reconsideration appeal. As it is, the emergence of the single ground of

appeal to this court from a welter of other grounds and wider submissions (and changes of counsel) is part of the history of this case even after the AIT reconsideration.

Conclusion

46. We do not say that NF's reliance on the position of her three older children was irrelevant to her article 8 case as a whole, although how much they could assist her must be very doubtful given the fact that they had spent nearly the whole of their lives in Ghana, without any contact whatsoever from NF; and given also the dubious circumstances of their reappearance on the scene in the UK. But, they were more or less irrelevant to NF's present sole ground of appeal which turns upon her young daughter Obi; and, of course, the modified DP 5/96 could on any view only be relevant to Obi, for the three older children, of whom two are already adults, have spent very little time in this country. Therefore, for the purposes of the present argument the older children were rather a distraction, and the AIT's conflation of their case with that of Obi has not only confused the position, but tended to undermine whatever value Obi's case in terms of the DP 5/96 policy had for NF's application.

47. In these circumstances, there have been three errors by the AIT in its reconsideration of NF's case. First, it failed to have proper regard to the nature of the policy discretion to be exercised in respect of DP 5/96, as indicated in *Tozlukaya* or in the other material now provided by the Secretary of State. Secondly, it failed in that context to focus sufficiently on the case of Obi, and became distracted by the position of NF's three older children. Thirdly, it inevitably applied the wrong test of exceptionality to the article 8 question of proportionality, since it was bound at the time of its own decision by this court's judgments in *Huang.* The House of Lords decision in *Huang* followed on 21 March 2007. That would have exacerbated the possibility of an unfair result consequent upon the first two errors. If, however, the only error had been that engendered by *Huang*, then, as is indicated by the limited basis on which Sedley LJ gave permission to appeal, it may have been impossible to say that the change of test in article 8 cases would have made any difference. As it is, the first two errors may have been exaggerated by the additional factor of *Huang*.

48. Of course, we bear fully in mind those cases in which an applicant's bad immigration history has turned the scale in respect of the policy under discussion, cases such as *MD* [2004] UKIAT 00208 and, in this court, *Baig*: see, in the latter case Buxton LJ's comments at paras 34/36, where he gave reasons on the facts of that case, some of which bear similarity to the facts of this, why a rational adjudicator, applying the presumption under the departmental policy in favour of non-removal, could still reach only one conclusion. We also bear in mind that at the time of the original decision under appeal Obi was only five, so that the policy did not then apply to him in any event. In that respect, this case is perhaps different from *Tozlukaya* where the decision under attack was that of 20 June 2005 and had thus been taken by reference to the policy at a time when the child there had shortly turned seven (see at para 86).

49. Nevertheless, as in *Tozlukaya*, it seems to us to be difficult to say that a different view is impossible or that the AIT's view was in any event inevitable. Moreover, we are uncertain of the significance of NF's solicitors' representation of January 2006 and of the (missing) reply from the Secretary of State of March 2006, by which time Obi was seven. That is why at the end of the hearing of this appeal, we announced our

decision, while reserving our reasons, that, unfortunate as it is, there must be a remission to the AIT so that NF's appeal to that tribunal can be reheard in the light of our judgments.

50. On that remission it will be open to the Secretary of State to revisit the question of whether Mr Obguehi had leave to remain at the time of the conception of Obi.