Neutral Citation Number: [2008] EWHC 2844 (Admin)

Case No: CO/1652/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: November 20th 2008

Before :

MR JOHN HOWELL QC
Sitting as a Deputy High Court Judge

Between :

THE QUEEN
on the application of

A — Claimant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT — Defendant

- - - - - - - - - - - - - - - - - - - -

Mr David Chirico (instructed by Glazer Delmar) **for the Claimant**
Mr Parishil Patel (instructed by the Treasury Solicitor) **for the Defendant**

Hearing dates: October 8th and November 20th 2008

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JUDGMENT
Approved by the Court for handing down
(subject to editorial corrections)

Mr John Howell QC:

1. This is a claim for judicial review of a decision taken by the Secretary of State for the Home Department that the Claimant should be granted leave to remain in this country for only three years. Permission to make this claim was granted by McCombe J on June 15th 2007.

Introduction

2. The claim raises issues about the legality, and the reasonableness, of the difference in the treatment accorded by the Secretary of State to children, requiring leave to remain in this country, who were born or who came here at an early age, once they have resided in this country continuously for seven years or more and are not to be removed ("relevant children").

3. Where a relevant child is living with a parent who also requires leave to remain, the Secretary of State's policy is to start from a presumption that it is only in exceptional cases that indefinite leave to remain ("ILR") will not be granted both for the child and the parent.

4. If removal of a relevant child (who is not living with a parent requiring leave to remain) would be incompatible with that child's right to respect for his or her private or family life under article 8 of the European Convention on Human Rights, such a child is entitled to leave to remain for no more than three years under the Secretary of State's policy for discretionary leave. After that period has expired that individual's situation will be actively reviewed and a further period of discretionary leave for up to three years may be granted. Such an individual is normally eligible to apply for ILR only after he or she has remained in this country on discretionary leave for six years.

5. The Claimant is a relevant child who is not living with his parents and whose removal from this country has been found to be incompatible with his rights under article 8. His basic complaint is that there is no justification for the Secretary of State's decision to grant him limited leave to remain for only three years, rather than ILR, when the Secretary of State grants ILR to children, who are also not to be removed and who have been living in this country for the same period, when they are living with a parent who also requires leave to remain.

6. The difference between ILR and limited leave to remain is of practical significance. Limited leave may be granted subject to conditions and it may be varied whether by restricting, enlarging or removing the limit on its duration or by adding varying or revoking any conditions to which it may be subject. If its holder wishes to remain for longer than the limited leave granted, he or she must make an application to vary it before it expires. If that application is not decided before the expiry of the period for which leave was granted, that period will be automatically extended until that decision is made. But the leave so extended will lapse (by virtue of section 3C(3) of the Immigration Act 1971) if the individual concerned leaves the United Kingdom for any reason.

7. By contrast those with ILR who are ordinarily resident in this country are treated as being settled here. In general such a person has a right of permanent residence in this county. An individual's ILR cannot be made subject to conditions and it cannot be varied, although it may lapse if the holder remains out of the United Kingdom for two years and it may be revoked. But the circumstances in which ILR can be revoked are limited to those specified in section 76 of the Nationality, Immigration and Asylum Act 2002 and an individual has a right of appeal in this country against such a decision. An individual with ILR who is settled has other advantages. Settlement protects an individual from any requirement to pay higher fees to attend publicly funded further and higher education institutions and it may make an individual eligible for student support from a local authority. Settlement may also qualify an individual's child for British citizenship if the child is born in the United Kingdom. An individual who is settled may also call for members of his or her family and other dependants to join him or her in the United Kingdom (provided that the necessary accommodation is available and there will be no additional recourse to public funds as a result). There is also a wider range of options for family reunion for those settled in the UK than for those with only a limited leave. Moreover having the right to settle leads to eligibility for naturalisation or registration as a British citizen.

The facts

8. The Claimant is a citizen of Nigeria. He was born on August 17th 1992. He came to this country with his mother when he was three in about 1995. His mother returned to Nigeria in 1997, leaving him here in the care of her sister. Unfortunately his mother died while in hospital in Nigeria, apparently due to complications during pregnancy. The Claimant's aunt and her husband, who are British citizens, have cared for him ever since, bringing him up as their son. Until 2003 the Claimant believed that his aunt was in fact his mother. He regarded their sons and daughter as his siblings. It appears that he also has an uncle in this country with three younger children with whom he has had a close relationship. The Claimant has also attended school in this country since he was four or five.

9. On July 19th 2003 an application was made on the Claimant's behalf for ILR on the basis that he had lived in the United Kingdom for more than seven years and so qualified for ILR under a policy known as "DP5/96". On September 5th 2005 the Secretary of State refused that application on the ground that evidence had not been produced of the Claimant's residence in the United Kingdom for the previous seven years. The Claimant was also informed that the Secretary of State considered that his removal would not breach his rights under Article 8. He was informed on the following day, September 6th 2005, that the Secretary of State had decided to remove him from the United Kingdom.

10. The Claimant appealed against that decision on the ground that it was unlawful under section 6 of the Human Rights Act 1998. In a decision promulgated on December 6th 2005 the Asylum and Immigration Tribunal

allowed his appeal on human rights grounds. Having found that the Claimant had by then been living for ten years in the United Kingdom (in the formative years between the ages of three and thirteen), the Tribunal found that his removal to Nigeria in the interests of immigration control would involve a disproportionate interference with his private and family life which had been established in this country.

11. Faced with that decision, the Secretary of State decided on July 19th 2006 to grant the Claimant leave to remain, but only for three years (until July 19th 2009), in accordance with his policy on discretionary leave. Following further representations, the Claimant's solicitors were told in a letter dated November 30th 2006 that the Secretary of State "can see no reason to deviate from his published policy and [that the Claimant] is subject to the relevant qualification period before ILR may be considered".

12. The Claimant's solicitors wrote to the Secretary of State again on February 8th 2007 contending that this decision was wrong. The first ground relied on was that

> "the Home Office policy is that children who have been in the UK for 7 years or more should not be removed. If this is the policy (and particularly as this was an appeal following a decision to remove), DP 5/96 must be taken into consideration and it is our contention that it is therefore Home Office policy to grant people who fall within this concession indefinite leave to remain in the UK."

13. In reply, in a letter dated February 13th 2007, it was stated that the decision notified in the letter dated November 30th 2006 had been considered again but that it would not be changed. It was considered that the grant of discretionary leave to remain which had been made was in accordance with the Secretary of State's policies. It was further stated that the Claimant

> "does not fall for consideration under DP5/96 as that is an enforcement policy relating to removals. [The Claimant] is not being removed therefore the [Secretary of State] is under no obligation to consider DP5/96 at this time."

"DP5/96"

14. The reference to "DP5/96" is a reference to a policy of the Secretary of State, which originated in a document issued in March 1996 with that number, that may protect certain children and people living with them in this country from removal. It is sometimes also referred to as "the seven year policy".

15. The precise content of this policy has caused some confusion as is apparent from *R (Dabrowski) v the Secretary of State for the Home Department* [2003] EWCA Civ 580, *Baig v the Secretary of State for the Home Department* [2005] EWCA Civ 1246, *R (Sadowska) v the Secretary of State for the Home Department* [2006] EWHC 979 (Admin), *R (Tozlukaya) v the Secretary of State for the Home Department* [2006] EWCA Civ 379, and *NF*

(Ghana) v the Secretary of State [2008] EWCA Civ 906. This confusion has been due to the fact that the policy has evolved since it was originally promulgated in 1996 and its content now has to be ascertained from a number of statements and practices, not all of which have been widely known.

16. The evolution of this policy and much of its current content was described by Rix LJ in *NF (Ghana)* as follows:

> "23. The original policy document DP 5/96 (headed "DP 5/96 and instruction to IES" i.e. 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....In this amended version...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...

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...

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."

29. Thirdly, the Home Office released a "policy modification statement"... It was undated, but [it was said] that it was issued following Mr O'Brien's parliamentary answer...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."

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 paragraph 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, i.e. 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 paragraph 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 paragraph 32 above), albeit repudiated in *Tozlukaya* (see paragraph 33 above), appears to us to be the nearest one comes to an identification of the current policy...

37. The Secretary of State 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 not 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.....The Secretary of State now accepts.....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 paragraph 29 above) and, for the reasons set out in *Tozlukaya*, also by Mr O'Brien's parliamentary answer (see paragraph 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."

17. There are a number of points about the policy known as "DP 5/96" as it now stands that should be noted.

18. The first concerns who may benefit from the policy. On behalf of the Secretary of State, Mr Parishil Patel submitted that, as stated in "DP 5/96" as originally promulgated, it is only a parent of any child satisfying the residence requirement who is protected. The written Parliamentary answer by the Minister on February 24th 1999 and the Press Release dated March 1st 1999 (referred to in paragraphs [26] and [27] of Rix LJ's judgment in *NF (Ghana)*) indicated that the "families" of those living with such children were to benefit from the change in approach they heralded. But the "policy modification statement" issued by the Home Office after the Ministerial Statement (referred to in paragraph [29] of that judgment) once again confined the benefit of the policy to parents who were liable to be removed living with such children. I shall take it, therefore, that the benefit afforded by "DP 5/96" extends, in accordance with published statements of the policy, only to a parent who requires leave to remain in this country who may be living with such a child.

19. The second point about the policy follows from the Secretary of State's practice rather than any published statement of policy. Where the policy applies and the Secretary of State decides not to remove a parent, ILR is granted, as indicated in paragraph [39(1)] of Rix LJ's judgment in *NF (Ghana)*. This is nowhere stated in the documents which may be said collectively to embody the policy. But, although there has been no such written policy published, the practice has always been to grant ILR, as was stated in a witness statement by Ms Julia Dolby filed on behalf of the Secretary of State and provided to the Court of Appeal in *NF (Ghana)* (with which I have also been supplied by the Secretary of State). This is but one illustration of the fact that aspects of the Secretary of State's policy have to be ascertained from practice rather than statements of policy.

20. The third point is that, again apparently as a matter of practice, when ILR is granted to a parent to whom "DP 5/96" applies, it will also be granted to any child under 18 satisfying the residence requirement with whom that parent lives who requires leave to remain.

21. The fourth matter, not mentioned in Rix LJ's description of the evolution of this policy, also concerns its ambit. In *R (Kadi) v the Secretary of State for the Home Department* [2001] EWHC Admin 375 it was held that the 'enforcement action' to which "DP5/96 and instruction to IES" applied did not cover removal in "port" cases, notably those cases in which a parent was present in this country on temporary admission. That followed from the description of the policy, "DP" standing for deportation procedure and "instruction to IES" referring to an instruction to the Illegal Entry Section. But, in *R (Dabrowski) v the Secretary of State for the Home Department* [2003] EWCA Civ 580, the Secretary of State accepted that the policy was also to be treated as applicable to "port" cases, as that had been the practice of those dealing with such cases, notwithstanding its original apparent scope relating to deportation and illegal entry. As Sedley LJ stated (at [17]), the purpose of the policy, to avoid "unnecessarily uprooting children or inducing family break up" was as relevant in "port cases" in which, for one reason or another, a family is still here after seven years as it may be in deportation or removal cases.

The Secretary of State's policy on discretionary leave

22. Discretionary leave is granted under the Secretary of State's powers to grant leave to a person otherwise than in accordance with the Immigration Rules. It replaced what had previously been referred to as "exceptional leave" on April 1st 2003. It may be granted to those not considered to be in need of "international protection" or to those who have been excluded from it. The Asylum Policy instruction that contains the Secretary of State's policy on discretionary leave makes it plain that discretionary leave is to be granted only if a case falls into one of a limited number of categories or if individual circumstances are so compelling that it is considered appropriate to grant some form of leave.

23. Two of the categories in which discretionary leave is appropriate identified in the Secretary of State's published policy on discretionary leave which are of relevance in this case are (i) when the removal of an individual (such as the Claimant in this case) is incompatible with article 8 and (ii) when there are inadequate reception arrangements available in his or her own country for an unaccompanied, unsuccessful, asylum-seeking child.

24. Although it may be made for a shorter period, an individual grant of discretionary leave should not be made (in accordance with the Secretary of State's policy) for more than three years. After that period has expired the claimant's situation will be reviewed with a further limited period of leave to remain for up to 3 years being granted if appropriate. This review is not intended to be a formality: it will normally be an "active review" conducted on the basis of the circumstances prevailing at that time.

25. As mentioned above, the Secretary of State's policy is that a person on discretionary leave will normally become eligible to apply for ILR after 6 years. Thus anyone granted discretionary leave will have to have at least one review before they become eligible for settlement. Moreover, as with any

request for an extension of discretionary leave, the application for ILR is intended to be the subject of an active review to consider whether or not the applicant still qualifies for leave.

The relationship between "DP 5/96" and the policy on discretionary leave

26. Some of those whose removal from this country would be incompatible with their rights under article 8 will also fall within "DP 5/96". But the documents which describe the Secretary of State's policy for discretionary leave make no mention of "DP 5/96" or its consequences or what is to occur if both policies apply.

27. In practice it appears that in such cases ILR will be granted. Thus the Secretary of State states that, if an individual successfully appealed against a decision to remove him or her on the ground both that removal was incompatible with article 8 and that removal was not in accordance with law as the Secretary of State had made some error regarding the applicability or application of "DP 5/96", consideration would be given to whether "DP5/96" applies and ILR would be granted if it does.

Whether "DP 5/96" is applicable in the Claimant's case

28. On behalf of the Claimant, Mr David Chirico, initially sought to contend that "DP 5/96" applied to the Claimant and that the reason given in the Secretary of State's letter dated February 13th 2007 for treating that policy as being inapplicable was in error.

29. In my judgment the reason there given by the Secretary of State why "DP 5/96" was inapplicable was flawed. The point made in that letter was that, as the Claimant was not being removed, "DP 5/96" was inapplicable as it was an enforcement policy relating to removals. This reflects the argument put on behalf of the Secretary of State to Wilkie J in *R (Sadowska) v the Secretary of State for the Home Department* [2006] EWHC 797 (Admin) that "DP 5/96" applied only in the context of removals, not when a person sought leave to enter or remain. Wilkie J found it unnecessary to decide whether or not that argument was well founded, as he held that a decision as to what leave to remain should be granted following a successful appeal against a decision to remove an individual based on article 8 was a decision made in the context of removal and, therefore, that "DP 5/96" was applicable to it. The Secretary of State's decision in this case was likewise one taken in the context of removal, as it followed the Claimant's successful appeal based on Article 8 against a decision to remove him. In my judgment, if only for that reason, the reason given in the Secretary of State's letter dated February 13th 2007 for treating "DP 5/96" as being inapplicable to the Claimant was in error.

30. The Secretary of State's argument on this point is misconceived, however, on wider grounds. As formulated in published statements, "DP 5/96" is a policy concerned solely with whether a person should be removed. As formulated in those statements, it says nothing about what should happen if the presumption is applied in favour of not removing that person. If regard is

limited to such published statements of policy, it may make sense to say that "DP 5/96" has no application if no removal is under consideration. But, once regard is had to the practice (which the Secretary of State accepts is part of her policy) to grant ILR to a person to whom the presumption applies, it makes no sense to regard "DP 5/96" as being concerned only with a decision whether to remove an individual and not with a decision whether to grant that individual leave to remain. As it was put succinctly in one letter from the Border and Immigration Agency which is before this Court, "DP 5/96 gives ILR outside the Rules". It can make no sense (when the circumstances are otherwise the same) to deny ILR to an individual because an individual has applied for it when the Secretary of State is not considering removing him but to grant it if the Secretary of State is considering removing him. In each case the individual concerned requires leave to be in this country and the question for the Secretary of State is whether or not to grant him ILR in accordance with policy "DP 5/96".

31. But in my judgment it does not follow that "DP 5/96" applied to this Claimant.

32. "DP 5/96" is a policy which only applies when there is someone who requires leave to remain in this country who is living with a child who has satisfied the relevant residence requirement. It is not a policy which is expressed to apply if it is only that child who requires leave to remain. Indeed it applies even if that child does not require such leave. As Ms Dolby put it in the witness statement to which I have already referred, "the spouse or civil partner and/or the dependent child/children of the person who is to be removed do not have to be the subject of removal action for the case to be considered under the seven year child policy." Thus in my judgment Mr Chirico correctly and candidly conceded during the course of the argument that "DP 5/96" cannot apply to the Claimant on any rational construction of the policy statements. Although he is a child who satisfies the relevant residence requirement, he is not a parent of such a child. Nor (even if it had been relevant) is he living in a family one of whose other members requires leave to remain. He is a merely a child who might have benefited from "DP 5/96" if he was living with a parent who required leave to remain. But he was not.

33. Of course, as the Court of Appeal has recognised, the content of the policy known as "DP 5/96" is not necessarily to be found only in policy statements but also in the Secretary of State's practice. But, however unsatisfactory this plainly is as a means of ascertaining the content of any policy, the Secretary of State has stated (both in her summary and her detailed grounds for opposing this claim) that there is no practice of granting ILR to individuals who are in the Claimant's position which is capable of giving rise to an expectation that the Claimant would be granted it. Mr Chirico was unable to point to any practice that has extended the application of "DP 5/96" to children requiring leave to remain who are not living with a parent or anyone else who requires such leave.

34. It follows, therefore, in my judgment that the Secretary of State was correct in her conclusion that "DP 5/96" did not apply to the Claimant, even though the reason given for that conclusion in the letter dated February 13th 2007 was flawed.

whether there is a justification for the difference in the treatment of relevant children who are, and who are not, living with a parent who also requires leave to remain in this country

(i) submissions

35. The Claimant's basic complaint is that there is no justification for the Secretary of State treating relevant children differently depending on whether or not the children live with a parent who also requires leave to remain in this country.

36. Mr Chirico submits that the object of "DP 5/96" is to protect the interests of a relevant child (not that child's parent) and it results in ILR for any child who requires leave to remain when neither the child nor the parent is to be removed. If that is so, then (so Mr Chirico submits) granting leave to remain for only three years to a relevant child (who is also not to be removed) merely because that child does not live with a parent who also requires leave to remain, and in particular granting such limited leave to remain to the Claimant, is a difference in treatment that involves discrimination contrary to article 14 of the European Convention on Human Rights and is thus unlawful. He also submits that it is treatment which in any event is so unreasonable in the circumstances that no reasonable Secretary of State could have decided that it was appropriate.

37. These complaints finally emerged in this case only with the Claimant's skeleton argument. Before that the Claimant's case was directed at the Secretary of State's refusal to treat the Claimant as falling within "DP 5/96", something that Mr Chirico now accepts that she was entitled to do. However Mr Patel did not ultimately object to my considering such complaints which, therefore, I shall do.

38. Mr Patel submitted that the difference in treatment was justified. He contended that it is trite law that policies have to be drawn using "bright lines" that may produce "winners and losers" but that that does not necessarily mean that those persons outside the scope of any policy (albeit deserving cases) suffer unlawful discrimination. He relied on Lord Bingham's opinion in *AL (Serbia)* that such deserving cases could be "addressed on a case by case basis" on article 8 grounds and thus that the effect of policy "DP 5/96" in excluding the Claimant from its ambit is not disproportionate as the Claimant is able to advance his claims in other ways. Mr Patel drew attention to the fact that the Secretary of State has other policies with respect to the granting of leave to children which do not involve the grant of ILR, such as the policies for granting limited leave to the children separated from both parents who are unsuccessful asylum claimants or whose removal would be incompatible with Article 8.

Accordingly the fact that the Secretary of State has chosen to deal with the Claimant's case in a particular way (that is to say by the grant of discretionary leave for three years) rather than by applying an inapplicable policy cannot mean, so Mr Patel submitted, that the Claimant has suffered any unlawful discrimination through the non-applicability of that policy. Mr Patel also submitted that what "DP 5/96" recognises is the effect that removing a parent may have on the child (something that does not arise if the child is not living with one of his or her parents). Further he pointed out that to grant ILR to a child who requires leave after he has been here for seven years may provide an incentive for those with whom the child has been living not to bring his presence here to the attention of the authorities.

(ii) the applicability of article 14

39. On behalf of the Secretary of State Mr Patel did not seek to contend that any difference in the treatment of relevant children did not require justification if it was to be treated as compatible with article 14. In my judgment he was right not to do so.

40. "DP 5/96" is a policy which falls within the ambit of article 8 of the Convention. A policy to grant limited, rather than indefinite, leave to remain in this country does not necessarily of itself involve any interference with, or any failure to respect, any individual's private or family life. But the Secretary of State's policy, that it is only in exceptional cases that ILR will not be granted to a relevant child who is living with a parent who also requires leave to remain, is a means by which the Secretary of State gives respect not only to any family life which that child may have here with that parent but also to the private life which that child has established in this country: see *Uner v the Netherlands* (2007) 45 EHRR 14 (GC) at [59].

41. The Claimant and a child who may receive ILR under "DP 5/96" are in an analogous situation insofar as both have resided during their formative years continuously for at least seven years in this country and are not to be removed. Whether there is a presumption that ILR should be granted depends on whether such a child is living with a parent who also requires leave to remain. In my judgment that difference in their treatment is one which is on the ground of "other status", or a personal characteristic, that requires justification under article 14. That difference in treatment is one on a basis which is very similar to that which was treated as requiring justification in *AL (Serbia) v the Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434. There the difference in treatment depended on whether a young adult was part of a family unit another member of which had claimed asylum. That is very similar to this case. Moreover, as Baroness Hale pointed out in that case (at [32]), the United Nations Convention on the Rights of the Child prohibits discrimination on the basis of the birth or other status of the child or his family and the United Nations Committee on the Rights of the Child has emphasised (in General Comment 6) that this prohibits any discrimination on the basis of the status of the child being unaccompanied or separated. In this case the difference in treatment depends precisely on the status of the child being separated or not

separated from his or her parents if that parent also requires leave to remain. To regard a difference of treatment on that basis as being a difference of treatment on the ground of "other status" (and thus one requiring justification under article 14) is also consistent in my judgment with the most recent decision of the House of Lords on this issue: see *R (RJM) v the Secretary of State for Work and Pensions* [2008] UKHL 63 at [5] and [35]-[47].

(iii) the general approach to justification under article 14 in this case

42. In my judgment the basic approach to be adopted when considering the issue of justification under article 14 is now well established. As the Grand Chamber of the European Court of Human Rights stated in *Stec v United Kingdom* (2006) 43 EHRR 1017 at [51], for example,

> "a difference of treatment is...discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."

43. In considering whether the difference in treatment involved in this case is justified, I remind myself that the Secretary of State is entitled to adopt policies to assist in the administration of immigration control and that the policies which the Secretary of State may choose to adopt for that purpose in the pursuit of legitimate aims are not ones which in general a court is well equipped to assess. Inevitably such policies may have to be applied in a very large number of cases and there is an inevitable tension between the need for simplicity to further the efficient administration of immigration control and for sensitivity to the differing circumstances of individuals subject to it. Inevitably the application of any policy may produce apparently hard results in some individual cases. Inevitably the application of a number of different policies in this context may also produce what may appear to be comparatively incongruous results in some cases. That would not of itself necessarily mean that the policies in question cannot be justified or that they involve any discrimination contrary to article 14 where that article is applicable. But equally it does not mean where that article is applicable that any significant difference in treatment of those who are in analogous situations does not require justification. It is rather a recognition of what it is reasonable to expect by way of justification in such circumstances.

44. In some cases a particularly careful examination of any justification offered for a difference in treatment which is based on whether or not a child is living with a parent may be called for. As Baroness Hale stated in *AL (Serbia)* at [34],

> "in certain circumstances, a difference in treatment between children who did or did not have parents to look after them, unless designed to correct the factual inequalities between them, would require particularly careful

> scrutiny. To deny a benefit to a child whose parents were dead, had disappeared, or were incapable of looking after him, which was available to a child who had parents available to look after him, might be very hard indeed to justify."

But, in approaching the question of justification in this case, I propose to give as much weight as is rationally possible to such matters as have been advanced by way of justification by the Secretary of State.

(iv) whether the difference in treatment is justified

45. Against that background, it is necessary to have regard to the aim which "DP 5/96" pursues, as the approach enunciated by the Grand Chamber in *Stec* indicates and as the decision of the House of Lords in *AL (Serbia)* (on which both the Claimant and the Defendant in this case rely) demonstrates.

46. In that case two young single adults impugned the Secretary of State's "family concession policy" under which certain asylum seekers with families who had been in the United Kingdom for three years or more became eligible for ILR. To be eligible the applicant had to have applied for asylum before October 2nd 2000 and to have at least one dependent child living as part of the family who was under 18 either on October 2nd 2000 or October 24th 2004. The principal aim of the "family concession policy" was to clear a backlog of difficult asylum claims as a one-off exercise so as to enable cases to be dealt with more efficiently in future. As Lord Brown explained (at [51]), "its plain intent was to improve the system of immigration control by releasing from it an easily identifiable group of people (of all nationalities, both sexes and various ages) who were causing it particular problems, essentially families with children." Eligibility was not extended to young adults who were not living as part of a family (such as the appellants) because this was not where the problem was thought to lie in clearing the backlog: see at [7], [37]-[38], [40]. But it was also sought to justify the policy on the basis that, in many of the family cases, there were also strong compassionate grounds for allowing them to remain: see at [39] . However, as Baroness Hale put it (at [47]), "the essence of the policy was its efficiency, not its compassion". The appellants' complaint concerned the fact that those to whom the policy applied would not be removed whatever the merits of their asylum claim whereas they might be. Their complaint does not appear to have been focussed on what leave to remain those to whom the policy applied or they themselves would be granted if they were not to be removed.

47. The "family concession policy" in *AL (Serbia)* was a policy accurately targeted at a problem posed by a group, of whom the appellants were not members, which it was desirable to resolve on pragmatic grounds. That aim was significant to its justification. Had that not been the principal aim of the exercise, the policy might not have been justified. As Baroness Hale stated (at [43]),

> "Instinctively one feels that to treat two young men so very differently, because one arrived here as a child with his family and one did not, has to

> be wrong. It would of course be different if the one who had arrived here without his family now had a family to whom he could return. However, given that he does not, it might be thought that, if either deserved more favourable treatment, it should be the one who lacks the emotional and material support which we all hope to have from our own families even after we have turned 18. If the aim of the policy had been to select the most deserving cases for special treatment, then the difference would have been difficult to explain, let alone to justify."

48. As Mr Chirico submitted, the aim of "DP 5/96" is to protect the interests of a child who satisfies the relevant seven year residence requirement. Any benefit which that child's parent may derive from that policy is a by-product of that aim. It is the interests of the child that have dictated both the presumption which the policy now contains and the period of residence on the part of the child required to create it. As Ms Dolby stated in the witness statement to which I have referred, "as the existence of the presumption would suggest, the terms of DP5/96 reflect the fact that, in cases where children have spent a significant period of their formative years in the United Kingdom, removal gives rise to significant disruption to the lives of those children and in the absence of any countervailing considerations that it may not be appropriate to enforce removal of their parents or parent." It is the need to avoid uprooting such a child that militates against removing any parent that child has living with him or her. Similarly, in explaining the modification of the policy in 1999, the press release issued by the Home Office quoted the Minister as saying that "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." Although "DP 5/96" thus creates a general presumption based on the interests of the child, it may nonetheless be displaced in an exceptional case by reference to factors listed in "DP 5/96" itself and the "policy modification statement". As Ms Dolby put it, "this reflects the balance the policy seeks to strike between safeguarding the interests of children who have established close connections with the United Kingdom over a significant period of time and the need to ensure that absolutely no incentive is provided to parents to seek to circumvent and abuse our system of immigration control. While the private rights of particular children must be afforded significant weight under the policy it is also important to realise that there is a wider public interest in maintaining an effective system of immigration control."

49. That the aim of the policy is to protect the interests of a child who satisfies the relevant residence requirement, rather than the interests of his or her parent, is also illustrated by the fact that a parent only benefits under this policy if that parent's child satisfies the qualifying period of residence. The parent does not benefit from the policy by virtue of any period of residence in this country which the parent may have accumulated. "DP 5/96" applies when a child is born here, or has come to the United Kingdom at an early age, and has seven years' or more continuous residence. Although "DP 5/96" allows for the length of a parent's residence without leave to be taken into account in deciding whether to depart from the general presumption

against removal (no doubt in part to discourage any parent from sending a child to the United Kingdom and only seeking to join that child at a time when reunification of the family will be of benefit to that parent), a parent need not have resided here for any similar period to that required of his or her child in order to benefit from the policy. It is only necessary for that parent to be part of an established family unit with the child in the United Kingdom when the parent's removal is under consideration.

50. In my judgment, therefore, the legitimate aim that "DP 5/96" pursues is protection of the interests of a child who has, over a significant period of time at a formative age, put down roots in this country from which (other than in an exceptional case) he or she should not be uprooted. The grant of ILR is a recognition, as Ms Dolby stated, that "as a matter of policy and common sense...removal is unlikely to become appropriate in the future (subject to any future criminality leading to deportation action)". Such children should accordingly normally be regarded as settled in this country.

51. In my judgment such considerations are equally applicable to all relevant children, whether or not they are living with a parent who requires leave to remain here.

52. It is suggested on behalf of the Secretary of State that "DP 5/96" recognises the effect that removing a parent who requires leave to remain may have on a child. That is, of course, something that does not arise if the child is not living with the parent in question. But in my judgment this aspect of "DP 5/96" is not directed at what in the policy requires justification in this case. The difference in treatment that requires justification in this case does not lie in whether or not anyone is to be removed. Where the presumption against removal in "DP 5/96" is to be given effect, removal is not in issue either for a parent or for any relevant child requiring leave. Likewise, where it would be incompatible with article 8 for a relevant child to be removed, that child's removal is obviously not in issue. In each case it is the private life that a relevant child has established in this country and any family life which a relevant child may also have established here, whether it is with a parent or others who may remain here, that is protected by the presumption against removal. In my judgment the difference in treatment that requires justification is that, in a case under "DP 5/96" where the presumption against removal applies, a relevant child who needs leave to remain will receive ILR whereas a relevant child who is not living with a parent but whose removal is incompatible with article 8 will only receive limited leave to remain for three years.

53. The point of granting only limited leave to remain (rather than ILR) is to preserve a right to review actively at a later date whether removal is appropriate and to postpone the time at which an individual may be regarded as settled in this country. Understandably Mr Patel did not seek to argue that the *future* removal of a relevant child, who is not living with a parent requiring leave to remain but whose removal is incompatible with article 8 of the Convention, is any more likely to be appropriate than the *future* removal of a relevant child who is living with a parent who also requires

leave to remain. If removal is already incompatible with a relevant child's right to respect for the private life and any family life which that child has established by virtue of seven years' continuous residence in this country during his formative years, that child's continued residence here will only make it more likely, not less, that any removal in future will be incompatible with that child's rights under article 8.

54. It is no doubt true that "DP 5/96" protects a relevant child's family life in this country with a parent who also requires leave. A child who is not living with a parent in this country may be able to enjoy family life with his or her parent abroad. But the protection under "DP 5/96" which is afforded to a parent requiring leave to remain who is living with a relevant child is a by-product of the respect given to the private life which that child has established here which makes it inappropriate to require him to enjoy such family life abroad. Once it has been found that it is incompatible with article 8 of the Convention to remove a relevant child who is not living with a parent in this country who requires leave to remain, it must equally be regarded as inappropriate to require that child to enjoy family life abroad with any parent which he or she may have there. Moreover there can be no reason why *less* favourable treatment should be given to a relevant child because any family life which he or she enjoys in this country is enjoyed with those who are already *entitled* to remain in this country (because, for example they are British citizens, as in this Claimant's case, or because they already have leave to remain) than if they are not. In my judgment, therefore, respect for a child's family life in this country cannot provide a justification for giving limited leave to remain, rather than ILR, to a relevant child who is not living with a parent who also requires leave to remain.

55. Mr Patel also made the point that to grant ILR to a child who has been here for seven formative years may provide an incentive for those with whom the child has been living not to bring his or her presence here to the attention of the authorities and that it may thus provide an incentive for immigration control to be circumvented. No doubt this may be so in some cases. In my judgment the Secretary of State may well be justified in taking into account any conduct that has sought to circumvent or abuse the system of immigration control, whether that conduct is by that child's parents or by others who may be looking after that child, when considering whether a child who has resided here for the relevant period should be removed. Under "DP 5/96" such conduct may rebut the presumption against removal which that policy now contains, even though any child involved is not responsible for it. Similarly, where "DP 5/96" does not apply, such conduct may be relevant to the question whether the removal of a relevant child is a proportionate interference with that child's rights under Article 8, even though the child may have no responsibility for it. But, once it is found that removal would be incompatible with a relevant child's rights under article 8, it is unclear why any such conduct may justify retaining the right to review actively whether removal is appropriate at a later date and postponing the time at which a relevant child may be regarded as settled. The conduct of others which occurs before it is recognised that a relevant child's removal is

incompatible with article 8 makes it no more likely that removal in future will become compatible with article 8.

56. In my judgment, therefore, the Secretary of State has not explained, much less justified, why retaining the right to review whether removal is appropriate actively at a later date and postponing the time at which an individual may be regarded as settled is necessary or expedient in the case of a relevant child who is not living with a parent who requires leave to remain when it is not necessary or expedient if that child is living with such a parent.

57. Mr Patel submitted, however, relying on Lord Bingham's opinion in *AL (Serbia),* that the fact that the Secretary of State has chosen to deal with the Claimant's case in a particular way (that is to say by the grant of discretionary leave for three years) rather than by applying an inapplicable policy cannot mean that the Claimant has suffered any unlawful discrimination through the non-applicability of that policy. He relied on the fact that the Secretary of State has other policies that deal with children that do not result in the immediate grant of ILR and on the fact that there is no policy that an individual who has lived continuously for seven years in this country whilst a child is eligible for ILR.

58. In my judgment these submissions are fundamentally flawed. Where the complaint of discrimination concerns the less favourable treatment that a relevant child receives under one policy compared with another it simply begs the question to assert that there is no discrimination because a relevant child may be assisted under the less favourable policy. The question is whether that less favourable treatment under that other policy is justified.

59. Nor do I consider that Mr Patel's reliance on the opinion of Lord Bingham in *AL (Serbia)* supports such an approach. In that case Lord Bingham stated (at [2] and [3]) that the Secretary of State

> "faced a formidable problem caused by the difficulty, delay and expense of removing families, and the solution was to grant an indulgence to them which was not called for in the case of young unaccompanied adults who were no part of the problem. If any of the latter had strong claims to remain on article 8 grounds, they could be addressed on a case by case basis...In my opinion the policy was justified by the administrative exigency which inspired it, and it was not disproportionate because it permitted compelling claims by those falling outside the policy to be recognised and accommodated."

60. These observations by Lord Bingham (on which Mr Patel relied) should not be taken out of context. The complaint in that case concerned who was to be protected from removal irrespective of the merits of their asylum claim. As the Appellate Committee found, there was good reason why the policy impugned in that case, the essence of which was to deal with a particular administrative problem, did not extend to those in the appellants' position (which in my judgment is not so for the reasons already given in respect of the grant of ILR in this case). What Lord Bingham was concerned with was

the fact that there might be other, compassionate reasons why the appellants in that case (like some of those who benefited from the policy impugned) should not be removed. The other policies were significant in that case as they showed that protection against removal on compassionate grounds was not limited to those to whom the impugned policy applied. What leave to remain those who were not to be removed under these various policies were to be given appears not to have been in issue.

61. In my judgment, therefore, applying a general presumption that ILR will be granted to relevant children when they live with a parent who also requires leave but not applying it to those relevant children who do not live with such a parent (none of whom are to be removed) has no justification. The difference in treatment of the relevant children appears to be simply arbitrary when regard is had to the aim of that policy which is to protect the interests of those children who have established their private life in this country, who should normally not be uprooted from it as a result and who should accordingly normally be regarded as settled here.

62. If necessary I would also hold that not applying the same general presumption that ILR will be granted to a relevant child on the ground that that child is not living with a parent who also requires leave to remain was one no reasonable person could have decided to adopt in the circumstances.

Other policies that the Secretary of State has which are applicable to children

63. In case I am wrong to reject the approach of looking at other policies that may apply to children which the Secretary of State has in determining whether the difference in the treatment of relevant children which is impugned in this case is justified, however, I have considered those other policies to see what support they could provide for the Secretary of State's approach when considering what leave to remain should be granted to the Claimant.

64. In my judgment, however, these other policies only illustrate (if anything) that the Secretary of State's approach to children separated from their parents who have established roots in this country does not appear to result from any systematic or coherent overall approach.

65. The policies of relevance are those which the Secretary of State has adopted for granting leave outside the Immigration Rules. To understand what policies the Secretary of State has applicable to children who are separated from their parents requires some reference to their evolution. In that respect April 1st 2003 is a significant date. Before April 1st 2003 the Secretary of State referred to limited leave to remain in this country that might be granted under such policies as exceptional leave to remain or "ELR". Leave to remain of that description has not been granted as from April 1st 2003. Instead the limited leave that has been granted in some cases has been referred to as "discretionary leave".

66. In 1993 the Immigration Minister made a commitment that no unaccompanied child would be removed from the United Kingdom unless

the Secretary of State was satisfied that adequate reception and care arrangements were in place in the country to which the child was to be removed. This led to an instruction, DP 2/93, which was replaced in March 1996 by DP 4/96 (issued at the same time as DP 5/96). DP 4/96 gave guidance in general terms on the consideration of cases of persons liable to be deported or removed as illegal entrants including children here on their own. It provided that

> "enforcement action against children and young persons under the age of 16 who are on their own in the United Kingdom should only be contemplated when the child's voluntary departure cannot be arranged. In all cases removal must not be enforced unless we are satisfied that the child will be met on arrival in his/her home country and that care arrangements are in place thereafter."

67. As Mr Patel points out, this instruction did not deal with the consequences if removal was not to be enforced. On behalf of the Secretary of State he has stated, however, that any unaccompanied child who could not be removed (whether or not he had made an unsuccessful asylum claim) was granted ELR for 4 years or until his or her 18th birthday (whichever was the shorter period) unless there was a realistic prospect of return sooner. If granted ELR for 4 years, the child would be eligible to apply on its expiry for ILR.

68. For those granted ELR for 4 years before April 1st 2003 which expired thereafter, transitional provisions (contained in an Asylum Policy Instruction on Discretionary Leave) provide that those who applied for ILR on its expiry should be considered for settlement (with background character and conduct checks and war crimes screening) but without a full active review or a need to show that they would qualify for humanitarian protection or discretionary leave.

69. It was a feature of the new system of discretionary leave introduced on April 1st 2003 that the maximum period of limited leave to be granted was to be 3 years and that on the expiry of any such period there was to be an active review of whether removal was then appropriate. Except where a person received discretionary leave as he or she was excluded from asylum or humanitarian protection (a category which can be disregarded for present purposes) an individual is entitled to apply for ILR after 6 years on discretionary leave. That application itself is subject to an active review to consider whether or not the individual concerned still qualifies for discretionary leave or some other form of leave to remain.

70. If a person does not qualify for leave elsewhere under the Immigration Rules or existing policies, the Secretary of State states that consideration will need to be given to the factors mentioned in paragraph 395C of the Immigration Rules before a decision is taken to remove that person under section 10 of the Immigration and Asylum Act 1999 and, if removal is not considered appropriate, ILR will normally be granted outside the Immigration Rules (unless limited leave or deferred removal is appropriate).

71. Mr Patel states that, after April 1st 2003, DP 4/96 remained in force as a casework instruction; that any child who cannot be returned to his or he country of origin is granted discretionary leave for 3 years or until his or her 18th birthday (whichever is the shorter), with one modification to which I shall refer below; and that such a child is eligible to apply for ILR after 6 years discretionary leave under the discretionary leave policy.

72. The documents that are said to demonstrate this approach, however, are not so clear, bearing in mind that the Asylum Policy Instruction that contains the Secretary of State's policy on discretionary leave makes it plain that discretionary leave is to be granted under it only if a case falls into one of a limited number of categories or if individual circumstances are so compelling that it is considered appropriate to grant some form of leave. There is, for example, no category in that document comprising all children whose removal would not be consistent with the policy in DP 4/96 to which I have referred.

73. There are three groups of children who are separated from their parents and who are liable to removal who need to be considered: (i) unaccompanied, unsuccessful asylum seeking children ("UASC"); (ii) accompanied, unsuccessful asylum seeking children ("AASC"); and (iii) other children who are separated from their parents who have no claim to remain under the Rules (to whom I shall refer as "other unaccompanied children"). Both UASCs and AASCs are children who have unsuccessfully applied for asylum in their own right and are separated from both parents. An AASC is a child who also either forms part of a family group or is being cared for by an adult who has responsibility to do so by law or custom.

74. As a notice from the Asylum Policy Unit dated April 1st 2003, the Asylum Policy Instruction on discretionary leave, Chapter 30.1 of the Enforcement Instructions and Guidance and the Asylum Instruction on "Processing Asylum Applications from Children" each make plain, one category in which discretionary leave may be granted is that of a UASC for whom adequate reception arrangements abroad are not available. In the case of such a child, for decisions made before April 1st 2007, the grant of discretionary leave was generally to be for a period of three years or until the child was aged 18 (whichever was the shorter). For decisions made on or after April 1st 2007, however, the grant of discretionary leave was to be for a period of 3 years or until the child was 17½ (whichever was the shorter). The purpose of this change made in an Asylum Policy Unit Instruction in March 2007 was to enable any application by the child to extend or vary his or her leave and any subsequent appeal to be dealt with before that individual turned 18, providing the young person with more clarity about their future.

75. None of these documents refers in terms, however, to AASCs and other unaccompanied children who are not to be removed as persons falling within a specified category to whom discretionary leave may be granted.

76. In the case of an AASC this may be understandable as the aim will no doubt be to remove the child with together with the family, or the adult who has responsibility for caring for the child, with whom the child is living. However in the Asylum Policy Unit Instruction in March 2007 that announced the change to the policy for children seeking asylum in their own right, it was stated that the policy hitherto (that discretionary leave would be granted for three years or until the child's 18th birthday, whichever was the shorter period) "applies primarily to [UASCs] but may also be applied to accompanied children where the adult cannot be removed with the child."

77. What the policy has been since April 2003 for other unaccompanied children who are not to be removed is perhaps less clearly discernable from published documents.

78. Paragraph 2 of the Asylum Policy Unit Instruction in March 2007 to which I have referred may appear to support the contention a child who cannot be removed consistently with the Secretary of State's commitment in 1993 and the guidance in DP 4/96 is to be granted discretionary leave in the same way as a UASC. But any such support may appear to be undercut by paragraphs 2 and 3 describing those to whom the policy applies (to which I have referred above) and by the fact that the Note is applicable only to children seeking asylum in their own right.

79. Moreover there is also a statement of the policy to be applied to children in the absence of their parents who have no apparent claim to remain under the Rules contained in Part 2 of Annex M to Section 3 of Chapter 3 of the Immigration Directorate's Instructions. The type of children to whom this guidance is said to apply include children taken into care by a local authority who have been abandoned by their parents, those placed into foster care and those refused leave to remain but who are still in the United Kingdom because enforcement action is normally only contemplated when the child's voluntary departure cannot be arranged. The policy is said not to apply to children the subject of residence orders by a United Kingdom court, adopted children or children who are living with a relative or relatives other than parents. It would not have applied, therefore, to the Claimant when living with his relatives, namely his aunt and her husband and their children. The decision whether or not to enforce removal under these guidelines is not governed solely by whether there are adequate reception arrangements for the care of the child concerned abroad but takes into account a far wider range of considerations, including the age of the child, his or her length of stay in the United Kingdom, the type of care the child has received here and the child's own feelings. The stated policy is that, where there is a realistic possibility of the child returning to his or her parent(s) and/or country of origin in the future (but not immediately), the child may be granted limited leave for periods of 12 months. But, where there is no realistic prospect of the child leaving, the child may be granted leave to remain for 4 years. In both cases, however, if there is no prospect of removal, after 4 years of limited leave to remain (not 6 as with discretionary leave), ILR may be granted.

80. However Mr Richard Honeyman, an Assistant Director, Operational Policy and Process Improvement Team 2 at the United Kingdom Border Agency, states (in a witness statement filed on behalf of the Secretary of State), that, after April 1st 2003, even if not a UASC, a child will be granted discretionary leave to remain (when he or she otherwise had no basis for remaining here) if there is no prospect of removal to the country of origin.

81. Mr Honeyman states that the policy in Annex M to which I have referred about what leave should be granted to a child who is not to be removed under those guidelines changed on April 1st 2003 but that this instruction was not updated and that it has remained available on the Home Office website. In fact Annex M is dated August 2003 and it refers elsewhere to the withdrawal of the "under 12 concession" on March 29th 2003. Why the relevant part of the guidelines in respect of the leave which is to be granted where an unaccompanied child to whom the guidelines applied is not to be removed was not amended in August 2003 (when that document was produced and after the policy is said to have changed in April 2003), and how it has remained unchanged on the websites of the Home Office and now the United Kingdom Borders Agency for over 5 years, is hard to understand. For present purposes, however, I will ignore what the published policy of the Secretary of State appears to be and have been in respect of other unaccompanied children falling within these guidelines and to take her policy to be what Mr Patel submits that it is.

82. I shall consider Mr Patel's general approach on the basis, therefore, that, in all cases after April 1st 2003 (not covered by any transitional arrangements) in which a UASC, a AASC and other unaccompanied child cannot be removed, that child will be granted discretionary leave as described above.

83. Ultimately there will also no doubt come a time when a child's removal is incompatible with that child's right to respect for the private and family life which he or she may have established in this country. At that point that child will become entitled to be granted discretionary leave in any event as mentioned above.

84. Thus, in accordance with the Secretary of State's policy on discretionary leave, a child who cannot be removed because adequate arrangements for his or her reception and care are not available in that child's home country may obtain ILR after 6 years' continuous residence in this country on discretionary leave. This policy applies whether or not those 6 years are spent in this country after the child was born here or came here at an early age. By contrast a relevant child needing leave to remain, who has already had at least 7 years' continuous residence after his or her birth or arrival at an early age in this country and whose removal would be incompatible with his rights under article 8 (but who is not living with a parent), is required to wait until he or she has spent at least 6 further years here on discretionary leave before becoming eligible for ILR. Such an individual could have to spend at least 13 years and possibly more in this country before he or she may be eligible for ILR and regarded as settled in accordance with the Secretary of State's policies on discretionary leave.

85. No doubt it is the case that both a child who cannot be removed because adequate arrangements for his reception and care are not available in his or her home country and a relevant child (not living with a parent who also requires leave) will each have to spend six years on discretionary leave before qualifying for settlement in accordance with the Secretary of State's policy on discretionary leave. It may be said, therefore, that a relevant child who does not live with a parent who also requires leave to remain in this country should not have counted in his or her favour for the purpose of obtaining ILR any period in which he or she has been living here without such discretionary leave.

86. But, even ignoring the fact that a relevant child may not have been unlawfully in this country throughout the whole of the period, the relevance of the existence of discretionary leave is not obvious in this connection. Under "DP 5/96" the presumption is that ILR will be granted based on 7 years' actual continuous residence in this country by that child in that child's formative years, regardless of whether or not that child has enjoyed any leave to be in this country in that period. The reason why it matters not that the child may not have had such leave to be in this country in that period is that the foundation for "DP 5/96" is the private life that a child who has lived here for that period will have established in this country, whether or not he or she has had any such leave to be here. It is the roots which such a child has established in this country as a matter of fact which make the grant of ILR for the parent with whom the child lives as well as the child normally appropriate.

87. It is not for me to determine whether the differing requirements I have mentioned (in paragraph [84] above) are required to be, or are, justified. But in my judgment the Secretary of State's approach to children who have established roots in this country by their residence here does not appear to be the result of any coherent overall approach and, although the Secretary of State invited my attention to his other discretionary policies for the grant of leave to children outside the Immigration Rules, that invitation was not accompanied by any indication that there was any principle or principles which underlie all of them and which can explain how they are consistent with each other.

88. A striking example of the results of these separate policies is provided by the interaction of "DP 5/96" and the Secretary of State's policy on discretionary leave for members of the same family. When "DP 5/96" applies, it is only a parent (whose removal is under consideration) and any child under 18 that parent has who may receive ILR. A letter from the Border and Immigration Agency which is before the Court states that "any siblings who have turned 18 at the date the younger child has engaged the policy are given 3 years [discretionary leave] in line with the [Asylum Policy Instruction Discretionary Leave] policy". A child who is over 18 living with a parent who benefits from policy "DP 5/96" will thus only receive 3 years' discretionary leave. That is so even though they all form part of the same family unit and even though the older child may have been living for longer in this country, and may accordingly have deeper roots here, than any

younger sibling who receives ILR. Indeed, had the application of "DP 5/96" to their family been considered earlier, he or she may also have received ILR in accordance with the general presumption it contains. It is far from obvious why such an older sibling should be apparently entitled to *less* in terms of leave to remain if he or she continues to reside for a yet *longer* period in this country.

89. In my judgment, therefore, against this background Mr Patel's submission that there is no discrimination in not applying the general presumption in respect of ILR to a relevant child who is not living with a parent because that child may be considered under other policies (even if that approach is relevant) has little or no force in any event. The Secretary of State's approach to children who may have established roots in this country by their residence here does not appear to be the result of any coherent overall approach.

Other matters

90. Mr Chirico further submitted that, in taking a decision on the Claimant's application for ILR, the Secretary of State was obliged, but failed, to take into account how children who have resided for 7 years here are treated under policy "DP 5/96".

91. As Carnwath LJ stated (when giving a judgment with which the other members of the Court of Appeal agreed in *R (Rudi) v the Secretary of State for the Home Department* [2007] EWCA Civ 1326 at [36]), however, "the law knows no 'near miss' principle. There is no presumption that those falling just outside the policy should be treated as though they were within it, or given special consideration for that reason." But, as Carnwath LJ also accepted in that case (at [31] and [32]), the rationale for a policy may nonetheless inform a judgment about the significance of a particular point in a case that falls outside it.

92. In my judgment, however, Mr Chirico's argument does not advance the Claimant's case. If there is justification for the difference in treatment of relevant children depending on whether the children do or do not live with a parent who also requires leave to remain in this country, then it does not assist the Claimant to point out (a) that his situation is the same as that of a relevant child who benefits from "DP 5/96" except that he is not living with a parent who also requires leave to remain and (b) that the rationale for that policy applies equally to him. On this assumption the difference in treatment is justified. On the other hand, if the difference in treatment is not justified, the Secretary of State's decision falls to be quashed in any event on that ground. Contending that she has failed to take into account the rationale underlying "DP 5/96" adds nothing to that complaint.

Conclusion

93. In this case the Secretary of State did not approach the decision whether or not to grant the Claimant ILR on the basis that there was a presumption that he should receive it given the period for which he had continuously resided

in this country having arrived here at an early age. In failing to do so, in my judgment she discriminated unlawfully and unreasonably against the Claimant on the basis that he was not living with a parent who also required leave to remain. It follows that the Secretary of State's decision falls be quashed.

94. Precisely because the starting point which the Secretary of State should have adopted is only a presumption, however, in my judgment it remains for her to consider whether the Claimant's case is an exceptional one in which departure from that presumption may be justified. The claim for a declaration that the Claimant is entitled to ILR is accordingly dismissed.