Trinity Term
[2012] UKSC 32
On appeal from: [2011] EWCA Civ 814

JUDGMENT

R (on the application of Munir and another) (Appellants) *v* Secretary of State for the Home Department (Respondent)

before

Lord Hope, Deputy President
Lord Walker
Lord Clarke
Lord Dyson
Lord Wilson

JUDGMENT GIVEN ON

18 July 2012

Heard on 24, 25 and 26 April 2012

Appellant
Zane Malik

(Instructed by Malik Law Chambers Solicitors)

Respondent
Jonathan Swift QC
Joanne Clement

(Instructed by Treasury Solicitors)

Intervener (Joint Council for the Welfare of Immigrants)
Richard Drabble QC
Shahram Taghavi
Charles Banner

(Instructed by Lewis Silkin LLP)

LORD DYSON: (with whom Lord Hope, Lord Walker, Lord Clarke and Lord Wilson agree)

1. Section 3(2) of the Immigration Act 1971 ("the 1971 Act") provides that:

> "The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter...."

2. The central question that arises in these two appeals is whether statements by the Secretary of State of her policy as regards the granting of concessions outside the immigration rules and of their subsequent withdrawal amount to statements as to "the practice to be followed" within the meaning of section 3(2) of the 1971 Act which she must, therefore, lay before Parliament.

The statutory framework

3. The 1971 Act lies at the heart of these appeals. Section 1(4) provides:

> "(4) The rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the rights of abode shall include provision for admitting (in such cases and subject to such restrictions as may be provided by the rules, and subject or not to conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom."

4. Section 3(1) provides that a person who is not a British citizen (a) shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of or made under the 1971 Act; (b) may be given leave to enter or remain for a limited or indefinite period; and (c) if given leave to enter or remain, it may be subject to all or any of the specified conditions.

5. Section 3(2) should be set out more fully than at para 1 above:

> "(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances……
>
> If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying…….then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution…"

6. Section 3A(1) states that the Secretary of State may "by order make further provision with respect to the giving, refusing or varying of leave to enter"; and the following subsections make particular provisions in relation to such orders. Section 3B makes similar provisions in relation to the giving, refusing or varying of leave to remain. Section 3C deals with continuation of leave pending a variation decision, subsection (6) providing that the Secretary of State "may make regulations determining when an application is decided for the purposes of this section".

7. Section 4(1) provides:

> "(1) The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(a) (whether as regards duration or conditions), shall be exercised by the Secretary of State……."

8. Section 33(1) states that "immigration rules" means "the rules for the time being laid down as mentioned in section 3(2) above". Section 33(5) provides: "This Act shall not be taken to supersede or impair any power exercisable by Her Majesty in relation to aliens by virtue of Her prerogative".

The relevant policies

9. In March 1996, the Secretary of State introduced Deportation Policy 5/96 ("DP5/96"). It was entitled "Deportation in cases where there are children with long residence". It defined "more clearly" the criteria to be applied by immigration decision makers "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". It stated that, whilst it was important that each individual case must be considered on its merits, certain factors (which were specified) might be of particular relevance in reaching a decision.

10. In June 1998, the Secretary of State issued chapter 18 of the Immigration Directorates' Instructions ("The Long Residence Concession"). It recognised that there was no provision in the immigration rules for a person to be granted indefinite leave to remain solely on the basis of the length of his or her residence. It stated that, where a person had 10 years or more continuous lawful residence or 14 years continuous residence, indefinite leave to remain should "normally be given in the absence of any strong countervailing factors". It made no specific reference to the position of children.

11. On 24 February 1999, the Under-Secretary for the Home Department announced a revision to DP5/96. The policy modification statement said that, whilst it was important that each case be considered on its merits, there were certain factors which were likely to be of particular relevance when considering whether enforcement action should proceed or be initiated against parents who had children who had lengthy residence in the United Kingdom. The "general presumption" would be that enforcement action would not normally proceed in cases where a child was born here and had lived continuously to the age of 7 or over, or where, having come to the United Kingdom at an early age, 7 years or more of continuous residence had been accumulated. The statement identified certain factors which would be relevant to reaching a judgment on whether enforcement action should nevertheless proceed in such cases.

12. On 31 March 2003, the Secretary of State laid before Parliament a statement of a number of changes to the immigration rules (HC 538). These included rules 276A to 276D which dealt with the issue of long residence. To a considerable extent, they occupied the same ground as the Long Residence Concession, but added some detail. So far as I am aware, there was no formal withdrawal of the Long Residence Concession, although it had been taken off the website by 8 November 2011. Rule 276B provided that the requirements for indefinite leave to remain on the ground of long residence were that an applicant had had at least 10 years continuous lawful residence or (excluding certain periods) at least 14 years residence and that, having

regard to the public interest, there were no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account various specified factors.

13. On 9 December 2008, the Minister for Borders and Immigration announced the immediate withdrawal of DP5/96. In a written Parliamentary ministerial statement, he said:

> "The [seven year child] concession set out the criteria to be applied when considering whether enforcement action should proceed or be initiated against parents of a child who was born here and has lived continuously to the age of seven or over or where, having come to the UK at an early age, they have accumulated seven years or more continuous residence. The original purpose and need for the concession has been overtaken by the Human Rights Act and changes to immigration rules. The fact that a child has spent a significant period of their life in the United Kingdom will continue to be an important relevant factor to be taken into account by case workers when evaluating whether removal of their parents is appropriate. Any decision to remove a family from the UK will continue to be made in accordance with our obligations under the European Convention on Human Rights (ECHR) and the Immigration Rules."

The facts

14. Mr Rahman is a citizen of Bangladesh. He entered the United Kingdom with his wife and two children on 17 September 2001 on a visitor's visa which expired on 16 February 2002. His application for an extension of his leave was refused on 11 March 2003. Thereafter, he and his family remained in the country unlawfully. On 20 July 2009, he applied for indefinite leave to remain. This application was refused on 12 February 2010 on the grounds that he did not satisfy the test for indefinite leave to remain under rule 276B. The Secretary of State also considered the application on an exceptional basis outside the immigration rules, but was satisfied that there were no compelling or compassionate grounds that would warrant the grant of indefinite leave to stay on that basis. Nor would the refusal of leave to remain involve an interference with the rights of Mr Rahman and his family under article 8 of the European Convention on Human Rights ("the Convention").

15. Mr Rahman issued proceedings challenging the refusal of leave to remain. The principal issue was whether the Secretary of State should have afforded him the benefits of policy DP5/96. His grounds of challenge included that he and his family

had been resident in the United Kingdom for more than 7 years before the withdrawal of the policy and that it was irrational and unfair for the Secretary of State to withdraw DP5/96 in a way which prevented persons already in the United Kingdom who had built up at least 7 years residence prior to the withdrawal of the policy from benefiting from it. On 12 November 2010, Judge Bidder QC allowed the claim for judicial review on this ground. He held that, having regard to what he described as the clear practice of the Secretary of State to grant indefinite leave to remain when DP5/96 was satisfied, it would be irrational to distinguish between (i) persons who had prior to 9 December 2008 had the necessary period of residence but who, like Mr Rahman, had not prior to that date been the subject of enforcement proceedings, and (ii) those with the necessary residence qualification but who had prior to that date been the subject of such proceedings. The judge also said that it was unfair not to have given a warning that the concession was to end. Not to afford Mr Rahman and his family the benefit of DP5/96 when they had accrued 7 years residence prior to the withdrawal of the policy was so conspicuously unfair as to amount to an abuse of power. The judge quashed the refusal decision and ordered the Secretary of State to reconsider the application under DP5/96. He gave the Secretary of State permission to appeal.

16. Mr Munir is a citizen of Pakistan. He entered the United Kingdom with his wife and daughter on 18 August 2002 on a visitor's visa. The visa expired on 17 January 2003. They remained in the United Kingdom unlawfully after that date. A son was born in 2005. On 27 November 2009, they applied for indefinite leave to remain outside the immigration rules and in reliance on article 8 of the Convention. The application was refused by the Secretary of State on 18 June 2010.

17. Mr Munir issued proceedings challenging the refusal decision. His grounds of challenge were essentially the same as those of Mr Rahman. On 17 February 2011, Mr David Holgate QC (sitting as a Deputy Judge of the High Court) refused his application for permission to apply for judicial review. Mr Munir had accepted that, prior to the withdrawal of DP5/96, neither of his children had been resident in the United Kingdom for a continuous period of 7 years. Accordingly, the reasoning of Judge Bidder could not apply to his case. Mr Munir was nevertheless granted permission to appeal by the Court of Appeal.

18. Shortly before the hearing of the appeals, the Secretary of State reconsidered the cases. She informed the Court of Appeal that, taking account of the passage of time since the original decisions were taken, the impact of removal on the particular children involved and article 8 of the Convention, she had decided that removal would not be enforced and that the families would be granted discretionary leave to remain outside the immigration rules for 3 years. Nevertheless, the Secretary of State pursued her appeal in the case of Mr Rahman and resisted the appeal of Mr Munir because of the point of principle raised by the decision of Judge Bidder, namely that DP5/96 continued to apply to families with children who had been in the United Kingdom for 7 years or more when the policy was withdrawn.

The Court of Appeal

19. The Court of Appeal (Thomas, Moore-Bick and Stanley Burnton LJJ) allowed the Secretary of State's appeal and dismissed that of Mr Munir: [2011] EWCA Civ 814. The lead judgment was given by Stanley Burnton LJ. They held that the Secretary of State had acted lawfully in withdrawing DP5/96 and in determining the transitional arrangements that would apply. The Secretary of State was entitled to review her policy (such as that contained in DP5/96) and to change or revoke it whenever she considered it to be in the public interest to do so. They rejected the argument that the decision to withdraw the policy was irrational or unfair and held that the interests of the children were adequately addressed by article 8 of the Convention. There has been no challenge to this part of the Court of Appeal's reasoning. It was plainly correct.

20. The appeal to this court arises because before the Court of Appeal, for the first time, it was submitted on behalf of Mr Rahman and Mr Munir that the withdrawal of DP5/96 amounted to a statement of a change in the immigration rules within the meaning of section 3(2) of the 1971 Act and that it was unlawful and of no effect because it had not been laid before Parliament in accordance with the subsection. Stanley Burnton LJ dealt with this argument crisply in these terms:

> "38. In my judgment, Mr Malik's submission that the withdrawal of DP5/96 amounted to a change in the immigration Rules proves too much. If the withdrawal of DP5/96 was such a change, it necessarily follows that DP5/96 itself should have been laid before Parliament in accordance with section 3(2). It was not. On this basis, DP5/96 was unlawful, and its withdrawal was lawful since it brought to an end the application of an unlawful policy.
>
> 39. It is therefore unnecessary to decide whether or not DP5/96 should have been laid before Parliament pursuant to section 3(2) of the 1971 Act. It is sufficient to say that it seems to me to be well arguable that it was indeed a rule 'laid down by [the Secretary of State] as to the practice to be followed….for regulating the entry into and stay in the United Kingdom of persons required…..to have leave to enter.' A direction that in defined circumstances a discretion conferred on the Secretary of State is normally to be exercised in a specified way may well be such a rule."

Discussion

21. The starting point is to consider the legal status of DP5/96. On its face, it was a statement by the Secretary of State of "the criteria to be applied when considering whether enforcement action should proceed or be initiated against parents [where there are children with long residence]". Mr Malik submits that this shows that it was a statement of "the practice to be followed in the administration of [the 1971] Act for regulating the….stay in the United Kingdom of persons required by this Act to have leave to enter" and, therefore, fell within the scope of section 3(2) of the 1971 Act. In other words, it was no less a statement of practice than a statement described as a "rule" to that effect would have been. He submits that any statement of a concessionary policy which is more favourable to migrants than a rule which makes provision for the grant of leave to enter or remain is, by definition, a statement of a change in the rules within the meaning of section 3(2).

22. The primary answer given by Mr Swift QC is that everything done by the Secretary of State for the purpose of regulating the entry into and stay in the United Kingdom of persons who require leave to enter or remain is done in exercise of the prerogative power. She is under no legal obligation to lay any rules before Parliament (although she may be subject to political constraints to do so). He therefore submits that (i) the making and laying of immigration rules before Parliament is an exercise by the Secretary of State of the prerogative power and (ii) the publication of a policy which identifies the circumstances in which there may be a relaxation of legislation or the rules which regulate entry into and stay in the United Kingdom is also an exercise of the prerogative power and not a statement within the meaning of section 3(2).

Source of the power to lay down immigration rules

23. Although the present appeals concern the withdrawal of a policy published outside the immigration rules, I propose to start by considering Mr Swift's submission that the making and laying of rules before Parliament is an exercise of the prerogative power. There has been some debate as to the scope of the prerogative power in relation to aliens, and in particular as to whether there is a distinction between alien friends and alien enemies in this context: see the discussion in *Macdonald's Immigration Law and Practice* 8th ed (2010) at para 1.5. For present purposes, it is unnecessary to enter into this debate. The traditional view is that the situation of British subjects differed from that of all aliens. British subjects, including Commonwealth citizens until the passing of the Commonwealth Immigrants Act 1962 ("the 1962 Act"), had a right of abode in the United Kingdom, whereas aliens did not. Until the passing of the 1962 Act, the prerogative power that existed to control the entry and expulsion of aliens could not be exercised in relation to a Commonwealth citizen who "had the right at common law to enter the United Kingdom without let or hindrance when and where he pleased and to remain here as long as he listed": per

Lord Diplock in *Director of Public Prosecutions v Bhagwan* [1972] AC 60, 74B-C. As Lord Diplock said, Commonwealth citizens continued to enjoy that right following the enactment of the 1962 Act, save in so far as it was restricted or qualified by the provisions of that Act. A prerogative power to control the entry and stay of Commonwealth citizens did not, by some process of alchemy, come into being after the 1962 Act. The prerogative power to control the entry of aliens into the United Kingdom had no more relevance to Commonwealth citizens after the 1962 Act than it had before. Neither the 1962 Act nor the Immigration Appeals Act 1969 ("the 1969 Act") made any reference to the prerogative power. It is not necessary to consider the questions raised at para 1.7 of *Macdonald* as to the juridical basis for Lord Diplock's observations. All that matters is that, whatever the scope of the prerogative power in relation to aliens, it had no application to Commonwealth citizens before or after the 1962 Act.

24. The 1969 Act conferred on Commonwealth citizens a right of appeal to an adjudicator. Section 8(1)(a)(i) provided that an adjudicator should allow an appeal if he considered that the decision or action against which the appeal was brought "was not in accordance with the law or with any immigration rules applicable to the case". Section 24(1) defined immigration rules as "rules made by the Secretary of State for the administration of [control on and after entry], being rules which have been published and laid before Parliament". This is the first reference in a statute to immigration rules.

25. The long title of the 1971 Act is that it is an Act "to amend *and replace* the present immigration laws, to make certain related changes in the citizenship law and enable help to be given to those wishing to return abroad, and for purposes connected therewith" (emphasis added). Of particular significance is section 33(5): "This Act shall not be taken to supersede or impair any power exercisable by Her Majesty in relation to aliens by virtue of Her prerogative". This saving provision gives rise to two inferences. First, Parliament must have considered that the prerogative power to regulate immigration control did not apply to those who owed their allegiance to the Crown, that is British and Commonwealth citizens, and only applied to aliens. Otherwise, Parliament would surely have made some provision as to how, if at all, the prerogative power was to be exercised in relation to Commonwealth citizens. Secondly, Parliament must have intended that, subject to the saving in section 33(5), all powers of immigration control were to be exercised pursuant to the statute. These inferences are supported by the fact that, when promoting the 1971 Act, the Government made it clear that it intended that the use of the prerogative should be limited to controlling the entry of enemy aliens into the United Kingdom. On 3 August 1971, Lord Brockway moved an amendment to the Bill to omit clause 33(5). The debate included the following exchanges Hansard (HL Debates) 3 August 1971, Col 1046-1047:

> "LORD BROCKWAY

> I desire to move this Amendment largely to obtain information. Subsection (5) of this clause reads: This Act shall not be taken to supersede or impair any power exercisable by Her Majesty in relation to aliens by virtue of Her prerogative. I want to ask what these powers are. The powers which are in the Bill already are so comprehensive and of such detail that I find it difficult to think that any additional powers are necessary. When immigration is to be regulated by the rules under the Bill, why should it be necessary to have extra powers of this kind, powers of which we have no knowledge? Why should these powers be extended by the Royal prerogative?
>
> LORD WINDLESHAM
>
> I think I can answer the noble Lord quite briefly. The prerogative powers in question have existed for very many years. They include the power in the Crown at times of war to intern, expel or otherwise control enemy aliens at its discretion, which is exercised on the advice of the Home Secretary…….The Government do not think it necessary to surrender these powers, which go back many years. We are talking about residuary prerogative powers for the kind of exceptional circumstances which have arisen in this century only on the occasions of the two World wars.
>
> LORD BROCKWAY
>
> ……. in view of the assurances given by the noble Lord, I beg leave to withdraw the Amendment."

26. In my view, the power to make immigration rules under the 1971 Act derives from the Act itself and is not an exercise of the prerogative. As its long title indicates, the purpose of the 1971 Act was to replace earlier laws with a single code of legislation on immigration control. Parliament was alive to the existence of the prerogative power in relation to enemy aliens and expressly preserved it by section 33(5). But prima facie, subject to the preservation of that power, the Act was intended to define the power to control immigration and say how it was to be exercised.

27. It is true that there is no provision in the 1971 Act which in terms confers on the Secretary of State the power or imposes on her the duty to make immigration rules. But for the reasons that follow, in my view it is implicit in the language of the Act that she is given such a power and made subject to such a duty *under the statute*.

28. Section 1(4) states that the rules laid down by the Secretary of State shall include provision for admitting persons coming for the purpose of taking employment, or for purposes of study, or as visitors or as dependants of persons lawfully in or entering the United Kingdom. It is implicit in the wording of this subsection that, in the case of the persons described, the Secretary of State is *obliged* to lay down rules "as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode". It cannot have been the intention of Parliament to leave it entirely to the discretion of the Secretary of State to decide whether to lay down any rules as to her practice, insisting only that, if she decided to do so, the rules should include provision for admitting the classes of person identified in the subsection. If that had been the intention of Parliament, the 1971 Act would have made it clear that the Secretary of State had a power (but not a duty) to lay down rules of practice, but it did not do so.

29. Section 3(2) requires the Secretary of State to "lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed etc". Here too, the statute does not state explicitly that the Secretary of State is obliged to make statements of the rules or changes of the rules. It merely states that she is obliged to lay before Parliament statements of the rules or changes of the rules. But the whole point of section 3(2) is to give Parliament a degree of control over the practice to be followed by the Secretary of State in the administration of the 1971 Act for regulating immigration control. If the Secretary of State were free not to lay down rules as to her practice, the plain purpose of section 3(2) would be frustrated. This cannot have been intended by Parliament.

30. At the House of Lords Committee stage on 21 and 22 July 1971, a further amendment was tabled proposing an affirmative resolution procedure. This was resisted by the Government "because of the need for the Secretary of State to have power to change these rules at short notice if any unforeseen gap in the immigration control comes to light" (see Hansard 12 October 1971).

31. Section 3(1) of the 1971 Act provides that a person who is not a British citizen shall not enter the United Kingdom unless given leave to do so "in accordance with the provisions of, or made under, this Act". Sections 3A to 3C give the Secretary of State further relevant powers. Section 3A(1) states that she "may by order make further provision with respect to the giving, refusing or varying of leave to enter the United Kingdom" and the following subsections say what such an order may provide. There is a similar provision in section 3B(1) in relation to the giving, refusing or varying of leave to remain. Section 3C deals with continuation of leave pending a decision on variation of leave and subsection (6) provides that the Secretary of State "may make regulations determining when an application is decided for the purposes of this section". Section 4(1) provides that "the power *under this Act* to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers and the

power to give leave to remain in the United Kingdom, or to vary any leave….shall be exercised by the Secretary of State" (emphasis added).

32. In addition to the powers conferred on the Secretary of State to which I have referred, Schedule 2 to the Act contains detailed "administrative provisions as to control on entry etc". Para 1(3) provides:

> "In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (not inconsistent with the immigration rules) as may be given them by the Secretary of State, and medical inspectors shall act in accordance with such instructions as may be given them by the Secretary of State……"

33. All of these detailed powers and duties derive from the 1971 Act. In particular, the power to make rules and to grant and vary leave to enter and remain is vested in the Secretary of State by the Act. The exercise of that power is an exercise of statutory power and not the prerogative. The prerogative has never been exercised over Commonwealth citizens. It had been exercised over (at least) enemy aliens and the power to continue to exercise the prerogative power for that limited purpose was expressly preserved by section 33(5) of the 1971 Act. But if (contrary to my view) the prerogative power was exercisable in order to control immigration of Commonwealth citizens before the 1971 Act came into force, then the power was implicitly abrogated or, at least, suspended by the Act: see, for example, *AG v de Keyser's Royal Hotel Ltd* [1920] AC 508, 539-40.

Odelola v Secretary of State for the Home Department

34. Mr Swift submits that my conclusion that the 1971 Act is the source of the power and duty to lay down immigration rules cannot be reconciled with the House of Lords decision in *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230. In that case, the applicant applied for leave to remain in the United Kingdom as a postgraduate doctor. The immigration rules which had been laid before Parliament in accordance with section 3(2) of the 1971 Act and which were current at the time of her application stated that a person who had only an overseas medical degree was (subject to other requirements) eligible to apply for an extension of leave as a postgraduate doctor. After the date of her application, the relevant rule was replaced by a rule which required an applicant to have completed a recognised United Kingdom degree. The issue was whether the Secretary of State was entitled to determine the application by reference to the new rule.

35. The House of Lords unanimously decided that she was. In the opinion of Lord Hoffmann, the case turned on the construction of the new rule (para 3). He said that the rules are "a statement by the Secretary of State as to how she will exercise powers of control over immigration" (para 7). For that reason, the most natural reading of the rules (in the absence of any statement to the contrary) was that they would apply to the decisions she makes until such time as she promulgates new rules. In my view, that is the essential ratio of the decision. It is, however, right to record that one of the submissions of Mr Drabble QC for the applicant in that case was that immigration rules are "subordinate legislation" within the meaning of section 23 of the Interpretation Act 1978 ("the 1978 Act") and that this submission was rejected by Lord Brown and Lord Neuberger. It was Mr Drabble's case that section 16(1) of the 1978 Act provides that, where an Act repeals an enactment, the repeal does not affect any right or privilege acquired (unless the contrary intention appears); section 23 of the 1978 Act applies to "subordinate legislation"; section 21 provides that "subordinate legislation" includes any "rules…made or to be made *under any Act*" (emphasis added); and a change in the immigration rules constitutes subordinate legislation repealing earlier such enactment.

36. Lord Brown (with whom Lord Hope and Lord Scott agreed) said at para 34 that the "core consideration in the case" was the fact that immigration rules are "essentially executive, not legislative". Indeed, Lord Hoffmann also said at para 6 that immigration rules are not subordinate legislation, but "detailed statements by a minister of the Crown as to how the Crown proposes to exercise its executive power to control immigration". Lord Brown said this at para 35:

> "The immigration rules are statements of administrative policy: an indication of how at any particular time the Secretary of State will exercise her discretion with regard to the grant of leave to enter or remain. Section 33(5) of the 1971 Act provides that 'This Act shall not be taken to supersede or impair any power exercisable by Her Majesty in relation to aliens by virtue of Her prerogative'. The Secretary of State's immigration rules, as and when promulgated, indicate how it is proposed to exercise the prerogative power of immigration control."

37. It is not clear what part this view of the nature of immigration rules played in Lord Brown's decision. His overall conclusion at para 39 was that, standing back from the detail and addressing "a single indivisible question, to be answered largely as a matter of impression", he had no doubt that changes in immigration rules, unless they specify to the contrary, take effect whenever they say they take effect. Ultimately, therefore, like Lord Hoffmann he treated the question as one of construction of the relevant rule. I would accept that the immigration rules are statements by the Secretary of State as to how she will exercise her power to regulate immigration. But that is so whether the power to make the rules is statutory or is an exercise of the prerogative. I

have difficulty in seeing how the *source of the power* sheds light on the question of construction that the House had to resolve.

38. Be that as it may, it is clear from what I have already said that I cannot agree with Lord Brown that the immigration rules indicate how the Secretary of State proposes to exercise the prerogative power of immigration control. Lord Brown referred in para 35 to section 33(5) of the 1971 Act. It may be that he did not appreciate the significance of the reference there to the exercise of the prerogative "in relation to *aliens*" (emphasis added). As already stated, there was no prerogative power to control immigration by Commonwealth citizens and, far from supporting the argument that the making of immigration rules was an exercise of prerogative power, section 33(5) is inconsistent with it.

39. Lord Neuberger also rejected Mr Drabble's argument based on the 1978 Act. At para 46, he said that the view that the rules were not made under any enactment was consistent with the statutory history. He said that immigration rules had existed long before the 1971 Act and this tended to support the view that the rules were non-statutory in origin. But as I have said the first statutory reference to immigration rules is to be found in the 1969 Act. There is no basis for saying that the immigration rules were non-statutory in origin. The position is that until the 1969 Act, there were no immigration rules so-called; and the prerogative power was exercised, but only in relation to aliens. Lord Neuberger went on to consider whether the common law presumption against retrospectivity had any application to changes in the rules and concluded that it did not.

40. In my view, the views expressed by their Lordships on whether the rules were "subordinate legislation" within the meaning of section 23 of the 1978 Act 1978 were not necessary for their decision. The ratio of the case is that, as a matter of construction, in the absence of a statement to the contrary, immigration rules apply when they say they take effect.

Concessionary policies

41. I would, therefore, reject Mr Swift's primary submission that, if a concessionary policy such as DP5/96 is a rule as to the practice to be followed in the administration of the 1971 Act for controlling immigration, there is no legal obligation on the Secretary of State to lay it before Parliament. What about the Secretary of State's power to make policies about the circumstances in which she will or may relax the rigorous application of the rules? It is important to distinguish between (i) the exercise of a discretion given by an immigration rule and (ii) a policy (such as DP5/96) which identifies the circumstances in which exceptionally leave to enter or remain will or may generally be granted outside the rules. We are concerned with (ii).

42. There is undoubtedly support in the authorities for the view that the power to make immigration decisions outside the immigration rules is exercised pursuant to the prerogative. In *R v Secretary of State for the Home Department, Ex p Rajinder Kaur* [1987] Imm AR 278, 291, Glidewell LJ said at p 291:

> "…immigration was formerly covered by the royal prerogative and it was a matter which lay entirely within the exercise of that prerogative. Much of the prerogative powers vested in the Crown in this field have now been superseded by a statute but there remains—and this is what the royal prerogative is—a residual power in the Crown, through Her Majesty's Secretary of State for Home Affairs, to exercise such residual power as is necessary for the proper control of immigration.
>
> In my view, the exercise of discretion in relation to leave to enter outside the rules is an exercise of the remaining part of that prerogative power….."

43. But those conjoined cases concerned Commonwealth citizens. For the reasons I have given, the observations by Glidewell LJ were incorrect. Similar comments were made in *R v Secretary of State for the Home Department, Ex p Ounejma* [1989] Imm AR 75, 82 and *Ahmed v Secretary of State for the Home Department* [1999] Imm AR 22. These cases also concerned Commonwealth citizens.

44. In my view, it is the 1971 Act itself which is the source of the Secretary of State's power to grant leave to enter or remain outside the immigration rules. The Secretary of State is given a wide discretion under sections 3, 3A, 3B and 3C to control the grant and refusal of leave to enter or to remain: see paras 4 to 6 above. The language of these provisions, especially section 3(1)(b) and (c), could not be wider. They provide clearly and without qualification that, where a person is not a British citizen, he may be given leave to enter or limited or indefinite leave to remain in the United Kingdom. They authorise the Secretary of State to grant leave to enter or remain even where leave would not be given under the immigration rules.

45. The question remains whether DP5/96 was a statement of practice within the meaning of section 3(2). If a concessionary policy statement says that the applicable rule will *always* be relaxed in specified circumstances, it may be difficult to avoid the conclusion that the statement is itself a rule "as to the practice to be followed" within the meaning of section 3(2) which should be laid before Parliament. But if the statement says that the rule *may* be relaxed if certain conditions are satisfied, but that whether it will be relaxed depends on all the circumstances of the case, then in my view it does not fall within the scope of section 3(2). Such a statement does no more

than say when a rule or statutory provision may be relaxed. I have referred to DP5/96 at para 9 above. It was not a statement of practice within the meaning of section 3(2). It made clear that it was important that each case had to be considered on its merits and that certain specified factors might (not would) be of particular relevance in reaching a decision. It was not a statement as to the circumstances in which overstayers would be allowed to stay. It did not have to be laid before Parliament.

Conclusion

46. For the reasons that I have given, I would reject Mr Swift's submission that the issuing of a concessionary policy (or indeed the waiving of a requirement in the rules in an individual case) is an exercise of prerogative power which *for that reason* does not come within the scope of section 3(2). But, subject to the constraints to which I have referred and any relevant public law principles, the Secretary of State is authorised by the 1971 Act to make policies setting out the principles by which she may, as a matter of discretion, grant concessions in individual cases to those seeking leave to enter or remain in the United Kingdom. The less the flexibility inherent in the concessionary policy, the more likely it is to be a statement "as to the practice to be followed" within the meaning of section 3(2) and therefore an immigration rule. But DP5/96 was amply flexible and was therefore not an immigration rule and did not have to be laid before Parliament.

47. I would not, therefore, agree with the tentative obiter dicta of Stanley Burnton LJ at para 39 of his judgment, but would nevertheless dismiss both appeals. Since the Secretary of State was not obliged to lay DP5/96 before Parliament, she was not obliged to lay the 24 February 1999 revision or statement of its withdrawal on 9 December 2008 before Parliament either.

48. In these circumstances, it is not necessary to deal with the point on which Stanley Burnton LJ decided this issue at para 38 of his judgment (the "proves too much point").