18 July 2012

PRESS SUMMARY

R (on the application of Munir and another) (Appellants) v Secretary of State for the Home Department (Respondent) [2012] UKSC 32

On appeal from [2011] EWCA Civ 814

JUSTICES: Lord Hope (Deputy President), Lord Walker, Lord Clarke, Lord Dyson and Lord Wilson.

BACKGROUND TO THE APPEALS

The central question 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 changes to it amount to statements as to "the practice to be followed" within the meaning of section 3(2) of the Immigration Act 1971 ("the 1971 Act") which requires her to lay such statements before Parliament **[1]**.

In March 1996, the Secretary of State introduced Deportation Policy 5/96 ("DP5/96") relating to cases involving children with long residence in the UK **[9]**. On 24 February 1999, this was revised so as to introduce the "general presumption" that enforcement action (broadly, deportation) would not normally proceed in cases where a child, either from birth or an early age, had accumulated 7 years or more continuous residence in the UK **[11]**. On 9 December 2008, the Minister for Borders and Immigration announced the immediate withdrawal of DP5/96 **[13]**. The introduction, revision and withdrawal of DP5/96 were not laid before Parliament.

The Appellants, Mr Rahman and Mr Munir are citizens of Bangladesh and Pakistan respectively. Mr Rahman entered the UK with his wife and two children in 2001. His visitor's visa expired in February 2002 and his application for an extension of his leave was refused in March 2003. He remained in the UK unlawfully after that date. On 20 July 2009, he applied for indefinite leave to remain. This application was refused on 12 February 2010 on the ground that he did not satisfy the test for indefinite leave to remain under the relevant immigration rule **[14]**. Mr Munir entered the UK with his wife and daughter in August 2002 on a visitor's visa, which expired in January 2003. They remained unlawfully after that date. They had a son together in 2005. On 27 November 2009, they applied for indefinite leave to remain. The application was refused on 18 June 2010 **[16]**.

Mr Rahman and Mr Munir claimed judicial review of the Secretary of State's refusal of their applications, seeking to rely on DP5/96 among other grounds. Mr Rahman's claim was allowed by the judge on the basis that he and his family had been resident in the UK 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 UK who had built up at least 7 years residence prior to the withdrawal of the policy from benefiting from it **[15]**. Mr Munir's claim failed because neither of his children had been resident in the UK for a continuous period of 7 years before the withdrawal of DP5/96 **[17]**. Prior to the appeals to the Court of Appeal, the Secretary of State reconsidered the cases and decided not to enforce removal because of the length of time since the original decisions, but she decided to proceed with the appeals because of the importance of the central question referred to above **[18]**.

The Court of Appeal allowed the Secretary of State's appeal in Rahman's case and dismissed Mr Munir's appeal. Mr Munir and Mr Rahman appeal to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeals. The source of concessionary policies is the 1971 Act and not the Royal prerogative. However, DP5/96, being an amply flexible statement that a rule may be relaxed depending on all the circumstances of the case, is not a rule within the meaning of s.3(2) of the 1971 Act and the Secretary of State did not have to lay it before Parliament.

Lord Dyson gives the leading judgment with which Lord Hope, Lord Walker, Lord Clarke and Lord Wilson agree.

REASONS FOR THE JUDGMENT

The power to make immigration rules under the 1971 Act derives from the Act itself and is not an exercise of the Royal prerogative. The purpose of the 1971 Act was to replace earlier laws with a single code of legislation on immigration control. While 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, 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 itself **[21]-[33]**. The Court therefore rejects the Secretary of State's 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, there is no legal obligation on the Secretary of State to lay it before Parliament **[41]**.

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 within the meaning of s.3(2) of the 1971 Act which should therefore 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 it does not fall within the scope of s.3(2) **[45]**.

DP5/96 was not a statement as to the practice to be followed 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 therefore have to be laid before Parliament **[45]**.

While the Court rejects the Secretary of State'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 s.3(2), 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 UK. 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 **[46]**.

References in square brackets are to paragraphs in the judgment