

GLS Administrative Law Webinar

CASE REFERENCE

**R. (on the application of Abbassi) v Secretary of State for the Home
Department**

Munir v Secretary of State for the Home Department

Also known as:

**R. (on the application of Rahman) v Secretary of State for the Home
Department**

**R. (on the application of Munir) v Secretary of State for the Home Department
Secretary of State for the Home Department v Rahman**

**Court of Appeal (Civil Division)
15 July 2011**

Westlaw Case Analysis 4 pages

Official Transcript 17 pages

Status:  Positive or Neutral Judicial Treatment

R. (on the application of Abbassi) v Secretary of State for the Home Department

Munir v Secretary of State for the Home Department

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R. (on the application of Rahman) v Secretary of State for the Home Department

R. (on the application of Munir) v Secretary of State for the Home Department

Secretary of State for the Home Department v Rahman

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Case Analysis

Where Reported

[2011] EWCA Civ 814; [Official Transcript](#)

Case Digest

Subject: Immigration

Keywords: Children; Consultation; Immigrants; Immigration policy; Indefinite leave to remain; Legitimate expectation; Right to respect for private and family life; Withdrawal

Summary: A judge had erred in concluding that policy DP 5/96, which contained a general presumption against the removal of immigrants where their children had accumulated seven years continuous residence, continued to apply to families whose children had been in the United Kingdom for seven years or more before the policy was withdrawn. The judge had failed to take into account the right of the Secretary of State for the Home Department to withdraw the policy on the grounds that it was contrary to the public interest.

Abstract: The appellant secretary of state appealed against a decision ([\[2010\] EWHC 2894 \(Admin\)](#)) that her refusal to grant the respondent (R) and his family leave to remain was unlawful. R, his wife and two children had arrived in the United Kingdom in 2001 on a visitor's visa, which expired five months later. They continued to reside in the UK and in 2009 applied for indefinite leave to remain under the terms of policy DP 5/96. That policy, which contained a general presumption against the removal of immigrants where their children had accumulated seven or more continuous years residence in the UK, had been withdrawn in 2008 after the secretary of state decided that it was contrary to the public interest, save in relation to applications made or removals ordered before its withdrawal. R and his family had completed their seven-year stay about three months before the withdrawal of the policy, but its withdrawal had taken place eight months before R made his application. The application was refused. The judge concluded that not to afford R and his family the benefit of DP 5/96 when they had accrued the necessary seven years' residence prior to the withdrawal of the policy was so conspicuously unfair as to amount to an abuse of power. R submitted that the withdrawal of the policy

was unlawful because it was made without any prior notice or consultation. The secretary of state submitted that R had had no legitimate expectation that DP 5/96 would apply. She further submitted that the judge had failed to take properly into account her right to decide whether a policy was in the public interest and the fact that R had evaded immigration control.

Appeal allowed. (1) The circumstances in which the courts would imply a duty to consult, where no expectation of consultation had been created by express or implied promise or practice, were narrow, [R. \(on the application of BAPIO Action Ltd\) v Secretary of State for the Home Department \[2007\] EWCA Civ 1139, \[2008\] A.C.D. 7](#) applied. Further, it would be wholly unreasonable to impose a duty to consult those whose presence in the UK was at best irregular, and at worst had been secured by deception. Accordingly, the secretary of state had not been bound to carry out any consultation before revoking the policy, nor was there a duty to give advance notice of the revocation (see paras 40-41 of judgment). (2) R had not known of the seven-year child concession policy before its withdrawal. He could not therefore show that he relied on it. It followed that the real questions were whether the secretary of state had acted lawfully in withdrawing the policy and in determining the transitional provisions that would apply. It was clear that she had. The policy was an invitation to parents whose immigration status was irregular not to seek to regularise their status, but to lie low until their children had been in the UK for seven years. It could operate as an inducement to enter the country fraudulently, with limited leave, and then to remain until the seven years had expired. The secretary of state was entitled to take the view that the policy was inimical to her immigration policy. A minister was entitled to review, change and revoke his policy whenever he considered it to be in the public interest to do so. Accordingly, the secretary of state's decision to withdraw the policy was not irrational. Nor did she fail to take into account the interest of the children of those seeking to remain; their interests, as well as their parents, were adequately addressed by the provisions of the European Convention on Human Rights 1950, in particular art.8 (para.43). There was also no basis for impugning the transitional provisions; they required the policy to continue to be applied to those whose cases were considered when the policy was in force, so that they could contend that the proper application of the policy should have led the secretary of state to decide not to remove them and/or to grant them leave to remain. There was a perfectly rational distinction between those cases and cases such as R's, in which the policy did not fall to be applied while it was in force (para.44). Furthermore, any reliance on the expectation that the policy would be applied would not have been legitimate in the sense of giving rise to any rights in public law. R had failed to regularise his family's immigration status after the expiration of his leave and that evasion or avoidance of immigration rules disqualified him from establishing any legitimate expectation. The judge had failed to take account of the irregular immigration status of R and his family or the interests of the UK in maintaining a rational and effective system of immigration control (paras 45-46).

Judge: Thomas, L.J.; Moore-Bick, L.J.; Stanley Burnton, L.J.

Counsel: For the Secretary of State: John-Paul Waite. For Rahman, Abbassi, Munir: Zane Malik.

Solicitor: For the Secretary of State: Treasury Solicitor. For Rahman, Abbassi, Munir: Malik Law Chambers.

Appellate History & Status

Queen's Bench Division (Administrative Court)

R. (on the application of Abbassi) v Secretary of State for the Home Department

[\[2010\] EWHC 2894 \(Admin\); Official Transcript](#)

Reversed

Court of Appeal (Civil Division)

R. (on the application of Abbassi) v Secretary of State for the Home Department

[\[2011\] EWCA Civ 814; Official Transcript](#)

Affirmed

Supreme Court

R. (on the application of Abbassi) v Secretary of State for the Home Department

[\[2012\] UKSC 32; \[2012\] 1 W.L.R. 2192; Times, August 6, 2012; Official Transcript](#)

Significant Cases Cited

R. (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department

[\[2007\] EWCA Civ 1139; \[2008\] A.C.D. 7; Official Transcript](#); CA (Civ Div)

All Cases Cited

R. (on the application of Lumba) v Secretary of State for the Home Department

[\[2011\] UKSC 12; \[2012\] 1 A.C. 245; \[2011\] 2 W.L.R. 671; \[2011\] 4 All E.R. 1; \[2011\] U.K.H.R.R. 437; \(2011\) 108\(14\) L.S.G. 20; \(2011\) 155\(12\) S.J.L.B. 30; Times, March 24, 2011; Official Transcript](#); SC

R. (on the application of A) v Secretary of State for the Home Department

[\[2008\] EWHC 2844 \(Admin\); \[2009\] 1 F.L.R. 531; \[2009\] 2 F.C.R. 38; \[2009\] Fam. Law 197](#); QBD (Admin)

R. (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department

[\[2007\] EWCA Civ 1139; \[2008\] A.C.D. 7; Official Transcript](#); CA (Civ Div)

R. (on the application of Zeqiri) v Secretary of State for the Home Department

[\[2002\] UKHL 3; \[2002\] Imm. A.R. 296; \[2002\] I.N.L.R. 291; \[2002\] A.C.D. 60; Times, February 15, 2002; Official Transcript](#); HL

All Cases Citing

Mentioned by

Patel v Secretary of State for the Home Department

[\[2012\] EWHC 2100 \(Admin\); Official Transcript](#); QBD (Admin)

Mentioned by

Miah v Secretary of State for the Home Department

[\[2012\] EWCA Civ 261](#); CA (Civ Div)

Mentioned by

MK (Best Interests of Child: India), Re

[\[2011\] UKUT 475 \(IAC\)](#); [\[2012\] Imm. A.R. 325](#); [\[2012\] I.N.L.R. 292: Official Transcript](#); UT (IAC)

Mentioned by

R. (on the application of Cheung) v Secretary of State for the Home Department

[\[2011\] EWHC 2337 \(Admin\)](#); [Official Transcript](#); QBD (Admin)

Legislation Cited

European Convention on Human Rights 1950

European Convention on Human Rights 1950 art.8

[Human Rights Act 1998 \(c.42\)](#)

[Immigration Act 1971 \(c.77\) Sch.2 para.12](#)

[Immigration Act 1971 \(c.77\) s.1](#)

[Immigration Act 1971 \(c.77\) s.1\(4\)](#)

[Immigration Act 1971 \(c.77\) s.3\(2\)](#)

Immigration Rules

Immigration Rules para.276B

[Immigration and Asylum Act 1999 \(c.33\)](#)

[Immigration and Asylum Act 1999 \(c.33\) s.10](#)

[Rehabilitation of Offenders Act 1974 \(c.53\)](#)

Journal Articles

Recent developments in public law (November)

Bias; Consultation; Costs; Delay; Duty to provide reasons; Fairness; Lawfulness of detention; Legitimate expectation; Relief; Ultra vires acts; Upper Tribunal.

[Legal Action 2011, Nov, 31-35](#)

Neutral Citation Number: [2011] EWCA Civ 814
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

HHJ Bidder QC (in the cases of Rahman and Abbassi)

David Holgate QC (sitting as a **Deputy High Court Judge**) (in the case of Munir)
[2010] EWHC 2894 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 15/07/2011

Before :
LORD JUSTICE THOMAS
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE STANLEY BURNTON

Between :

**THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Appellant

- and -

MAHBUBUR RAHMAN

Respondent

and between

FAUZIA ABBASSI

Applicant

- and -

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Respondent

and between

MUHAMMAD MUNIR

Appellant

- and -

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Respondent

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

John-Paul Waite (instructed by **the Treasury Solicitor**) for the **Secretary of State**
Zane Malik (instructed by **Malik Law Chambers**) for **Mahbubur Rahman, Fauzia Abbassi,**
and **Muhammad Munir**

Hearing date : 23 May 2010

Judgment
As Approved by the Court

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Lord Justice Stanley Burnton :

Introduction

1. These three cases arise from the withdrawal by the Secretary of State of DP 5/96, the so-called seven year child concession policy, under which families who did not have leave to be in this country, but with children who had been in this country for 7 years were, save in exceptional circumstances, allowed to remain here. In each of these cases, it is claimed that the policy must continue to be applied to the applicants, who made their applications for leave to remain to the Secretary of State after the policy had been withdrawn.
2. The Home Secretary appeals against the order of His Honour Judge Bidder QC quashing her decision to refuse Mr Rahman's application for leave to remain, and directing her to retake her decision applying policy DP 5/96. Mr Rahman and his family had lived in the UK for more than 7 years before the policy was withdrawn.
3. Mrs Abbassi applies for permission to appeal (with appeal to follow if permission is granted) against the decision of HHJ Bidder QC to dismiss her substantive application for judicial review of the Secretary of State's decision not to grant her leave to remain. Mrs Abbassi and her family had lived in the UK for less than 7 years before the seven year child concession policy was withdrawn.
4. Mr Munir appeals against the order of David Holgate QC (sitting as a Deputy High Court Judge) dismissing his application for permission to apply for judicial review of the Secretary of State's decision not to grant him leave to remain. Mr Munir and his family had lived in the UK for less than 7 years before the seven year child concession policy was withdrawn.
5. For convenience, I shall refer to Mr Rahman, Mrs Abbassi and Mr Munir collectively as "the applicants".

The policy and its withdrawal

6. DP 5/96 ("Deportation Policy 5/96") in its original terms was concerned with the criteria to be applied by immigration decision makers when considering whether enforcement action should proceed against families with children who had spent more than 10 years in this country. It was phrased neutrally: it did not direct the decision maker how to lean in the exercise of his discretion. However, in practice the policy as applied was not normally to remove in the case of families who had been living here for 10 or more years.
7. On 24 February 1999 the Under Secretary for the Home Department, Mr O'Brien, in a parliamentary written answer announced the revision to the policy:

"In future, the enforced removal or deportation will not normally be appropriate where there are minor dependent children and families [who have been] living in the United Kingdom continuously for seven or more years."

(Hansard 24.04.99, columns 309/310).

8. A policy modification statement was issued by the Home Office. It read:

“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.

9. In *NF (Ghana) v Secretary of State* [2008] EWHC 906 (Admin) Rix LJ highlighted that the policy revision replaced the neutral language of the original DP 5/96 with an

express presumption against removal by which the Secretary of State accepted she was bound.

10. The assumption made by Rix LJ at paragraph 39 of his judgment, that the corollary of the policy's presumption against removal was a presumption in favour of granting leave to remain, was acknowledged to be the actual practice of the Home Secretary in *A v Secretary of State for the Home Department* [2008] EWHC 2844 (Admin). In that case John Howell QC, sitting as a Deputy High Court Judge, held that DP 5/96 applied outside the context of enforcement:

“30. ...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. 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.”

11. On 9 December 2008 the Immigration Minister Mr Woolas announced the immediate withdrawal of DP 5/96. In a written ministerial statement (Hansard 9.12.08, column 49WS) he stated that the withdrawal was to ensure a more consistent approach to all cases involving children and to prevent a benefit accruing in particular to overstayers or people who are unlawfully present in the UK:

“The United Kingdom Border Agency is withdrawing DP5/96, a concession which has also been referred to as the seven year child concession, as of 9 December 2008. The 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 withdrawal of DP5/96 and replacing it with consideration under the Immigration Rules and article 8

of the ECHR will ensure a fairer, more consistent approach to all cases involving children, whether accompanied or unaccompanied, across UKBA. Withdrawing the policy will also prevent those overstaying or unlawfully present in the UK having the benefit of a concession which does not apply to those persons who comply with the Immigration Rules and remain in the UK lawfully.”

12. The Home Office published transitional arrangements:

“From the 09 December 2008 the discretionary enforcement policy DP5/96 (also known as the Seven Year Child Concession) is formally withdrawn. All cases involving families with dependant children with long residence will now be considered under the Immigration Rules and Article 8 of the European Convention on Human Rights (ECHR) pursuant to the Human Rights Act 1998.

Transitional arrangements

There are likely to be existing cases where DP5/96 will continue to apply despite its withdrawal. These types of cases are:

- current appeal cases where the policy has already been applied (before its withdrawal) and rejected by UKBA and the appeal is either still pending with the Asylum and Immigration Tribunal (AIT) or has been allowed;
- appeal cases where the policy was not applied by UKBA (before its withdrawal) and where the AIT directs UKBA to consider DP5/96 in the context of an allowed appeal
- cases where UKBA are challenging an allowed appeal by either the AIT or an upper Court;
- where UKBA have acknowledged in writing that they have received an application which relies on DP5/96;
- enforcement cases where UKBA have initiated the process of considering DP5/96 prior to its withdrawal on 09 December 2008. **

** Examples of such circumstances are where a caseworker has already considered DP5/96 prior to its withdrawal and has written to the individual and the representative requesting further information / evidence in relation to the child’s length of residence.

Any information / evidence requested will need to be submitted within 28 days of the date of request, for the policy to continue to be applied to that case. The same factors contained within the withdrawn policy will still continue to apply when considering cases under DP5/96.

From the 09 December 2008 consideration under Article 8 of the ECHR and the Immigration Rules will also be given to any outstanding further representations against removal which cite the withdrawn policy (for example pursuant to paragraph 353 of the Immigration Rules) which have not yet been considered.”

13. The Home Office also issued an instruction to staff which was published on the Internet:

“3. Deportation in Cases where there are children with long residence:

3.1 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.

3.2 It is important that full reasons are given making clear that each case is considered on its individual merits.”

14. The Secretary of State’s note to the court of 20 May 2011 enlarged on the Secretary of State’s reasons for withdrawing the policy:

“For the avoidance of doubt, the SSHD remains of the clear view that DP5/96 was wholly contrary to the public interest. The principle that any family who managed to stay in the United Kingdom for a period of seven years would, subject to exceptional circumstances, be permitted to stay in the UK indefinitely did, in the SSHD's view, serve as a direct incentive to others to embark upon a calculated abuse of this country's immigration laws. DP5/96 is also considered to have been unfair on the many families who complied with their obligations under the immigration rules.”

15. Section 1 of the Immigration Act 1971 sets out general principles for the “Regulation of entry into and stay in United Kingdom”. Subsection (4) refers to the Immigration Rules:

“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 right 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.”

16. Section 3(2) of the 1971 Act imposes duties on the Home Secretary:

“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; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality).

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 (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), 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 (but exclusive as aforesaid).”

17. Thus the Immigration Rules are subject to Parliamentary scrutiny, and the Home Secretary may be compelled by Parliament to alter any proposed change in the Rules.
18. The Immigration Rules applicable to the grant of indefinite leave to remain and the rules which relate to a decision to remove are as follows:

“276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom; or

(b) he has had at least 14 years continuous residence in the United Kingdom, excluding any period spent in the United Kingdom following service of notice of liability to removal or notice of a decision to remove by way of directions under paragraphs 8 to 10A, or 12 to 14, of Schedule 2 to the Immigration Act 1971 or section 10 of the Immigration and Asylum Act 1999 Act, or of a notice of intention to deport him from the United Kingdom; and

(ii) having regard to the public interest there are 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 his:

(a) age; and

(b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) compassionate circumstances; and

(f) any representations received on the person's behalf; and

(iii) the applicant does not have one or more unspent convictions within the meaning of the Rehabilitation of Offenders Act 1974.

(iv) the applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.

...

395C. Before a decision to remove under section 10 [of the Immigration and Asylum Act 1999] is given, regard will be had to all the relevant factors known to the Secretary of State including:

(i) age;

(ii) length of residence in the United Kingdom;

(iii) strength of connections with the United Kingdom;

(iv) personal history, including character, conduct and employment record;

(v) domestic circumstances;

(vi) previous criminal record and the nature of any offence of which the person has been convicted;

(vii) compassionate circumstances;

(viii) any representations received on the person's behalf.

In the case of family members, the factors listed in paragraphs 365-368 must also be taken into account.”

The facts

Mr Rahman

19. Mr Rahman is a Bangladeshi citizen. He arrived in the UK with his wife and two children on 17 September 2001 on a visitor's visa which expired 5 months' later, on 16 February 2002. He made an application for an extension of his leave on 8 February 2002. It was refused on 11 March 2003. No further applications were made until 20 July 2009 when Mr Rahman applied for indefinite leave to remain under the terms of DP 5/96. He and his family had been here for more than 7 years when DP 5/96 was withdrawn, but its withdrawal took place 8 months earlier before he made his application.
20. At paragraph 3 of a statement prepared as part of his application to the Home Office, Mr Rahman said of himself and his family:

“When we came to the United Kingdom we severed all connections [with Bangladesh]. We came to [the] UK with intention we were coming to start a new life and were never returning.”

The Home Office considers that this statement shows that Mr Rahman used deception to enter the UK by not declaring his true intentions to the relevant Entry Clearance Officer. Mr Malik was unable to dispute this inference.

21. Mr Rahman’s application was refused on 9 December 2009. The decision letter stated that it was considered that Mr Rahman did not satisfy the criteria in paragraph 276B of the Immigration Rules and that refusal of leave did not constitute an unlawful infringement of Mr Rahman’s Article 8 rights. Mr Rahman issued his claim for judicial review of this decision on 1 March 2010. HHJ Bidder QC granted his application for judicial review but also granted the Secretary of State permission to appeal.

Mrs Abbassi

22. Mrs Abbassi is a Pakistani national. She arrived in the UK with her husband and three children on a visitor’s visa on 4 September 2002. The visa expired six months’ later on 4 March 2003.
23. Mrs Abbassi and her dependents had spent 6 years 3 months in the UK at the time of the withdrawal of DP 5/96. She applied for leave to remain in the UK on 14 March 2009. Her application was refused on 15 September 2009. She issued judicial review proceedings on 21 October 2009.
24. HHJ Bidder refused Mrs Abbassi’s application for judicial review and refused permission to appeal.

Mr Munir

25. Mr Munir is a Pakistani national. He entered the UK on a visitor’s visa with his wife and two daughters on 18 August 2002. The visa expired on 17 January 2003. Mr Munir’s third child, a son, was born in this country in 2005. Mr Munir and his family had spent 6 years 4 months in the UK at the time of the withdrawal of policy DP 5/96.
26. Mr Munir applied for leave to remain on 27 November 2009. His application was refused by the Home Office on 18 June 2010. He issued judicial review proceedings on 19 July 2010.
27. In his statement prepared for submission to the Home Office with his application of 27 November 2009, Mr Munir stated:

“When we came to the United Kingdom we severed all connections. We came to the UK with intention we were coming to start a ‘new life’ and were never returning.”

The identical wording of this statement with that of Mr Rahman to which I have referred gives rise to doubts as to their authorship. If true, Mr Munir’s statement is evidence that he too obtained his visitor’s visa by deception as to his intentions.

28. His Honour Judge Waksman QC refused Mr Munir permission to apply for judicial review on the papers. Mr David Holgate QC (sitting as a Deputy High Court Judge) refused permission on oral renewal on 17 February 2011.

The judgments under appeal

29. The substance of HH Judge Bidder's decision in the case of Rahman is to be found in paragraphs 37 to 43:

"37. ... it would be irrational for the Secretary of State to distinguish between persons who had the necessary period of residence but who were not the subject of enforcement proceedings and those with the necessary residence qualification, who were.

38. Thus, in my judgment, Mr. Rahman and his family, who completed their 7 years in the UK about 3 months prior to the withdrawal of the policy, would, had their claims been considered before the policy was withdrawn, have qualified for indefinite leave to remain. They had, in my judgment, something which might properly be described as akin to an accrued right, and not merely one not to be removed.

39. Although they had not sought to regularise their position in the UK until after the withdrawal of the policy, in my judgment, they fell within a class of persons who were then entitled to the benefit of the policy and the presumption was that ILR would be granted to them unless it was considered by the Secretary of State under the policy that there were particular circumstances in which it was considered that enforcement action was still appropriate, as detailed in the policy modification statement.

40. There is no indication here that Mr. Rahman or his family (nor indeed Mrs Adams and her family) were aware that they had accrued a right under the policy but neither were the claimants in Rashid aware of their rights. It may be relevant, when considering the issue of the fairness of the withdrawal of the policy, to consider whether or not a claimant was personally aware of the existence of the policy, but it is not an essential requirement.

41. This issue of whether personal knowledge of a representation contended to found a legitimate expectation is discussed at paragraph 12-037 to 039 of the current edition of De Smith's Judicial Review. The learned editors cite at 12-038 the dictum of Lord Hoffmann in *R. v Secretary of State for the Home Department ex p. Zequiri* [2002] UKHL 3 : "Kosovar refugees cannot be expected to check the small print" and continue:

"There is surely merit in encouraging good administration which requires decision-makers to bear the normal consequences of their representations"

42. Then, after referring to Rashid and the judgments both of Pill LJ and Dyson LJ in that case, the editors continue:

"Clearly there should be an expectation that public officials will implement their own policies, but the use of the term "expectation" in that context may not add anything to these general public law duties and indeed may dilute their essence. In any event there is an independent duty of consistent application of policies which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness. Although in some cases lack of knowledge of an assurance or practice has defeated a legitimate expectation, it is surely right that reliance should not be a "necessary precondition" of a legitimate expectation "where statements are made to the public at large"."

43. The group to which Mr. Rahman and his family belonged had no warning of the Secretary of State's policy change. While I am not satisfied that any formal consultation or opportunity to make representations was necessary to secure procedural fairness I am satisfied that it was simply not fair to that group not even to have given a month's warning that the concession was to end. I have, therefore, on this first ground, come to the conclusion in the Rahman case that not to afford them the benefit of DP 5/96 when they had accrued the necessary 7 years residence prior to the withdrawal of the policy was so conspicuously unfair as to amount to an abuse of power."

30. In the case of Mrs Abbassi, the judge rejected the submission made by Mr Malik on her behalf that "the only rational response to an application made by a family who would have qualified under the withdrawn policy is grant of leave". There were other grounds considered by the judge, but they are not relevant to her appeal.

Mr Munir

31. Mr David Holgate QC refused Mr Munir permission to apply for judicial review on the ground, as I read his judgment, that DP 5/96 did not apply to him, and that the Secretary of State had sufficiently taken the length of his residence in this country into account when making her decision.

Subsequent developments

32. Shortly before the hearing of these cases, the Court was informed that:

"The Secretary of State has reconsidered the individual circumstances of each of the present cases, taking in to account

the passage of time which has accrued since the original decisions were taken, the impact of removal upon the particular children concerned and the UK's obligations under Article 8 of the ECHR. The SSHD has decided, pursuant to that consideration, that removal will not be enforced and that each family will be granted discretionary leave to remain for a period of three years."

33. Nonetheless, the Secretary of State pursued her appeal, and resisted the application and appeal of Mrs Abbassi and Mr Munir respectively, because of the important issue of principle raised by the decision of HH Judge Bidder in the case of Mr Rahman. The effect of his decision is that DP 5/96 continues to apply to families with children who had been in this country for 7 years or more when the policy was withdrawn, in addition to those cases referred to in the transitional arrangements notice.

The contentions of the parties

34. The principal submissions of Mr Waite, for the Secretary of State, are:
- (1) None of the applicants had any substantive or procedural legitimate expectation that DP 5/96 would apply to their case.
 - (2) There was no legal basis for HH Judge Bidder's finding that Mr Rahman had "something which might properly be described as akin to an accrued right" to the application of the policy.
 - (3) The judge had failed to take properly into account the right of the Secretary of State to decide whether a policy was or was not in the public interest. The Secretary of State had decided that the continued application of DP 5/96 was contrary to the public interest and that it should be withdrawn with immediate effect, save in relation to applications made or removals ordered before its withdrawal. There was no legal basis to challenge those decisions.
 - (4) The judge had failed to take properly into account the fact that Mr Rahman had evaded immigration control, and indeed had obtained entry unlawfully.
35. For the applicants, Mr Malik submitted:
- (1) The withdrawal of the policy was unlawful for being incompatible with the underlying statutory scheme. The withdrawal was a statement of the practice to be applied by the Home Office, and as such was required to be subject to the Parliamentary procedure in section 3(2) of the 1971 Act.
 - (2) The withdrawal of the policy was unlawful because it was made without any prior notice, consultation or invitation to make representations.
 - (3) The withdrawal of the policy was irrational and perverse.
 - (4) HH Judge Bidder rightly held that it was conspicuously unfair and an abuse of power for the Secretary of State to withdraw the policy in a way that prevented those already in the United Kingdom who had built up at least seven years residence prior to the policy being withdrawn from benefiting from it.

- (5) The present cases fall within the Secretary of State's transitional arrangements.
- (6) The Court below erred in law in holding that it is open to the Secretary of State to deny leave to a family who would have qualified under the withdrawn policy as such a refusal is deemed to be incompatible with Article 8.

36. All these submissions were disputed by Mr Waite.

Discussion

- 37. It is convenient to address first Mr Malik's first ground, since the other issues raised by his and Mr Waite's submissions are interrelated.
- 38. In my judgment, Mr Malik's submission that the withdrawal of DP 5/96 amounted to a change in the Immigration Rules proves too much. If the withdrawal of DP 5/96 was such a change, it necessarily follows that DP 5/96 itself should have been laid before Parliament in accordance with section 3(2). It was not. On this basis, DP 5/96 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 DP 5/96 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.

A duty to consult?

- 40. The circumstances in which the courts will imply a duty to consult, where no expectation of consultation has been created by express or implied promise or practice, are narrow in the extreme: see the judgment of the Court of Appeal in *R (Bapio Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139. It is not suggested that there was any such promise or practice in this case. As in *Bapio*, the lack of specificity as to who is to be consulted and the absence of any principled basis for imposing such a duty are incompatible with it. However, I would go further. In my judgment, it would be wholly unreasonable to impose a duty on the Secretary of State to consult those whose presence in this country is at best irregular, and at worst has been secured by deception, or those representing such persons.
- 41. I would reject the contention that the Secretary of State was bound to carry out any process of consultation before revoking the policy. Similarly, I see no basis for any duty on the part of the Secretary of State to give advance notice of the revocation of the policy.

Legitimate expectation and the transitional provisions

42. I remain of the view, shared by Professor Christopher Forsyth¹ that the concept of legitimate expectation is normally otiose in cases where there has been no representation, by words or conduct, by the public authority in question to the claimant seeking to rely on it. See too *De Smith's Judicial Review* 6th edition, at paragraph 12-039. The confirmation by the Supreme Court that a decision by a public authority that fails to apply its published policy is generally unlawful, quite apart from the principle of legitimate expectation, underlines this view: see *Walumba Lumba 1 and 2 v Secretary of State for the Home Department*; *Kadian Mighty v Secretary of State for the Home Department* [2011] UKSC 12 at paragraphs 34 to 39 and 88, per Lord Dyson. The rule was helpfully summarised by Lord Hope at paragraph 170:

“[170] In agreement with Lord Walker, Lady Hale, Lord Collins, Lord Kerr and Lord Dyson I would hold that the Secretary of State is liable to the Appellants in the tort of false imprisonment because she applied to them an unpublished policy which was inconsistent with her published policy, ..

43. None of the applicants knew of the seven year child concession policy before its withdrawal. They cannot therefore show that they relied on it, quite apart from the question whether their reliance would have given rise to a legitimate expectation. It follows, in my judgment, that the real questions are: apart from the possible application of sections 1 and 3(2) of the 1971 Act, did the Secretary of State act lawfully in withdrawing the policy and in determining the transitional provisions that she would apply? In my judgment, it is clear that she did so. The policy was an invitation to parents whose immigration status was irregular not to seek to regularise their status, but to lie low until their children had been here for 7 years. Indeed, as two of the present cases show, it could operate as an inducement to enter this country fraudulently, with limited leave, and then to remain here until the seven years have expired. It would operate as an incentive to families not to seek to regularise their immigration status, and to seek to remain here after their limited leave has expired. In my judgment, the Secretary of State was entitled to take the view that the policy was inimical to her immigration policy. A minister is entitled to review, to change and to revoke his policy whenever he considers it to be in the public interest to do so: Thus I would reject any suggestion that the Secretary of State's decision to withdraw the policy was irrational. Nor did she fail to take into account the interests of the children of those seeking to remain here: their interests, as well as those of their parents, are adequately addressed by the provisions of the European Convention on Human Rights, and in particular article 8.
44. I also see no basis for impugning the transitional provisions set out at paragraph 12 above. In summary, they require the policy to continue to be applied to those whose cases were considered when the policy was in force, so that they can contend that the proper application of that policy should have led the Secretary of State to decide not to remove them and/or to grant them leave to remain. There is a perfectly rational, indeed sensible, distinction between such cases and cases, such as the applicants', in

¹ See my lecture to the Administrative Law Bar Association in 2006 (*Occam's Razor, Administrative Law and Human Rights*) and Professor Forsyth's paper *Legitimate Expectation Revisited*, both of which are at <http://www.adminlaw.org.uk/library/publications.php>.

which the policy did not fall to be applied while it was in force. The suggestion that the transitional provisions are applicable to the applicants is inconsistent with the clear terms of those provisions: none of the applicants' cases came for decision before the Secretary of State while the policy was revoked.

45. Was there anything unfair in the refusal to apply the policy to those, such as Mr Rahman, who had been here for more than 7 years, but who had not sought to regularise their immigration status before the withdrawal of the policy? To put it otherwise, if he had an expectation that the policy would be applied to his family, was that expectation legitimate? I have no doubt that there was no unfairness and that any reliance on the expectation would not have been legitimate in the sense of giving rise to any right in public law. Mr Rahman entered this country under a leave he obtained by deception. In addition, and in my judgment this is sufficient to disentitle him, he failed to seek to regularise his family's immigration status after the expiration of his leave. In this sense, they were here unlawfully. His evasion or avoidance of immigration rules disqualifies him from establishing any legitimate expectation.
46. I would therefore reject the findings by HH Judge Bidder QC that Mr Rahman and his family had "something which might properly be described as akin to an accrued right", or that the refusal to apply the policy to them "was so conspicuously unfair as to amount to an abuse of power". In making these findings the judge failed to take account of the irregular immigration status of Mr Rahman and his family, including the misrepresentation that led to his being given leave to enter this country, or the interests of this country in maintaining a rational and effective system of immigration control.

Article 8

47. The suggestion that anyone to whom the policy applied would necessarily have been entitled to remain in this country by virtue of Article 8 has only to be stated to be rejected. In appropriate circumstances, the enforcement of immigration restrictions may result in children who have been in this country for more than 7 years being required to leave. What those circumstances are is something it would be unwise to try to prescribe.

Conclusion

48. For the reasons I have set out above, I would allow the Secretary of State's appeal against the judgment of HH Judge Bidder QC. For the same reasons, neither the Abbassi nor the Munir families were entitled to the benefit of the policy. Indeed, since they had been here for less than 7 years when the policy was revoked, I am unable to see how they could sensibly have been entitled to have it applied to them. I would dismiss Mr Munir's appeal and I would refuse Mrs Abbassi permission to appeal.

Lord Justice Moore-Bick

49. I agree.

Lord Justice Thomas:

50. I also agree.