

GLS Legitimate Expectation Webinar

CASE REFERENCE

R. v Secretary of State for the Home Department; Ex p. Khan (Asif Mahmood)

Court of Appeal (Civil Division)

04 April 1984

Westlaw Case Analysis 10 pages

Official Transcript 12 pages

Status:  Positive or Neutral Judicial Treatment

R. v Secretary of State for the Home Department Ex p. Khan (Asif Mahmood)

Also known as:

Khan (Asif Mahmood) v Immigration Appeal Tribunal

Court of Appeal (Civil Division)

04 April 1984

Case Analysis

Where Reported

[\[1984\] 1 W.L.R. 1337](#); [1985] 1 All E.R. 40; [1984] Imm. A.R. 68; [1984] Fam. Law 278; (1984) 81 L.S.G. 1678; (1984) 128 S.J. 580; [Official Transcript](#)

Case Digest

Subject: Immigration

Keywords: Adoption; Foreign nationals; Immigration

Summary: Adoption; adoption of foreign child; Home Office policy; reasonableness

Abstract: A and his wife, both Pakistani nationals, were domiciled in England where they were granted indefinite leave to remain. They desired to adopt a child, aged 5 1/2, born in Pakistan of a close relative. In 1981 A sought advice and was handed a letter issued by the Home Office which stated that there was no provision in the Immigration Rules for a child to be brought to the UK for adoption and that if a child was allowed to enter for such a purpose it would only be at the Home Secretary's discretion and in exceptional cases. The appellant commenced the necessary procedures along the lines indicated by the letter for such cases. Unfortunately, a further enquiry by the DHSS as to the appropriateness of an adoption order being made was not carried out owing to an administrative muddle and the entry application for the child was refused. Upon the hearing of A's application for judicial review the judge held that he was unable to find any ground that the Secretary of State had acted unfairly.

Held, allowing the appeal, that by sending the circular letter setting out the necessary criteria and procedure, the Secretary of State had effectively made his own rules and had stated those matters which he considered relevant in reaching his decision. The categories of unreasonableness were not closed and an unfair action would seldom be a reasonable one. Although the circumstances did not create an estoppel the Secretary of State had misdirected himself according to his own criteria and had acted unreasonably ([Associated Provincial Picture Houses Ltd v Wednesbury Corp \[1948\] 1 K.B. 223](#) considered; [R. v Liverpool City Council Ex p. Liverpool Taxi Fleet Operators Association \[1975\] 1 W.L.R. 701](#) considered; [O'Reilly v Mackman \[1983\] 2 A.C. 237](#) considered; [Attorney General of Hong Kong v Ng Yuen Shiu \[1983\] 2 A.C. 629](#) considered and [R. v Entry Clearance Officer \(Bombay\) Ex p. Amin \[1983\] 2 A.C. 818](#) considered).

Judge: Dunn, L.J.; Watkins, L.J.; Parker, L.J.

Significant Cases Cited

R. v Entry Clearance Officer (Bombay) Ex p. Amin

[\[1983\] 2 A.C. 818](#); [\[1983\] 3 W.L.R. 258](#); [\[1983\] 2 All E.R. 864](#); HL; 1983-07-07

Attorney General of Hong Kong v Ng Yuen Shiu

[\[1983\] 2 A.C. 629](#); [\[1983\] 2 W.L.R. 735](#); [\[1983\] 2 All E.R. 346](#); [\(1983\) 127 S.J. 188](#); PC (HK); 1983-02-21

O'Reilly v Mackman

[\[1983\] 2 A.C. 237](#); [\[1982\] 3 W.L.R. 1096](#); [\[1982\] 3 All E.R. 1124](#); [\(1982\) 126 S.J. 820](#); HL; 1982-11-25

R. v Liverpool City Council Ex p. Liverpool Taxi Fleet Operators Association

[\[1975\] 1 W.L.R. 701](#); [\[1975\] 1 All E.R. 379](#); [73 L.G.R. 143](#); [\(1974\) 119 S.J. 166](#); QBD; 1974-12-04

R. v Liverpool Corp Ex p. Liverpool Taxi Fleet Operators Association

[\[1972\] 2 Q.B. 299](#); [\[1972\] 2 W.L.R. 1262](#); [\[1972\] 2 All E.R. 589](#); [71 L.G.R. 387](#); [\(1972\) 116 S.J. 201](#); CA (Civ Div); 1972-02-14

Associated Provincial Picture Houses Ltd v Wednesbury Corp

[\[1948\] 1 K.B. 223](#); [\[1947\] 2 All E.R. 680](#); [\(1947\) 63 T.L.R. 623](#); [\(1948\) 112 J.P. 55](#); [45 L.G.R. 635](#); [\[1948\] L.J.R. 190](#); [\(1947\) 177 L.T. 641](#); [\(1948\) 92 S.J. 26](#); CA; 1947-11-10

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R. v Entry Clearance Officer (Bombay) Ex p. Amin

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Attorney General of Hong Kong v Ng Yuen Shiu

[\[1983\] 2 A.C. 629](#); [\[1983\] 2 W.L.R. 735](#); [\[1983\] 2 All E.R. 346](#); [\(1983\) 127 S.J. 188](#); PC (HK); 1983-02-21

O'Reilly v Mackman

[\[1983\] 2 A.C. 237](#); [\[1982\] 3 W.L.R. 1096](#); [\[1982\] 3 All E.R. 1124](#); [\(1982\) 126 S.J. 820](#); HL; 1982-11-25

R. v Liverpool City Council Ex p. Liverpool Taxi Fleet Operators Association

[\[1975\] 1 W.L.R. 701](#); [\[1975\] 1 All E.R. 379](#); [73 L.G.R. 143](#); [\(1974\) 119 S.J. 166](#); QBD; 1974-12-04

R. v Liverpool Corp Ex p. Liverpool Taxi Fleet Operators Association

[\[1972\] 2 Q.B. 299](#); [\[1972\] 2 W.L.R. 1262](#); [\[1972\] 2 All E.R. 589](#); [71 L.G.R. 387](#); [\(1972\) 116 S.J. 201](#); CA (Civ Div); 1972-02-14

Schmidt v Secretary of State for Home Affairs

[\[1969\] 2 Ch. 149](#); [\[1969\] 2 W.L.R. 337](#); [\[1969\] 1 All E.R. 904](#); [\(1969\) 133 J.P. 274](#); [\(1969\) 113 S.J. 16](#); [Times, December 20, 1968](#); CA (Civ Div); 1968-12-19

Associated Provincial Picture Houses Ltd v Wednesbury Corp

[\[1948\] 1 K.B. 223](#); [\[1947\] 2 All E.R. 680](#); [\(1947\) 63 T.L.R. 623](#); [\(1948\) 112 J.P. 55](#); [45 L.G.R. 635](#); [\[1948\] L.J.R. 190](#); [\(1947\) 177 L.T. 641](#); [\(1948\) 92 S.J. 26](#); CA; 1947-11-10

Key Cases Citing

Distinguished

R. (on the application of TVDanmark 1 Ltd) v Independent Television Commission

[Official Transcript](#); QBD; 2000-09-08

Considered

R. v Lambeth LBC Ex p. Trabi

[\(1998\) 30 H.L.R. 975](#); QBD; 1997-12-16

R. v Secretary of State for the Home Department Ex p. Ruddock

[\[1987\] 1 W.L.R. 1482](#); [\[1987\] 2 All E.R. 518](#); [\(1987\) 131 S.J. 1550](#); QBD; 1986-09-02

All Cases Citing

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[\[2013\] EWHC 3722 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2013-11-27

Mentioned by

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[\[2011\] EWCA Civ 400](#); [\[2012\] Q.B. 345](#); [\[2011\] 3 W.L.R. 971](#); [\[2011\] R.T.R. 29](#); [Official Transcript](#); CA (Civ Div); 2011-04-12

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[\[2010\] EWHC 2134 \(Admin\)](#); [\[2010\] 3 E.G.L.R. 125](#); [Official Transcript](#); QBD (Admin); 2010-08-12

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[\[2005\] EWCA Civ 1363](#); [Times, December 14, 2005](#); [Official Transcript](#); CA (Civ Div); 2005-11-22

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Manz v Secretary of State for the Home Department

[2003 S.L.T. 1278](#); [2003 G.W.D. 31-875](#); OH; 2003-09-26

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Thomas v Baptiste

[\[2000\] 2 A.C. 1](#); [\[1999\] 3 W.L.R. 249](#); [6 B.H.R.C. 259](#); [\(1999\) 143 S.J.L.B. 187](#); [Times, March 23, 1999](#); PC (Trin); 1999-03-17

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[\(1994\) 26 H.L.R. 597](#); QBD; 1994-02-18

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[\[1994\] 1 W.L.R. 74](#); [\[1994\] 1 All E.R. 577](#); [\[1994\] Env. L.R. 134](#); [Times, October 12, 1993](#); [Independent, October 15, 1993](#); QBD; 1993-09-29

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[Official Transcript](#); CA (Civ Div); 1992-07-30

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The Queen v The Secretary of State for the Home Department

[Official Transcript](#); CA (Civ Div); 1986-07-30

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The doctrine of legitimate expectation and the concepts of fairness and abuse of power in immigration cases

Abuse of power; Competence; Fairness; Immigration; Legitimate expectation; Review grounds.

[I.L.D. 2010, 16\(1\), 15-24](#)

The doctrine of legitimate expectation and the concepts of fairness and abuse of power in immigration cases.

Abuse of power; Jurisdiction; Legitimate expectation.

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Abuse of power; Decision-making; Fairness; Policies; Promises; Public administration; Public interest; Wednesbury unreasonableness.

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Substantive legitimate expectations after Coughlan

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Fairness, legitimate expectations and estoppel.

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Books

Cross on Local Government Law

Chapter: Chapter 10 - Judicial Control of Local Authorities, Legal Proceedings by and Against Local Authorities and the Human Rights Act 1998

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Cross on Local Government Law

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Encyclopedia of Social Services and Child Care Law

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Documents: [C4-010](#)

The Queen v The Secretary of State for the Home Department

In the Supreme Court of Judicature

Court of Appeal

On Appeal from the High Court of Justice

Queen's Bench Division (Divisional Court)

4 April 1984

1984 WL 282488

Lord Justice Dunn Lord Justice Watkins and Lord Justice Parker

Wednesday 4th April 1984

Representation

MR. M. KNOTT (instructed by Messrs Siefert, Sedley & Co.) appeared on behalf of the Appellant/Applicant.

MR. D. LATHAM (instructed by the Treasury Solicitor) appeared on behalf of the Respondent/Respondent.

JUDGMENT

LORD JUSTICE PARKER:

The appellant, Asif Mahmood Khan, is by birth a citizen of Pakistan. He is settled in this country having been given indefinite leave to remain, notwithstanding his original illegal entry in October 1972, under an amnesty of 28th February 1975. His wife was given indefinite leave to remain on her arrival in February 1976. He and his wife have been married for some six years and have been informed that for medical reasons they are incapable of having a child of their own. They desire to adopt one Shehzad who was born in Pakistan on 10th October 1978 and is thus some 5½ years of age. He is the third and youngest child of the appellant's brother and sister-in-law.

In the Autumn of 1981 the appellant, whose brother and sister-in-law were willing for their child to be adopted, went to the Dalston Advice Bureau to seek advice about the procedure for adoption. He was there handed a letter issued by the Home Office explaining the system.

That letter is the foundation of the appellant's case and it is necessary to set out certain parts of it. It begins:

"Dear...

Thank you for your letter of ...; the following information may be of help to you."

It is clearly a letter used by the Home Office to answer enquiries from those such as the appellant and supplied to Advice Bureaux so that they may use it when enquiries are made of them. The letter then continues:

"There is no provision in the Immigration Rules for a child to be brought to the United Kingdom for adoption. The Home Secretary may, however, exercise his discretion and exceptionally allow a child to be brought here for adoption where he is satisfied that the intention to adopt under United Kingdom law is genuine and not merely a device for gaining entry; that the child's welfare in this country is assured; and that the court here is likely to grant an adoption order. It is also

necessary for one of the intending adopters to be domiciled here.”

Anyone reading this paragraph would have no difficulty in understanding that a child could not be brought in for adoption under the Immigration Rules and that if a child was to be allowed in for such purpose it would only be at the discretion of the Home Secretary and in exceptional cases. Such cases would arise only where the Home Secretary was satisfied of the four matters specified, namely:

- (1) That there was a genuine intention to adopt.
- (2) That the child's welfare in this country was assured.
- (3) That the Court here would be likely to grant an adoption order.
- (4) That one of the intending adopters was domiciled here.

The paragraph does not say that on the Home Secretary being satisfied of such four matters the child will be allowed in, although a reader might well infer that this would be the likely result.

In the following paragraph the seriousness of adoption is pointed out. It is unnecessary to set it out but the next paragraph thereafter is of importance. It reads:

“It is particularly important that the adoption law in this country, which is designed to safeguard the interests of the child and the natural parents and to ensure that the intending adopters are suitable persons to adopt a particular child, is fully satisfied. Also, the law specifically requires that in reaching any decision relating to the adoption of a child, a court must give first consideration to the need to safeguard and promote the welfare of the child throughout his childhood. Because the welfare of a child is at stake, the Department concerned must be satisfied that there are no apparent reasons why a court would refuse to grant an adoption order. They have therefore devised the following procedure which is designed to act as a safeguard for everyone concerned.”

This paragraph is clearly in amplification of the third of the requirements mentioned in the first paragraph. It rightly stresses that the welfare of the child is the paramount consideration for the court when considering whether to make an adoption order.

The devised procedure is in two parts, the first relating to steps to be taken in the country in which the prospective adoptee is living. That first part reads as follows:

“The procedure is for the representatives of the intending adopters in the country where the child is living to apply to the nearest British Government representative for an entry clearance for the child to come here. He will require the documentation and information outlined in Appendix 1 attached to this letter. He will also need to ascertain the child's wishes and feelings having regard to his age and understanding and to see evidence that the child's parents or guardians fully understand what is involved and unconditionally agree to the child coming to the United Kingdom for adoption. He will also be required to confirm that the relevant authorities in the child's present country of residence do not object to the proposal. Further he will be required to prepare, attest and certify documents confirming the information he has given and in some cases will need to translate original documents. The intending adopters will be charged consular fees for this service, which may be substantial.”

The appellant did not appoint representatives to carry out his part of this phase of the procedure, but himself went to the Immigration Section at the Islamabad Embassy to apply for an entry clearance for the child to come to this country. There the necessary documentation was completed. It is important to note that the letter does not state that the Government representative will require to be satisfied that the original parents are incapable of caring for the child, merely that he will require evidence that

they fully understand what is involved and unconditionally agree to the child coming to the United Kingdom for adoption. It is also important to note that there is nothing in Appendix 1 to the letter which seeks information as to whether the parents are or are not capable of looking after the child.

The entry clearance officer at Islamabad, having interviewed the appellant, the natural mother and the child on 22nd October 1981, sent a report with the necessary documentation attached to the Home Office on 11th November 1981. No complaint is made about that report. It includes certain statements which must be mentioned. They are:

a) that the Appellant had stated that the child lived with his mother two brothers and paternal grandparents in the grandparents' brick built modern house with electricity and water on tap and the family enjoyed a good standard of living, the natural father remitting funds from Iran.

b) that although legal adoption was not permitted in Pakistan it was not unknown for parents to hand over children to childless close relatives and that this was certainly such a case.

c) that the application was made for the benefit of the childless sponsors rather than the child, which enjoyed a comfortable standard of living in Pakistan.

The appellant, having been told that his application for entry clearance would be referred to the Home Office, returned to this country on 7th November 1981 and waited.

I now return to the Home Office letter which sets out, or purports to set out what would happen when the entry clearance application was referred to them. It is in the following terms:

"When the application is referred to this Department for decision we will require the intending adopters to give an undertaking that as soon as the child arrives here they will inform the Social Services Department of their local authority of their intention to apply to the court for an adoption order. They must also give an undertaking that they will take financial responsibility for the child, including the cost of repatriating the child if for any reason this becomes necessary, for example, the child is not adopted by them. A suitable form specifying the undertakings is attached at Appendix 2. We will then ask the Department of Health and Social Security (or in the case of intending adopters living in Northern Ireland, Scotland or Wales, the relevant Department there) if there are any apparent reasons why a court would refuse to grant an adoption order. The relevant Department will then arrange for appropriate enquiries to be made through the intending adopters' local authority social services department, establish that a suitable home is being offered and ensure that the placement would be in the interests of the child's welfare. It may, in some cases, instigate enquiries into the child's background through a social work agency operating in his country of residence.

It is emphasised that these enquiries are necessary to safeguard both the child's and public interest and are likely to be protracted. It is therefore important that the application for the entry clearance is made as soon as details of the child are known. It is also important that intending adopters do not make arrangements to travel to collect the child or for his journey here or enter any commitments with regard to the child, until they have been informed by this Department that the entry clearance has been authorised ."

In fact the undertakings in Appendix 2 had been duly signed on the visit to Pakistan and were forwarded by the entry clearance officer with his report. According to the Home Office letter the procedure to be adopted on receipt of the report was therefore as follows:

(1) The Home Office would enquire of the DHSS if there were any apparent reasons why a court would refuse to grant an adoption order.

(2) That department would then arrange for appropriate enquiries to be made through the appellant's local authority's social services department with a view to establishing that a suitable home was being offered and ensuring that the placement would be in the interests of

the child's welfare.

(3) In some cases enquiries in the country of origin might be made.

In the case of the appellant the above procedure was not however initiated. It appears that there was a postal or administrative muddle which resulted in the delay until 28th February when the Islamabad Entry Clearance Officer issued a refusal of the application made on behalf of the child in the following terms:

"You have applied to enter the United Kingdom for adoption by Asif Mahmood Khan but you have no claim to admission for this purpose under the Immigration Rules. Furthermore the Secretary of State is not satisfied that serious and compelling family or other considerations make exclusion undesirable."

In the light of the Home Office letter the terms of the second sentence are a little surprising. The appellant took legal advice. An appeal on behalf of the child was launched but it is common ground that this must fail because it is clear that no case under the Immigration Rules can be made out. The appellant, however, also applied for judicial review of the refusal of the application for entry clearance and an order of certiorari to quash it. That application was dismissed by Mr. Justice Stephen Brown on 23rd May 1983 and the appellant now appeals against that decision.

In opposition to the Application an affidavit sworn by a senior executive in the Home Office, one Daphne Hewett, was filed on behalf of the Secretary of State. She deposes that the discretion of the Secretary of State to allow entry to a child for adoption is exercised on closely analogous principles to those laid down in paragraph 46 of H.C. 394 of 1980, and that guidance in very general terms for prospective adopters is given in the Home Office letter to which I have referred.

The relevant part of paragraph 46 reads as follows:

"... children under 18 ... are to be admitted for settlement

(f) if one parent or a relative other than a parent is settled ... in the United Kingdom and there are serious and compelling family or other considerations which make exclusion undesirable ... and suitable arrangements have been made for the child's care.

In this paragraph "parent" includes ... an adoptive parent, but only where there has been a genuine transfer of parental responsibility on the ground of the original parents' inability to care for the child and the adoption is not one of convenience arranged to facilitate the child's admission."

According to Mrs Hewett the Secretary of State when exercising his discretion treats "would-be adoptive parents" on a par with adoptive parents.

If this was the policy, the "guidance" given in the Home Office letter is grossly misleading as was frankly accepted by Mr. Latham on behalf of the Secretary of State. There is not a word to suggest that in exercising his discretion the Secretary of State requires to be satisfied that the natural parents are incapable of looking after the prospective adoptee, or even that their ability or inability to do so was considered relevant. Furthermore, there is no evidence that entry clearance officers were instructed to enquire as to this matter, which of course does not depend only on the standard of living enjoyed in the natural home. The whole tenor of the letter is that, if the application was genuine, the child's welfare was assured, a court would be likely to grant an order and the natural parents gave a real consent the child would be let in and its ultimate fate left to the court here. If an adoption order was made it would remain. If an order was refused it would be returned.

The appellant relies on three authorities on the basis of which he contends that the refusal of entry clearance should be quashed. The first of these cases is *R. v. Liverpool Corporation ex parte Liverpool Taxi Fleet Operators Association* [1972] 2 QB. 299 . In that case the Corporation had statutory powers to license such numbers of Hackney Carriages or Coaches as they thought fit. The

Corporation gave public and private undertakings that no licences in addition to the existing number (300) would be issued until proposed legislation had been enacted and come into force. Notwithstanding the undertakings, which were given on 4th and 11th August 1971, the Corporation in December resolved to increase the number of licences to 350 from 1st January 1972, to 400 from 1st July 1972 and thereafter without limits. The proposed legislation was expected to be in force in early 1973. The Court of Appeal prohibited the Corporation from acting upon the resolution to increase the numbers without first hearing any representations which might be made by interested persons and any other matters relevant thereto including the undertaking of 11th August.

The form of the order was the result of the decision that the undertaking was binding so long as the performance of it was compatible with their public duty. At page 308 Lord Denning said this:

“... they ought not to depart from it except after the most serious consideration and hearing what the other party has to say and then only if they are satisfied that the overriding public interest requires it. The public interest may be better served by honouring their undertaking than by breaking it ... they broke their undertaking without any sufficient cause or excuse.”

Reference may also be made to Lord Justice Roskill at page 311, where he said:

“It seems to me, therefore, that now to allow the council to resile from that undertaking without notice to and representations from the applicants is to condone unfairness where there is a duty to act fairly.”

And to Lord Justice Wilmer at page 313:

“As has been pointed out by Lord Denning M.R. what is now sought to be done can only be regarded as being in flat defiance of the undertaking publicly given by the chairman of the sub-committee at the meeting of the city council, and repeated privately to the applicants through the town clerk's letter. It seems to me that in these very special circumstances, having regard to the history of how this matter had been dealt with in the past, and having regard especially to the giving of the undertaking, the applicants are justified in regarding themselves as “aggrieved” by what I can only describe as unfair treatment on the part of the Liverpool Corporation. Accordingly, it seems to me that this is indeed a proper case in which this court can and should interfere, in order to ensure that a decision is arrived at only after fair discussion and after hearing all proper representations of the parties interested.”

In that case there was a specific undertaking, whereas here there is not; the Corporation had a statutory power whereas here the power of the Secretary of State is a common law power and the matter complained of was a positive act, whereas here the complaint is a refusal to act. There can, however, be no doubt that the Secretary of State has a duty to exercise his common law discretion fairly. Furthermore, just as, in the case cited, the Corporation was held not to be entitled to resile from an undertaking and change its policy without giving a fair hearing so, in principle, the Secretary of State, if he undertakes to allow in persons if certain conditions are satisfied, should not in my view be entitled to resile from that undertaking without affording interested persons a hearing and then only if the overriding public interest demands it.

The second of the authorities relied on by the appellant is *O'Reilly v. Mackman* [1983] 2 AC. 237. The case is relied on solely for a statement of principle in the speech of Lord Diplock with which all members of the Judicial Committee agreed. It is therefore necessary to state the facts only to the limited extent necessary to render that statement understandable. Four prisoners had been awarded forfeiture of remission by the Board of Visitors. They sought to challenge the decision of the Board on the ground that there had been a failure to observe the rules of natural justice the relief sought being declaratory only. At page 275 Lord Diplock said:

“It is not, and it could not be, contended that the decision of the board awarding him forfeiture of remission had infringed or threatened to infringe any right of the appellant derived from private law, whether a common law right or one created by a statute. Under the Prison Rules remission of sentence is not a matter of right but of indulgence. So far as private law is concerned all that each appellant had was a legitimate expectation, based upon his knowledge of what is the

general practice, that he would be granted the maximum remission, permitted by rule 5(2) of the Prison Rules, of one third of his sentence if by that time no disciplinary award of forfeiture of remission had been made against him. So the second thing to be noted is that none of the appellants had any remedy in private law.

In public law, as distinguished from private law, however, such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the board on the ground that in one way or another the board in reaching its decision had acted out-with the powers conferred upon it by the legislation under which it was acting; and such grounds would include the board's failure to observe the rules of natural justice: which means no more than to act fairly towards him in carrying out their decision-making process, and I prefer so to put it."

Here it is contended that the appellant by virtue of the terms of the Home Office letter had a legitimate expectation that the procedures set out in the letter would be followed and that such legitimate expectation gave him sufficient interest to challenge the admitted failure of the Secretary of State to observe such procedures. I agree and the contrary was not suggested by Mr. Latham. But to have a sufficient interest to afford a locus standi to challenge is a long way from being entitled to succeed in such challenge.

The appellant, however, contends that on the basis of the third authority on which he relies, coupled with his first which I have already considered, he is so entitled. That authority is a Privy Council case, *Attorney General of Hong Kong v. Ng Yuen Shin* [1983] 2 AC 629 which at the time of the hearing before the judge had been reported only in the Times Newspaper. The advice of their Lordships was delivered by Lord Fraser of Tullybelton. The other members of the Judicial Committee were Lord Scarman, Lord Bridge of Harwich, Lord Brandon of Oalbrook and Sir John Megaw. For some years prior to 23rd October 1980 the Government of Hong Kong had adopted a policy under which illegal immigrants from China were not repatriated if they managed to reach the urban areas without being arrested. This was known as the "reached base policy. On 23rd October 1980 the Government announced that this policy would be discontinued forthwith and at the same time issued a new Ordinance which, inter alia gave the Director of Immigration power to make removal orders in respect of illegal immigrants. There was no statutory provision for a hearing or enquiry before a removal order was made. Subsequent to the change of policy there were a series of television announcements stating that all illegal immigrants from China would be liable to be repatriated. Mr. Ng like many others in the Colony, although they had entered illegally from Macau, were of Chinese origin. They were accordingly worried and on 28th October 1980 a group, not including Mr. Ng, went to Government House and submitted a petition.

There there were read out a series of questions and answers prepared in the Office of the Secretary of Security which dealt with the position of such persons and the action they should take. One of such questions, with its answer, was:

"Q. Will we be given identity cards? A. Those illegal immigrants from Macau will be treated in accordance with procedures for illegal immigrants from anywhere other than China. They will be interviewed in due course. No guarantee can be given that you may not subsequently be removed. Each case will be treated "on its merits."

Although Mr. Ng was not present he did see a television programme on the subject on the evening of the same day.

On 31st October a removal order was made against him. This he challenged and eventually on 13th May 1981 the Court of Appeal made an order of prohibition prohibiting the Director of Immigration from executing the removal order before an opportunity had been given to Mr. Ng of putting all the circumstances of his case before the Director. The Attorney General appealed to the Privy Council.

The High Court and the Court of Appeal in Hong Kong had both held that Mr. Ng had no general right to a fair hearing before a removal order was made against him and the Judicial committee assumed without deciding that they had rightly so decided. It was concerned only with the narrow question whether what had been said outside Government House entitled Mr. Ng to such a hearing.

It is necessary to cite four passages from Lord Fraser's judgment:

(1) "Legitimate expectations" in this context are capable of including expectations which go beyond enforceable legal rights provided they have some reasonable basis".(p.636 E - F)

(2) "The expectations may be based upon some statement or undertaking by or on behalf of the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry." (p.637 C - D)

(3) "Their Lordships see no reason why the principle should not be applicable when the person who will be affected by the decision is an alien, just as much as when he is a British subject. The justification for it is primarily that, when a public authority has promised to follow a certain procedure , it is in the interest of good administration that it should act fairly and should implement its promise , so long as implementation does not interfere with its statutory duty . The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct.

In the opinion of their Lordships the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty, is applicable to the undertaking given by the Government of Hong Kong to the applicant, along with other illegal immigrants from Macau, in the announcement outside the Government House on October 28, that each case would be considered on its merits. The only ground on which it was argued before the Board that the undertaking had not been implemented was that the applicant had not been given an opportunity to put his case for an exercise of discretion, which the director undoubtedly possesses, in his favour before a decision was reached." (p.638 E - H)

(4) "Their Lordships consider that this is a very narrow case on its facts, but they are not disposed to differ from the view expressed by both the courts below, to the effect that the government's promise to the applicant has not been implemented. Accordingly the appeal ought to be dismissed. But in the circumstances their Lordships are of opinion that the order made by the Court of Appeal should be varied. The appropriate remedy is not the conditional order of prohibition made by the Court of Appeal, but an order of certiorari to quash the removal order made by the director on October 31 against the applicant. That order of certiorari is of course entirely without prejudice to the making of a fresh removal order by the Director of Immigration after a fair inquiry has been held at which the applicant has been given an opportunity to make such representations as he may see fit as to why he should not be removed." (p.639 E - F)

The emphasis is in each case mine.

This case is, of course, not binding on this court but is of high persuasive authority. In my view it correctly sets out the law of England and should be applied.

I have no doubt that the Home Office letter afforded the appellant a reasonable expectation that the procedures it set out, which were just as certain in their terms as the Question and Answer in Mr. Ng's case, would be followed; that if the result of the implementation of those procedures satisfied the Secretary of State of the four matters mentioned, a temporary entry clearance would be granted and that the ultimate fate of the child would then be decided by the adoption court of this country. I have equally no doubt that it was considered by the department at the time the letter was sent out that if those procedures were fully implemented they would be sufficient to safeguard the public interest. The letter can mean nothing else. This is not surprising. The adoption court will apply the law of this country and will thus protect all the interests which the law of this country considers should be protected. The Secretary of State is, of course, at liberty to change the policy but in my view, vis-a-vis the recipient of such a letter, a new policy can only be implemented after such recipient has been given a full and serious consideration whether there is some overriding public interest which justifies a departure from the procedures stated in the letter.

I refer to the policy of refusing entry save where the natural parents are incapable of looking after the child as a new policy for without specific evidence, which is not present, that such policy existed at the time, I am not prepared to assume that the Home Office would have issued a letter in the terms which they did or have failed both to mention that the sponsors would be required to satisfy the Home Secretary on the point and to have instructed overseas officers to make enquiries as to the position.

There are two further matters which I should mention. In the first place the appellant can have no complaint, and indeed made none, that he was led to expend money on the faith of the letter. Secondly, Mr. Latham raised the point that it would be very strange if a child which had already been adopted could be let in only where the adoption was on the ground that the natural parents were incapable of looking after the child but a prospective adoptee could be let in even if this were not so. At first sight this argument appears to have considerable force and it may account for the new policy, but it appears to me on further examination to be based on a failure to distinguish between two quite separate situations. Where an existing adoptee seeks entry, the adoption will in many cases have been effected pursuant to laws very different from our own which fail to afford the safeguards afforded by our own laws and the question is whether he should be admitted for settlement. Where however a prospective adoptee is concerned, the question is different. It is whether he should be allowed in temporarily and allowed to remain permanently only after a court of this country has made an adoption order.

I would allow the appeal and quash the refusal of entry clearance. This will leave the Secretary of State free either to proceed on the basis of the letter or, if he considers it desirable, to operate the new policy to afford the applicant a full opportunity to make representations why, in his case, it should not be followed.

I would add only this. If the new policy is to continue in operation, the sooner the Home Office letter is redrafted and false hopes cease to be raised in those who may have a deep emotional need to adopt, the better it will be. To leave it in its present form is not only bad and grossly unfair administration but, in some instances at any rate, positively cruel.

LORD JUSTICE WATKINS:

The applicant's complaint, his counsel said, was essentially of unfairness. He was told his case would be dealt with by the Secretary of State in one way. It was in fact dealt with in another way. The applicant is an intending adopter of a child who can lawfully enter this country from his native Pakistan only if in his discretion the Secretary of State exercising a common law power decides to allow him to enter for the purpose of being legally adopted here. In his discretion the Secretary of State has denied him entry. That discretion was, so Mr. Knott contends, wrongly exercised.

In a circular letter IMM 160 issued to intending adopters of children of a foreign state the Secretary of State, it is submitted, undertook upon receiving an application for leave to bring a child into this country to be adopted to (1) carry out a procedure involving the taking of a number of steps so as to acquaint himself with relevant information and (2) to be guided in the exercise of his discretion solely by clearly stated criteria. In this case the Secretary of State in breach of his undertakings has failed to take an important step in the procedure; he did not ask the Department of Health and Social Security if there was an apparent reason why a court here would not make the adoption order to be applied for and he was not guided only by the stated criteria in exercising his discretion. The criteria referred to are said to appear in the first paragraph of the letter, which states:

"There is no provision in the Immigration Rules for a child to be brought to the United Kingdom for adoption. The Home Secretary may, however, exercise his discretion and exceptionally allow a child to be brought here for adoption where he is satisfied that the intention to adopt under United Kingdom law is genuine and not merely a device for gaining entry; that the child's welfare in this country is assured; and that the court here is likely to grant an adoption order. It is also necessary for one of the intending adopters to be domiciled here."

It is not in doubt, so it seems to me, that the Secretary of State was satisfied that the intention to adopt by an intending adopter domiciled here was genuine and that the child's welfare in this country was assured. It is true that he did not enquire as to whether a court here would be likely to grant an adoption order but it is equally true that there is no evidence to suggest that he at any time thought that a court would be unlikely to grant an adoption order. It was a matter which did not influence him one way or the other.

He exercised his discretion as was customary in a case such as this, states Mrs. Hewett in her affidavit, by analogy with the terms of paragraph 46 of H.C. 394 of 1980.

These terms include the following:

“children under 18 ... are to be admitted for settlement

(f) if one parent or a relative other than a parent is settled ... in the United Kingdom and there are serious and compelling family or other considerations which make exclusion undesirable ... and suitable arrangements have been made for the child's care.

In this paragraph “parent” includes ... an adoptive parent, but only where there has been a genuine transfer of parental responsibility on the ground of the original parents' inability to care for the child and the adoption is not one of convenience arranged to facilitate the child's admission.”

The emphasis is mine.

In this case the Secretary of State in refusing entry and having stated that the child has no claim to admission under the Immigration Rules declared that he was not satisfied that serious and compelling family or other considerations made exclusion undesirable.

This, in the light of the undertaking to apply only the stated criteria is, it is argued, obviously the wrong test. The Secretary of State took account of matters he was not entitled to. Thus he was classically in error in exercising a discretion. This court is, therefore, left with no alternative but to quash the decision, leaving the Secretary of State to reconsider the matter adopting the procedures and applying the criteria in his undertakings. This would involve no far-reaching implications. All the Secretary of State has to do is to deal with this case as he should have done and did not do, and simply re-word appropriately the letter.

Much of the argument addressed to this court on behalf of the applicant was submitted to Mr. Justice Stephen Brown (as he then was) in the court below.

His general conclusions in response to them were these:

“The submission which Mr. Knott makes is that the letter to which I have referred which gives advice and guidance to prospective adoptive parents ought to be considered as setting out something in the nature of a rule. He submits that in this case all the procedures which that letter envisages have not been carried out. I say at once that I cannot accept that the entry clearance officer did not give proper consideration to the matter on the basis of his affidavit and on the basis of the information which clearly was considered by Mrs. Hewett. It seems to me that the most careful consideration was given to this case, not only by the entry clearance officer, but ultimately by Mrs. Hewett who in fact made the decision.

I am unable to accept the argument that this letter offering guidance could or should be considered as giving any right to or laying down any rule for prospective adopters. This is, as it indicates, a letter designed to help as to how to go about seeking the exercise of the Secretary of State's “exceptional discretion” . The letter emphasises in the first paragraph: ‘The Home Secretary may, however,’ (although there is no provision in the Immigration Rules) “exercise his discretion and exceptionally allow a child to be brought here for adoption” . In this case, it seems to me that it is impossible to point to any failure on the part of the Secretary of State to consider any relevant matter.

It is not for this court to seek to tell the Secretary of State how to exercise his discretion; this court has the function of judicially reviewing the exercise of discretion, but in this particular sphere the court cannot express its own view as to what ought to be done having regard to the facts of any particular case. I am quite unable to find any ground upon which this application can succeed. It seems to me to indicate what may be a general misapprehension and a growing misunderstanding of the function and powers of the court in relation to these matters. Where there are no rules, it can only be in extreme cases - of bad faith for example - that the court could

possibly intervene in the exercise of the Secretary of State's discretion. I am quite unable to find that he has failed to apply correct principles or that he has applied incorrect principles. Indeed it seems to me that this matter has received fair consideration upon its merits."

Although having regard to the arguments addressed to this court by Mr. Knott and Mr. Latham I would express my reasons somewhat differently, I agree with the learned judge. There has, in my judgment, been a fundamental misconception by Mr. Knott of the status of the whole contents of the letter and a misunderstanding of the first paragraph of it which has caused him to endeavour to create an edifice of an argument upon a basis which does not in reality exist. Hence his striving to rely erroneously, in my view, for support upon the principles said to emerge from *R. v. Liverpool Corporation Ex parte Liverpool Taxi Fleet Operators Association* [1972] 2 QB. 299 ; *O'Reilly v. Mackman* [1983 2 AC 237] and *Attorney General of Hong Kong v. N.G. Yeun Shin* [1983] 2 AC 629 .

In two of those cases, the first and third, the facts in which differ vastly from those in the present case, it could not be gainsaid that the successful applicants for the various kinds of relief which they succeeded in obtaining were either given undertakings or promises which to their detriment were breached or broken or they had been denied natural justice, or both. The second of them involved issues of private and public law and the rules of natural justice.

Returning to the letter which is the centrepiece of this appeal, I do not think that it could properly be said that undertakings were therein given of the kind referred to in the cases I have mentioned. I take the letter to be no more than a helpful guide to an intending adopter from the Secretary of State upon whom there is no legal obligation to allow into this country a child who it is sought legally to adopt here. Even if it could be said that undertakings which the Secretary of State was bound to honour were by the letter given to an intending adopter in relation to procedural steps, I would totally reject the suggestion that that undertaking was in any circumstance broken. All the steps referred to in the letter, save one, were taken. That one, namely the enquiry of the Department of Health and Social Security as to adoption was, in the circumstances in which the Secretary of State made his decision, wholly irrelevant to it. His rejection of the application to bring the child into this country was not in any way influenced by his failure to secure a satisfactory answer to such an enquiry.

As for the undertaking to exercise discretion upon stated criteria, I am unable to understand how it can possibly be said upon a fair reading of the first paragraph that the Secretary of State was therein informing an intending adopter that he would allow the child to be admitted into this country merely upon being satisfied that the intention to adopt that child under United Kingdom law was genuine and not merely a device for gaining entry; that the child's welfare in this country was assured; and that the court here would be likely to grant an adoption order upon the application of an intending adopter domiciled here. I take it to be clear from the whole of that paragraph that the Secretary of State was informing the intending adopter that, once those conditions were demonstrated to him to have been satisfied, he would then proceed to exercise his discretion and in an exceptional case allow a child to be brought here for adoption. A failure to satisfy him upon one or more of those essential pre-requisites would effectively prevent him from even beginning the process of exercising that discretion.

It is apparent from that paragraph and from the remainder of the letter that the Secretary of State did not explain how he would exercise his discretion. In other words, he did not set out the matters that he either would, or would not, take into consideration. I do not in that respect regard him as having behaved in the least unfairly. He was under no legal or other obligation to do otherwise.

There is, in my judgment, no material before this court which would enable it to judicially review the exercise of the discretion of the Secretary of State in this case. He was, I think, fully entitled to exercise it provided he acted in good faith, by analogy with paragraph 46 or in any other manner deemed by him to be appropriate in the interests of everyone concerned with this kind of immigration.

I reject the submission that this applicant has been in any way unfairly or unjustly treated and would dismiss this appeal.

LORD JUSTICE DUNN:

The Home Office circular letter states, with accuracy, that there is no provision in the Immigration Rules for a child to be brought into the U.K. for adoption. The letter goes on to assert that the Home Secretary may in the exercise of his discretion, allow children to be brought here for that purpose. Thus, it appears, that the Home Secretary was assuming an administrative discretion the exercise of

which is subject to judicial review on the principles which were stated by Lord Greene M.R. in the well-known case of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223 at p.228. Such review is concerned not with the merits of a decision but with the manner in which the decision was made (*R. v. Entry Clearance Officer ex parte Amin* [1983] AC 818 per Lord Fraser of Tullybelton at p.829). If the manner of making the decision is unreasonable, the courts can intervene to quash the decision. As Lord Greene said in *Wednesbury's* case supra at p.230:

“It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word ‘unreasonable’ in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.’, If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably’ ”.

So, if there are statutory provisions or rules which the Minister has failed to follow, or if he has taken into account matters outside such provisions or rules, then the court may intervene, because he will have misdirected himself and so acted unreasonably. Mr. Latham submitted on behalf of the Home Secretary in this case that there were no statutory provisions or rules, that the Secretary of State had an unfettered discretion, and that he was entitled to take into account a pre-eminent policy consideration, namely that leave would only be granted to bring a child here for adoption where there was to be a genuine transfer of parental responsibility on the ground of the natural parents' inability to care for the child.

If the Home Secretary had done no more than to state that it was a matter for his discretion whether or not the child could be brought here for adoption, I should find great force in that submission. But the Home Secretary did not do that. He caused the circular letter in common form to be sent to all applicants setting out the four criteria to be satisfied before leave could be given. Thereby, in my judgment, he in effect made his own rules, and stated those matters which he regarded as relevant and would consider in reaching his decision. The letter said nothing about the natural parents' inability to care for the child as being a relevant consideration, and did not even contain a general “sweeping up clause” to include all the circumstances of the case which might seem relevant to the Home Secretary.

The categories of unreasonableness are not closed, and in my judgment an unfair action can seldom be a reasonable one. The cases cited by Lord Justice Parker show that the Home Secretary is under a duty to act fairly, and I agree that what happened in this case was not only unfair but unreasonable. Although the circular letter did not create an estoppel, the Home Secretary set out therein for the benefit of applicants the matters to be taken into consideration, and then reached his decision upon a consideration which on his own showing was irrelevant. In so doing in my judgment he misdirected himself according to his own criteria and acted unreasonably.

I would allow the appeal and quash the refusal of entry clearance.

LORD JUSTICE DUNN: The effect of the judgment is that the appeal is allowed and the refusal of entry clearance will be quashed.

MR. YOXALL (for Mr. Knott): My Lord, today I appear on behalf of the appellant; my learned friend, Mr. Reynolds, appears on behalf of the respondent.

My client is legally aided. However, I do ask for an order that the respondents pay the costs of the appellant's application and of the appeal. I do so because the judgments describe what happened in this case as being unfair and unreasonable.

LORD JUSTICE DUNN: Prima facie, as the successful appellant, you are entitled to the costs here and below. The fact that you are legally aided is neither here nor there.

Do you oppose that, Mr. Reynolds?

MR. REYNOLDS: My Lord, the only ground upon which I could do so is that it is an exercise of taking money from one public purse to another.

LORD JUSTICE DUNN: That is no reason for not ordering costs.

MR. REYNOLDS: My Lord, for my part I would agree, but I am instructed to place that matter before the court.

LORD JUSTICE DUNN: The appeal is allowed with costs here and below.

MR. REYNOLDS: There is only one other matter which occurs to those instructing me. The decision being stated as one to quash the refusal of entry clearance, in fact looking at the case it was really the Secretary of State's decision which was in issue, which then resulted in the refusal of the entrance ...

LORD JUSTICE DUNN: But technically, is the refusal to quash the entry clearance not the substantive decision? What does the application say?

MR. REYNOLDS: My Lord, it was to do that.

LORD JUSTICE DUNN: That is right. That is what was asked for and that is what we have decided to do.

MR. REYNOLDS: The decision sets out the Secretary of State's decision, as it were, so it comes to the same thing.

LORD JUSTICE DUNN: That is right. Very well.

MR. YOXALL: May I mention one matter - I am sorry to be troublesome about the question of costs - but do I need an order for legal aid taxation?

LORD JUSTICE DUNN: You certainly do and you need to lodge your legal aid certificate, otherwise you will not get your costs taxed, but you shall have an order for legal aid taxation.

own criteria and acted unreasonably.

I would allow the appeal and quash the refusal of entry clearance.

Appeal allowed with costs. Legal aid taxation of appellant's costs. Order below set aside.

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