



Supreme Court Rules on the Powers of the Home Secretary

1 Two recent decisions of the Supreme Court are an important source of guidance on the scope of the Home Secretary's powers to exercise immigration control. The first case discussed below emphasises the necessity of including in the Immigration Rules (which have to be laid before Parliament) any requirements material to regulating the entry into the United Kingdom, stay in and associated conditions of particular individuals. The second case makes it clear that administrative tasks not directly concerned with, albeit incidental to, such regulation need not be included in the Immigration Rules or have any other statutory basis.

2 The Immigration Rules are made under powers conferred on the Secretary of State by section 3(2) of the Immigration Act 1971 which describes them as "statements of the rules...as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and conditions to be attached in different circumstances". British citizens and others with a right of abode do not require leave to enter, nor do citizens of other Member States of the European Economic Area. The Rules govern the leave to enter and remain of citizens of all other countries. They contain hundreds of detailed paragraphs for the guidance of immigration officers in the United Kingdom, entry clearance officers at missions abroad and immigration judges and other judges dealing with appeals against adverse decisions in immigration and asylum cases or judicial review or other cases which affect the rights of individuals to enter or remain in the UK. They are required by section 3(2) to be laid before Parliament and are subject to the negative resolution procedure.

3 The first case is *Alvi (Respondent) v Secretary of State for the Home Department* [2012] UKSC 33 decided on 18 July 2012. The respondent was from Pakistan and after completing studies in the UK he obtained leave to remain in the UK as a physiotherapy assistant in 2005. In 2009 he applied for further leave as a Tier 2 (General Migrant) under the points based system which had been introduced in 2008. In February 2010 his application was rejected on the ground that his job as an assistant physiotherapist was not at the level of skilled occupations required by the relevant Rule, paragraph 82 of Appendix A to the Immigration Rules. That Rule requires (i) that the job appear on the United Kingdom Border Agency's (UKBA) list of skilled occupations and (ii) that the applicant's salary must be at or above the appropriate rate for the job as stated in that list. The list of skilled occupations was to be found on the UKBA website and was not contained in the Immigration Rules. The Supreme Court ruled that any change in the listing of such occupations was a change in the law which must be made in proper legal fashion by amending the Immigration Rules which requires parliamentary approval and that an amendment to the Home Office website or other administrative fiat did not have legal effect. In making this ruling the Supreme Court approved an earlier decision of the Court of Appeal, *Pankina v Secretary of State for the Home Department* [2010] EWCA Civ. 719, discussed in Legal Paper MW 196.

4 The decision means that a great deal of material which was hitherto accessible only on the UKBA website will from now on have to be incorporated into the Immigration Rules if it is to have legal effect. The Home Office reacted promptly to the decision by laying before the House of Lords a fresh set of amendments to the Rules on 20 July 2012, two days after the decision was published. These amendments run to 288 pages and contain detailed provisions on

work permits, including the information referred to in paragraph 3 above which the Home Secretary was unable to rely on in her appeal because it was not contained in the Rules.

5 The other recent Supreme Court decision to be considered here is a judicial review case *R (On the application of New London College Limited) (Appellant) v Secretary of State for the Home Department (Respondent)* [2013] UKSC 51 in which judgment was delivered on 17 July 2013. The case concerned the system for licensing by the Home Office of educational institutions to sponsor students from outside the European Economic Area who require Tier 4 visas under the points based system to enter the United Kingdom for the purpose of study. A precondition of the grant of a Tier 4 is that the student must have been sponsored by an educational institution holding a sponsor's licence. This condition is included in the Immigration Rules. The requirements which have to be met by educational institutions which seek to qualify for a sponsor's licence are contained only in a document entitled Tier 4 Sponsor Guidance, which is not included in the Immigration Rules and has therefore not received parliamentary approval. That document spells out such matters as the adequacy of the institution's facilities and key staff, monitoring of student attendance, reporting significant absences of students to the Home Office and keeping proper records of these matters. The institutions are also required to assess students' command of English, ability to follow courses and adequacy of resources to maintain themselves during their studies in the United Kingdom.

6 New College London, the appellant, had been a licensed Tier 4 sponsor until December 2009. Its licence was suspended and subsequently revoked on the ground that it had failed to comply with one of the requirements of the Sponsor Guidance document, specifically a test introduced in September 2011 that where an institution had been licensed for twelve months, not more than 20 per cent of Tier 4 applicants to whom it had given a Certificate of Acceptance for Studies (CAS) should have been refused leave to enter or remain. Such non-compliance obviously indicated a failure to exercise proper scrutiny of applications. The appellant College challenged this decision by judicial review. Its contention was that the mandatory provisions of the Sponsor Guidance on which the Secretary of State relied in reaching this decision had not been laid before Parliament and she was therefore acting unlawfully. The appeal failed in the High Court, Court of Appeal and finally in the Supreme Court.

7 The principal judgment of the Supreme Court was delivered by Lord Sumption, with whom three other members of the Court concurred. Lord Carnwath, the fifth member of the Court, also dismissed the appeal but for different reasons. The reasoning behind Lord Sumption's judgment is based principally on the wording of section 3(2) of the Immigration Act, quoted in paragraph 2 above, the statutory basis for the Immigration Rules. Clearly any Rules which regulate the entry into and stay in the United Kingdom and any conditions attaching to such entry or stay must be made under the powers which the subsection confers and laid before Parliament. This is made clear by the decision in *Alvi* quoted above. Applicants for Tier 4 student visas must *inter alia* have the support of an educational institution which is an approved sponsor, complying with the Home Office's Tier 4 Sponsor Guidance requirements. The Secretary of State exercises statutory powers of immigration control but those powers must of necessity extend to a range of ancillary and other administrative measures, including the vetting and regulation of sponsors, which are not and need not be expressly authorised in the Act.

8 This latter decision is welcome in that it indicates a greater readiness on the part of the judiciary to appreciate the need to understand the difficulties faced by the government in administering effective immigration control and to refrain as far as possible from interfering in that process than has always been apparent in recent years. It marks a change from the mindset manifested in the majority judgment of the Supreme Court in *Quila v Secretary of State for the Home Department* [2011] UKSC 45 discussed in Legal Paper MW 240. This was the case in which the court struck down the Home Secretary's decision to amend the Immigration Rules by raising the minimum age for a marriage visa from 18 to 21, a decision taken with the objective of placing an impediment in the way of forced marriage. In that paper I referred to the dissenting judgment of Lord Brown. Lord Sumption, the most recently appointed member of the court, appears to be a like minded judge.

Harry Mitchell QC
Honorary Legal Adviser
Migration Watch
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