Trinity Term
[2012] UKSC 33
On appeal from: [2011] EWCA Civ 681

JUDGMENT

R (on the application of Alvi) (Respondent) *v* Secretary of State for the Home Department (Appellant)

before

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

JUDGMENT GIVEN ON

18 July 2012

Heard on 24, 25 and 26 April 2012

Appellant
Jonathan Swift QC
Joanne Clement
(Instructed by Treasury Solicitors)

Respondent
Zane Malik

(Instructed by Malik Law Chambers Solicitors)

Intervener (Joint Council for the Welfare of Immigrants)
Richard Drabble QC
Shahram Taghavi
Charles Banner
(Instructed by Lewis Silkin LLP)

LORD HOPE

1. The respondent, Hussain Zulfiquar Alvi, is a citizen of Pakistan. He was born on 5 November 1977. On 20 September 2003 he entered the United Kingdom as a student, with leave to remain until 31 January 2005. After completing his studies he applied for leave to remain here as a physiotherapy assistant. On 10 February 2005 he was granted leave to remain as a qualifying work permit holder until 10 February 2009. For the next four years he worked as a physiotherapy assistant at a clinic in Kensington.

2. On 9 February 2009 Mr Alvi applied for further leave to remain in this country. A few months prior to that date the work permit regime had been replaced by a points-based system. It came into effect on 27 November 2008. So Mr Alvi applied for leave to remain under that system as a Tier 2 (General) Migrant. His application was rejected as invalid on 24 February 2009 because a mandatory section of his application form had not been completed. He re-submitted his application on 24 March 2009. It was refused on 18 June 2009 because the Secretary of State was not satisfied that his salary was appropriate for a job at the required level. On 21 September 2009 Mr Alvi applied for judicial review of the Secretary of State's decision. On 9 February 2010 the refusal of 18 June 2009 was replaced by a revised decision letter. In that letter it was stated that Mr Alvi did not satisfy the requirements of the Immigration Rules for the relevant category because his job title as an assistant physiotherapist was not of the level of skilled occupations required by the rules.

3. The ground of refusal was set out in the letter of 9 February 2010 in these terms:

> "On 24 March 2009 you applied for leave to remain in the United Kingdom as a Tier 2 (General) Migrant under the Points Based System (PBS). An official has considered your application on behalf of the Secretary of State.
>
> You have claimed 50 points under certificate of sponsorship, but your clients [sic] job title stated on the application form and Certificate of Sponsorship as Assistant Physiotherapist does not meet as a job role that is above NVQ or SVQ level 3. The codes of practice document at the time of the application stated that this job role is below N/SVQ level 3. You have not therefore been awarded any points under certificate of sponsorship.

> Therefore you do not satisfy the requirements of the immigration rules for this category and it has been decided to refuse your application for leave to remain as a Tier 2 (General) Migrant under paragraph 245ZF(e) of the Immigration Rules."

4. Mr Alvi was given permission to apply for judicial review on 17 March 2010. The application was heard on 28 September 2010. It was common ground that his occupation as a physiotherapy assistant did not fall within the list of skilled occupations as required by paragraph 82(a)(i) of Appendix A to the Immigration Rules. The following arguments were advanced on his behalf:

(1) that he did not need to comply with paragraph 82(a)(i) as he had an existing work permit, so all he had to do was to satisfy the transitional provisions set out in paragraph 83 of the Appendix to which the list of skilled occupations does not apply; and
(2) that in any event the list of skilled occupations was not part of the Immigration Rules, as the document in which that list was set out had not been laid before Parliament under section 3(2) of the Immigration Act 1971.

5. His claim for judicial review was dismissed on 25 October 2010. The Deputy Judge, Lord Carlile of Berriew QC, did not deal expressly with the first of these two arguments but his disposal of the claim shows that he must have rejected it. As for the second argument, his conclusion was that it was not the intention of Parliament that the list of skilled occupations, which was to be found in the UK Border Agency's website in the Tier 2 Codes of Practice, should be an intrinsic part of the Immigration Rules or subject to specific Parliamentary approval: [2010] EWHC 2666 (Admin), para 31. Mr Alvi was given permission to appeal to the Court of Appeal. On 9 June 2011 the Court of Appeal (the President (Sir Anthony May), Jackson and Tomlinson LJJ) allowed his appeal on the second argument and quashed the Secretary of State's decision of 9 February 2010 to refuse his application for leave to remain. On 18 November 2011 the Secretary of State was given permission to appeal to this court. Her appeal was heard together with the appeal in *R (Munir and another) v Secretary of State for the Home Department* [2012] UKSC 32.

The legislative framework

6. Section 1(2) of the Immigration Act 1971 provides that those not having a right of abode in the United Kingdom may live, work and settle here by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by the Act. Section 1(4) is in these terms:

> "(4) The rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the 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."

Section 3(1), as amended by section 39 of the British Nationality Act 1981 and paragraphs 43 and 44(1) of Schedule 14 to the Immigration and Asylum Act 1999, provides that a person who is not a British citizen shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of or made under the Act, that he may be given leave to enter or remain for a limited or for an indefinite period and that if he is given leave to enter or to remain in the United Kingdom it may be given subject to conditions restricting his employment or occupation or requiring him to register with the police.

7. Section 3(2) of the 1971 Act makes the following provision with regard to the rules mentioned in section 1(4) above. It provides:

> "(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; 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)."

It is common ground that the code of practice document referred to in the refusal letter of 9 February 2010, which stated that the appellant's job role was below N/SVQ level 3, had not been laid before Parliament under this subsection.

8. Sections 3A and 3B of the 1971 Act, which were inserted by sections 1 and 2 of the Immigration and Asylum Act 1999, state that the Secretary of State may by order make further provision with regard to the giving, refusing or varying of leave to enter and leave to remain. Section 3C, as substituted by section 118 of the Nationality, Immigration and Asylum Act 2002, confers similar powers on the Secretary of State with regard to the continuation of leave pending a decision to vary. Section 4(1) provides that the power under the 1971 Act to give or refuse leave to enter the United Kingdom is to be exercised by immigration officers, and that the power to give leave to remain in the United Kingdom or to vary any leave is to be exercised by the Secretary of State. Paragraph 1(3) of Schedule 2 to the Act provides that in the exercise of their functions immigration officers "shall act in accordance with such instructions (not inconsistent with the immigration rules) as may be given to them by the Secretary of State."

9. Questions as to the meaning and effect of section 3(2) of the 1971 Act lie at the heart of this appeal, and I will have to return to them later. For the time being I note that in *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230, para 6 Lord Hoffmann said:

> "The status of the immigration rules is rather unusual. They are not subordinate legislation but detailed statements by a minister of the Crown as to how the Crown proposes to exercise its executive power to control immigration. But they create legal rights: under section 84(1) of the Nationality, Immigration and Asylum Act 2002, one may appeal against an immigration decision on the ground that it is not in accordance with the immigration rules."

That case involved a change to the entitlement of persons who had medical qualifications to leave to remain as post-graduate doctors. Previously that entitlement was unrestricted. The issue was whether a statement of changes to the Immigration Rules which confined that entitlement to persons with medical qualifications from UK institutions applied to all cases in which leave had still to be granted, or only to those who had not yet applied. In para 7 Lord Hoffmann said

the rules were not to be construed as creating rights which subsequent rules should not, in the absence of express language, be construed as removing:

> "They are, as I have said, a statement by the Secretary of State as to how she will exercise powers of control over immigration. So the most natural reading is that (in the absence of any statement to the contrary) they will apply to decisions that she makes until such time as she promulgates different rules, after which she will decide according to the new rules."

10. The 1971 Act received the Royal Assent on 28 October 1971. Section 3(2) came into force on 1 January 1973: Immigration Act 1971 (Commencement) Order 1972 (SI 1972/1514). Draft immigration rules had been published and were available during the debates on the Bill in Parliament. On 23 October 1972 the Secretary of State laid two sets of immigration rules before Parliament: a Statement of Immigration Rules for Control on Entry (Cmnd 4606); and a Statement of Immigration Rules for Control after Entry (Cmnd 4792). These statements were disapproved after a debate on the floor of the House of Commons on 22 November 1972. But they were the rules under which the Act was administered until two new sets of rules, one for Commonwealth citizens and the other for foreign nationals, were laid on 23 January 1973: HC (1972-1973) Nos 79-82. The current Immigration Rules have their origin in a Statement of Changes in the Immigration Rules (HC 395) which was laid before Parliament on 23 May 1994.

11. The system which the Secretary of State operates today in the administration of the 1971 Act is far removed from that which was contemplated at the time when the Bill that became that Act was being discussed in Parliament. The first versions of the rules were 17 and 20 pages long. The 1994 Statement of Changes in Immigration Rules (HC 395) extended to 80 pages. There have been over 90 statements of change since then, and HC 395 has become increasingly complex. The current consolidated version which is available on line from the UKBA website extends to 488 pages. Extensive use is now made of the internet, a system for the dissemination of information to the public that was, of course, unknown 40 years ago. 19 statements of changes in the Immigration Rules have been published on the website since February 2010. There have been four this year, the last of which was in June 2012. The ease with which information on a website can be removed, added to or amended encourages resort to these techniques to a degree that would have been wholly impracticable in the days of the mechanical typewriter. In *DP (United States of America) v Secretary of State for the Home Department* [2012] EWCA Civ 365, para 14 Longmore LJ lamented, with good reason, the absolute whirlwind which litigants and judges now feel themselves in due to the speed with which the law, practice and policy change in this field of law.

The points-based system

12. The points-based system, proposals for which were published in March 2006 and further explained in May 2008, was introduced as Part 6A of the Immigration Rules by a Statement of Change which was laid on 4 November 2008 (HC 1113). The system took effect from 27 November 2008. It applies to non-European Economic Area (EEA) nationals who wish to work or study in the United Kingdom. Tier 1 (General) allows the entry of highly skilled workers who do not need to be sponsored by an employer. Tier 2 (General) applies to skilled workers. They do need to be sponsored. This system replaced the then existing system of work permits. Instead it provides the mechanism by which employers may employ non-EEA workers to fill particular posts which cannot be filled by UK residents or workers from the EEA. As a result of changes which have been made since February 2010, when Mr Alvi's application was refused, the provisions with which his case is concerned no longer appear under the same numbering on the UKBA website. The numbering that I will be using for the purposes of this judgment is that which was current in February 2010.

13. Paragraph 245ZF provides:

> "To qualify for leave to remain as a Tier 2 Migrant under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused."

Among the requirements listed in that paragraph are provisions which state that to obtain entry clearance or leave to remain a Tier 2 (General) Migrant needs to obtain a total of 70 points, which must include at least 50 points for "attributes", 10 points for English language skills and 10 points for maintenance. Paragraph 245ZF(e) provides that points for attributes are to be awarded under paragraphs 59-84 which HC 1113 inserted into Appendix A to the Immigration Rules.

14. Paragraph 59 of Appendix A restates the requirement that an applicant applying for entry clearance or leave to remain as a Tier 2 (General) Migrant must score 50 points for attributes. Paragraph 60 states that, subject to paragraph 61, available points for entry clearance or leave to remain are shown in Table 10. But in paragraph 61(b) an applicant who, like Mr Alvi, had or was last granted entry clearance, leave to enter or leave to remain as a qualifying work permit holder is told that, in his case, available points for leave to remain are shown in Table 11. Table 10 divides the migrants who may score points under it into four categories, one of which is where the job offered to him passes the resident labour market test.

Among the notes on sponsorship set out under that table is paragraph 71, which states that, in order for the applicant to be awarded points for a job offer that passes the resident labour market test, "the certificate of sponsorship checking service entry must indicate that the sponsor has met the requirements of that test, as defined in guidance published by the United Kingdom Border Agency, in respect of the job."

15. A further set of notes on sponsorship is set out below Table 11. It states in paragraph 81 that paragraphs 63 to 68 of the notes that apply to cases under Table 10 apply in this case also. Paragraph 71 is not mentioned, as the resident labour market test does not apply to cases under Table 11. The notes to this table then include the following paragraph:

> "82. No points will be awarded for sponsorship unless:
>
> (a) (i) the job that the Certificate of Sponsorship Checking Service entry records that the person is being sponsored to do appears on the United Kingdom Border Agency's list of skilled occupations, or
>
> (ii) the applicant is a Senior Care Worker or an Established Entertainer, and
>
> (b) (unless the applicant is an Established Entertainer) the salary that the Certificate of Sponsorship Checking Service entry records that the migrant will be paid is at or above the appropriate rate for the job as stated in the list of skilled occupations referred to in (a)(i)."

16. The Secretary of State first published Occupation Codes of Practice under the sponsored skilled migrant tier of the points-based system on the website of the United Kingdom Border Agency ("UKBA") on 17 September 2008. Their main function was to provide guidance to persons who were proposing to sponsor a skilled migrant as to how to meet the criteria that would be applied in determining the application. This is indicated by the following directions which appeared under heading "The process to follow to find the code of practice" on the first page of the introduction:

> "The process you should follow to find out if you can sponsor a skilled migrant for your job under this tier is:

• Choose your sector

• Choose the Standard Occupational Classification (SOC) code closest to your job, using the information in the sector table

[Insert drop-down list or menu of all sector pages]

If you already know which SOC code is most appropriate, select the code of practice from the following list:

[Insert drop-down list of all SOC codes that have a code of practice]

Find out the skill level, appropriate rate of pay and how to meet the resident labour market test"

17. The Codes contained a list of occupations that were recognised by the Secretary of State as sufficiently skilled to qualify under Tier 2. On the second page of the introduction that was published in 17 September 2008 this explanation is given:

"**How the codes have been developed**

These codes of practice have been drawn up based on advice from industry experts and the Migration Advisory Committee. They are the official guidance for sponsors and caseworkers."

The Migration Advisory Committee is a non-statutory public body set up to provide advice to the government and sponsored by UKBA. The codes were divided into sections organised by industry. Section Q dealt with human health and social work activities. On 27 November 2008, when the Statement of Change (HC 1113) took effect, UKBA published a slightly revised version of Occupation Codes of Practice on its website. It contained some changes to the list of skilled occupations and made some other minor amendments to the previous version which had been published on 17 September 2008. In a preface to the list of occupations the following advice was given to sponsors:

"This page explains the codes of practice that you must use to check the skill level and appropriate rate for the job you want to employ the migrant for, in tiers 2 and 5 of the points-based system, and advice on where to advertise the job.

…

> Before you can sponsor a skilled migrant, you need to check that the job you are sponsoring them to do meets the requirements of the skilled migrant tier:
>
> • The job must be skilled at N/SVQ level 3 or above; and
>
> • The job must be paid at the appropriate rate or above; and
>
> • You must normally have carried out a resident labour market test for the job before sponsoring a skilled migrant.
>
> This section contains codes of practice for every occupation. The codes of practice give information on skill levels and appropriate rates, and advice on where to advertise the job. This is so that you can check that the job meets these requirements. If the job does not meet these requirements you cannot issue a certificate of sponsorship."

18. National Vocational Qualifications (NVQs) are competence-based qualifications which are available in England and Wales and Northern Ireland. They teach practical, work-related tasks which are designed to develop the skills and knowledge to do a job effectively and can be studied at work, at a college or as part of an apprenticeship. In Scotland they are known as SVQs. They are available in a wide range of subjects, and there are five levels of award. Level 1 focuses on basic work ability. Level 5 is for senior management. Although these levels are not formally defined in terms of academic equivalents, level 2 can be taken to be equivalent to five GCSEs at A* to C and level 3 to two or more A levels. The codes of practice that were in operation in February 2010 have been replaced by a new set of codes for sponsor organisations and sponsor workers wishing to apply under tiers 2 and 5 of the points-based system on or after 6 April 2012, and the required skill level which was not mentioned in the rules in February 2010 is now stated explicitly in paragraph 77E of Appendix A. A sponsor help document is available on the UKBA website which explains that a certificate of sponsorship is not an actual certificate or paper document but is a virtual document similar to a database record. It has to be created by using the online sponsor management system for each individual who is being sponsored. The description that follows is based on the system that was in operation in February 2010.

19. Code 3221 is the section in the Occupation Codes of Practice that applies to physiotherapists. It contains the following information:

> "This page explains the skill level and appropriate salary rate for physiotherapists, and tells you how to meet the resident labour market test."

Under the heading "Skill level" the code sets out the requirement that all jobs are at or above NVQ or SVQ level 3. It then states that the jobs of assistant practitioners, physiotherapists and senior physiotherapists are at or above that level, and that the jobs of physiotherapy assistants and technical instructors are below it. Under the heading "Appropriate salary rate" it sets out the minimum rates of salary for the jobs listed as being above the N/SVQ level 3, derived from the Annual Survey of Hours and Earnings or, where alternative salary data is available, from an alternative code of practice. Under the heading "resident labour market test" reference is made to Jobcentre Plus, to national newspapers, to two professional journals and to 16 websites to which resort may be had for advertising on the internet.

20. Mr Alvi's application was rejected because his job, which is that of an assistant physiotherapist, did not meet the requirement set out in paragraph 82(a)(i) of Appendix A to the Immigration Rules. This was because, although it appeared on the UKBA's list of skilled occupations, it was not shown on that list as an occupation that was above NVQ or SVQ level 3. This meant that it did not meet the requirement under the Occupation Codes of Practice under the skilled migrant tier that the job must be skilled at N/SVQ level 3 or above. This in turn meant that Mr Alvi could not satisfy the requirement set out in paragraph 245ZF of the Immigration Rules because he could not obtain the minimum number of points under paragraphs 59-84 of Appendix A.

The issues

21. The question which lies at the heart of this appeal is whether the reference in paragraph 82(a)(i) of Appendix A to "the United Kingdom Border Agency's list of skilled occupations" was sufficient to satisfy the requirements of section 3(2) of the 1971 Act. Neither the statement in the preface to the list that the job must be skilled at N/SVQ level 3 or above nor the list itself which showed that Mr Alvi's occupation was below that level formed part of the Immigration Rules as laid before Parliament. Were these provisions "rules" within the meaning of section 3(2) of the 1971 Act? The issue that this question raises is set out in the agreed statement of facts and issues in these terms:

> "What is the meaning and effect of section 3(2) of the 1971 Act? Is the decision of the Court of Appeal in *Pakina* correct: namely, that section 3(2) of the 1971 Act meant that the Immigration Rules could

> not lawfully incorporate provisions set out in another document which had not been laid before Parliament, and which was able to be changed after the Rule in question had been laid before Parliament?"

Pankina v Secretary of State for the Home Department [2010] EWCA Civ 719, [2011] QB 376 was the first case to consider the changes effected by the points-based system: see para 43, below.

22. Mr Swift QC for the Secretary of State submitted that the question can be broken down into three parts. First, to what extent is it open to the Secretary of State to refer in the rules to matters the details of which are set out in material which is outside the rules themselves? Second, if it is open to the Secretary of State to do this, can those details be changed without laying the changes before Parliament under section 3(2) of the 1971 Act? Third, can the Secretary of State control immigration in ways that are not covered by the Immigration Rules by means of a published policy which is not in conflict with what the rules provide for?

23. In response to the issue raised by the first of Mr Swift's questions Mr Drabble QC, for the Joint Council for the Welfare of Immigrants (intervening, but taking a leading role in the appeal), accepted that it was open to the Secretary of State to refer in a rule to another document which was available when the rule, or a statement of changes in the rules, was laid before Parliament. But it would be so only if the content of that other document was fixed and thus not open to change at the Secretary of State's discretion without further reference to Parliament. The key question in Mr Alvi's case, therefore is the second question which Mr Swift identified. Put more precisely to fit the facts of this case, was it sufficient for the Secretary of State to state in paragraph 82(a)(i) that no points would be awarded for sponsorship unless that job for which the person was being sponsored appeared on UKBA's list of skilled occupations if that list was not fixed but was open to change at the discretion of the Secretary of State?

24. But within the second question lies a further question which is really what this appeal is all about. Mr Drabble made it clear that it was not his case that no change whatever could be made to details set out in the other document without laying that change before Parliament. It would be open to the Secretary of State to include in the rule a formula or criterion for making changes which could be applied objectively and could not be the subject of controversy, such as for the adjustment of rates of pay according to the Retail Prices Index. Although he said that he was inclined to say that everything should be laid before Parliament because to do otherwise would enable the Secretary of State to introduce hurdles in the way of applicants which were not subject to Parliamentary scrutiny, it is questionable whether that submission goes too far, given the extent and nature of

all the details set out in the Occupation Codes of Practice on UKBA's website. But it would not be right for us to hold that it goes too far unless we can say where, and how, the line is to be drawn between those changes which it is open to the Secretary of State to make without reference to Parliament and those that must be subjected to Parliamentary scrutiny.

25. The third question is not directly in point in Mr Alvi's case. It arises in *R (Munir and another) v Secretary of State for the Home Department*, because the issue in the cases of Mr Munir and Mr Rahman is whether it was open to the Secretary of State to withdraw the so-called 7 year children concession policy in DP5/96 without laying the statement of withdrawal before Parliament under section 3(2) of the 1971 Act. But Mr Swift relied on the points that it raises in Mr Alvi's case too. He submitted that it was within the power of the Secretary of State to control immigration in ways not covered by the rules. This could be done in the exercise of her common law powers under the prerogative, assuming that this was in ways that were not in conflict with what the rules provide for. He relied in support of this proposition on a passage in the speech of Lord Brown of Eaton-under-Heywood in *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230, para 35 where he said that the Secretary of State's Immigration Rules, as and when promulgated, indicate how it is proposed to exercise the prerogative power of immigration control. This question too must be addressed, as part of the background, in Mr Alvi's case. But I can do so briefly, as I am in full and grateful agreement with the way Lord Dyson has dealt with this issue in his judgment in *Munir*, paras 23-33.

Background: the prerogative

26. The key question in Mr Alvi's case cannot be answered satisfactorily without understanding the system that was envisaged when section 3(2) of the 1971 Act was enacted, and the effect that the Act has had on the system of immigration control exercised by the Secretary of State.

27. Prior to the enactment of the 1971 Act Parliament did not exercise formal control over the rules and instructions that the Secretary of State issued from time to time for the administration and control of immigration. As Lord Bingham of Cornhill observed in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] UKHL 27, [2008] 1 AC 1003, para 4, it is one of the oldest powers of a sovereign state to decide whether any, and if so which, non-nationals shall be permitted to enter its territory, and to regulate and enforce the terms on which they may do so. In *Rex v Bottrill* [1947] 1 KB 41, 51 Scott LJ declared that the King, under our constitution, is under no obligation to admit into the United Kingdom, or to retain here when admitted, any alien. Prior to the passing of the Commonwealth Immigrants Act 1962 Commonwealth citizens had the right, in

common with all British subjects, to enter the United Kingdom without let or hindrance when and where they pleased and to remain here as long as they liked: *Reg v Bhagwan* [1972] AC 60, 80 per Lord Diplock. They were not aliens: *Reg v Immigration Appeal Tribunal, Ex p Secretary of State for the Home Department* [1990] 1 WLR 1126, 1134, per Stuart Smith LJ. But the Secretary of State had unfettered control over aliens in the exercise of the prerogative.

28. The exercise of a prerogative power may however be suspended, or abrogated, by an Act of Parliament: *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, per Lord Atkinson at pp 539-540. So a statute which operates in the field of prerogative may exclude the possibility of exercising prerogative powers. Where a complete and exhaustive code is to be found in the statute, any powers under the prerogative which would otherwise have applied are excluded entirely: see, eg, *Re Mitchell* [1954] Ch 525. Any exercise of a prerogative power in a manner, or for a purpose, which is inconsistent with the statute will be an abuse of power: *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, per Lord Nicholls of Birkenhead at p 576.

29. As Lord Bingham observed in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, para 6, successive administrations over the years have endeavoured in Immigration Rules and administrative directions, revised and updated from time to time, to identify those to whom leave to enter and remain should be granted, and such rules, to be administratively workable, require that a line must be drawn somewhere. The Immigration Appeals Act 1969 first introduced the concept of immigration rules and conferred rights of appeal on Commonwealth citizens. By section 8(1)(a)(i) it was provided that an adjudicator was to allow an appeal if he considered that the decision or action in question was not in accordance with the law or with any immigration rules applicable to the case. Section 14(1) enabled provision to be made by Order in Council under the Aliens Restriction Act 1914 for appeals in connection with the powers for the time being exercisable in respect of the admission into and removal from the United Kingdom of aliens. The expression "immigration rules" was defined in section 24(2) as meaning rules made by the Secretary of State for the administration of the control of entry into the United Kingdom of persons to whom the Act applied and the control of such persons after entry. But no provision was made for the laying of those rules before Parliament.

30. The 1971 Act was, according to its long title, enacted "to amend and replace the present immigration laws". One of its main objectives was to assimilate controls over immigrants from Commonwealth countries to the corresponding rules for aliens. Section 1(2) subjected them all to such regulation and control of their entry into, stay in and departure from the United Kingdom as was imposed by the Act. Section 3(1) extended those controls to all persons, including Commonwealth citizens who did not have a right of abode in this country under

section 2 of the Act, who were not patrial. As amended by section 39 of the British Nationality Act 1981, this subsection now extends to everyone who is not a British Citizen. Section 33(5) provides:

> "This Act shall not be taken to supersede or impair any power exercisable by Her Majesty in relation to aliens by virtue of Her prerogative."

But it is hard to see how that provision, which may have been thought appropriate 40 years ago, can have any practical effect today. One has only to think of the possibility of a challenge under article 5 of the European Convention on Human Rights, which declares that no one shall be deprived of his liberty save in accordance with a procedure prescribed by law. The old order, under which such a sweeping power could be exercised at will by the executive, is now long gone.

31. In *R v Secretary of State for the Home Department, Ex p Ounejma* (1989) Imm A R 75, 80 per Glidewell LJ said that the residual prerogative powers remain, and in Macdonald, *Immigration Law and Practice in the United Kingdom* 8th ed (2010), para 2.35 it is asserted that the prerogative power is not impaired or superseded, merely put in abeyance. But these propositions understate the effect of the 1971 Act. It should be seen as a constitutional landmark which, for all practical purposes, gave statutory force to all the powers previously exercisable in the field of immigration control under the prerogative. It is still open to the Secretary of State in her discretion to grant leave to enter or remain to an alien whose application does not meet the requirements of the Immigration Rules. It is for her to determine the practice to be followed in the administration of the Act. But the statutory context in which those powers are being exercised must be respected. As their source is the 1971 Act itself, it would not be open to her to exercise them in a way that was not in accordance with the rules that she has laid before Parliament.

32. What then is one to make of Lord Brown's observation in *Odelola*, para 35 on which Mr Swift relies? Are the Immigration Rules to be seen, as Lord Brown said, as an indication of how it is proposed to exercise the prerogative power of immigration control? Lord Hoffmann's description of them in para 6 as detailed statements of how the Crown proposes to exercise its executive power to control immigration avoids attributing the source of that power to the prerogative, and it is unexceptionable. Although I said in para 1 of *Odelola* that I agreed with Lord Brown's opinion, I think that it must be recognised that his statement as to the source of the power was wrong. The entry to and stay in this country of Commonwealth citizens was never subject to control under the prerogative. The powers of control that are vested in the Secretary of State in the case of all those who require leave to enter or to remain are now entirely the creature of statute. That includes the power to make rules of the kind referred to in the 1971 Act.

33. I would therefore hold that Mr Swift's submission that it is open to the Secretary of State to control immigration in a way not covered by the Immigration Rules in the exercise of powers under the prerogative, assuming that there is no conflict with them, must be rejected. As Lord Hoffmann said in *Odelola*, para 6, the rules are not subordinate legislation. They are therefore to be seen as statements by the Secretary of State as to how she proposes to control immigration. But the scope of that duty is now defined by the statute. The obligation under section 3(2) of the 1971 Act to lay statements of the rules, and any changes in the rules, cannot be modified or qualified in any way by reference to the common law prerogative. It excludes the possibility of exercising prerogative powers to restrict or control immigration in ways that are not disclosed by the rules.

The negative resolution procedure

34. The system that was introduced by the 1971 Act was that control over the content of the Immigration Rules was to be exercised by Parliament. Section 3(2) provides that this is to be carried out under the negative resolution procedure. The Home Secretary, Mr Maudling, explained that there was a case for making the rules subject to Parliamentary control because they would extend to Commonwealth citizens, not just to aliens, and that the negative procedure was chosen in the interests of flexibility: *Hansard* HC Deb 16 June 1971, cols 482-483. This procedure enables the policy content of the rules to be considered in either House.

35. In practice, the merits of all statements of changes to the Immigration Rules are examined by the Secondary Legislation Scrutiny Committee (formerly the Merits Committee) in the House of Lords, which by long tradition has peers who have held high judicial office among its membership. Written and oral evidence may be called for from, among others, the Secretary of State herself. The result of these inquiries is made the subject of a detailed report, in which the changes to the rules may be drawn to the special attention of the House. The Committee aims to do this within 12 to 15 days of laying, so that there is time for members of the House to give the instruments further scrutiny within the 40 day period. Reports of this kind are issued not infrequently: for some recent examples from Session 2010-2011, see HC 1148 in the Committee's 35th report; HC 1511 in its 40th report; and HC 1888 in its 58th report. As was noted in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2010] EWCA Civ 3524, para 12, the statement of changes in HC 59 which was laid before Parliament on 28 June 2010 was considered by the Merits Committee in its 4th report for the session of 2010-2011. It was drawn to the special attention of the House on the ground that it gave rise to issues of public policy likely to be of interest to it.

36. A statement of changes to the Immigration Rules cannot be amended under this procedure. But it is open to the Committee to call for an extraneous document to which it refers to be produced if it has not been laid already, to raise the question whether it was appropriate for the contents of that document or any part thereof not to be set out in the rules themselves and to require the Secretary of State to explain why this was not done. A motion may be made to enable either House to examine the actions of the Secretary of State, either by means of a motion to disapprove the rules or a motion of regret to enable the issue to be debated. For example, Lord Hunt of Kings Heath moved a motion regretting that the government had not published a comprehensive explanation of the findings from the consultation on Tiers 1 and 2 about significant changes in the Statements of Changes in Immigration Rules (HC 863) to implement the Government's strategy for reducing non-EEA economic migration. Attention had been drawn to these findings in the 27th Report of Session 2010-2011 from the Merits Committee. His motion was debated in the Chamber and replied to by the Minister of State in the Home Office, Baroness Neville-Jones, on 3 May 2011: HL Deb 3 May 2011, col 409.

37. The control that can be exercised by means of this procedure, however diligent and far-reaching, is nevertheless incomplete. It is dependent to a large extent on what the statements of changes themselves provide. The effect of provisions in the external document may not be apparent, and the ability of the Secretary of State to make changes to it without laying a fresh statement of changes before Parliament may not be obvious either. It is also very rare for a motion against an instrument under the negative resolution procedure to be carried. The Secretary of State can be called to account, and may feel that further changes should be made to meet an objection to a Statement of Changes which she regards as having real substance. But she can usually expect her views as to what they should contain to command the support of a majority in either House.

38. Moreover, as Lord Hoffmann pointed out in *Odelola*, para 6, the Immigration Rules create legal rights as, under section 84(1)(a) of the Nationality, Immigration and Asylum Act 2002, a person may appeal against an immigration decision on the ground that it is not in accordance with what they provide. So I do not think that oversight of the content of the rules can be left entirely to Parliament. The rule of law requires that the Secretary of State must fulfil the duty that has been laid on her by section 3(2) of the 1971 Act. In the event of a challenge it is for the courts to say whether or not she has done so. The Asylum and Immigration Appeal Tribunal observed, in its decision in *Pankina v Secretary of State for the Home Department* (IA 01396-09), para 17, that it would quite easy to say that the provision objected to had been approved by Parliament and to leave the matter there. But, as the tribunal went on to point out, the effect of what was done in that case without laying a Statement of Changes before Parliament was to restrict the substance of the provisions which up to then had been part of the

Immigration Rules, and to prevent some people from satisfying them in their new version.

39. I would hold therefore that the courts have a responsibility in this matter too. The right of appeal under section 84(1)(a) of the 2002 Act on the ground that the decision in question is not in accordance with the Immigration Rules would be seriously undermined if it was open to the Secretary of State to change the rules at her own discretion in a way that was to the appellant's prejudice without laying those changes before Parliament. Although Lord Denning MR said in *R v Secretary of State for the Home Department, Ex p Hosenball* [1977] 1 WLR 766, 781 that the rules do not amount to strict rules of law, section 86(3) of the 2002 Act includes Immigration Rules in the law to which the adjudicator must have regard when determining an appeal: see also section 84(1)(e). The system that the right of appeal relies on assumes that the rules have been made available by the Secretary of State to Parliament for scrutiny in the performance of her duty under the statute.

40. In *Reg v Secretary of State for Social Services, Ex p Camden London Borough Council* [1987] 1 WLR 819, 827-828 Slade LJ referred with approval to Macpherson J's observations in the court below about the technique of reference to outside documents in a statutory instrument. The judge said that, provided the reference was to an existing document and there was no question of sub-delegation, there was no objection to this practice in the eyes of the Joint Committee on Statutory Instruments and that there had been an increasing tendency to resort to this technique. The court's task was to look to see whether the reference offended against the provisions of the enabling statute and was in truth simply part of the regulations by which the Secretary of State purported to exercise his powers. If that inquiry is negative, then all is well. Any control of the extended use of references which are permissible in their own statutory context was a matter for Parliament and its practices.

41. There is, of course, no enabling statute in this case. But the 1971 Act must now be seen as the source of the powers vested in the Secretary of State, and it is the Act which provides the statutory machinery for their exercise. The content of the rules is prescribed by sections 1(4) and 3(2) of the 1971 Act in a way that leaves matters other than those to which they refer to her discretion. The scope of the duty that then follows depends on the meaning that is to be given to the provisions of the statute. What section 3(2) requires is that there must be laid before Parliament statements of the rules, and of any changes to the rules, as to the practice to be followed in the administration of the Act for regulating the control of entry into and stay in the United Kingdom of persons who require leave to enter. The Secretary of State's duty is expressed in the broadest terms. A contrast may be drawn between the rules and the instructions (not inconsistent with the rules) which the Secretary may give to immigration officers under paragraph 1(3) of

Schedule 2 to the 1971 Act. As Sedley LJ said in *ZH (Bangladesh) v Secretary of State for the Home Department* [2009] Imm AR 450, para 32, the instructions do not have, and cannot be treated as if they possessed, the force of law. The Act does not require those instructions or documents which give guidance of various kinds to caseworkers, of which there are very many, to be laid before Parliament. But the rules must be. So everything which is in the nature of a rule as to the practice to be followed in the administration of the Act is subject to this requirement. Resort to the technique of referring to outside documents, which the Scrutiny Committee can ask to be produced if it wishes to see them, is not in itself objectionable. But it will be objectionable if it enables the Secretary of State to avoid her statutory obligation to lay any changes in the *rules* before Parliament.

42. In *R v Immigration Appeal Tribunal, Ex p Bakhtuar Singh* [1986] 1 WLR 901, 917-918 Lord Bridge of Harwich said that the rules, as they stood at that time, frequently offered no more than broad guidance as to how discretion was to be exercised in different typical situations. That is no longer true. The introduction of the points-based system has created an entirely different means of immigration control. The emphasis now is on certainty in place of discretion, on detail rather than broad guidance. There is much in this change of approach that is to be commended. But the rigidity and amount of detail that comes with it has a direct bearing on the scope for an appeal against a decision that is adverse to the applicant. As the content of the rules will determine the scope of any appeal under section 84(1)(a) of the 2002 Act, it is all the more necessary to achieve clarity as to what must be in the rules and what need not be. The increasing complexity of the system and the resort to modern technology for its administration, for which detailed instructions have to be given to those who wish to make use of it, makes this a difficult exercise.

The Pankina line of cases

43. The first case to consider the changes effected by the points-based system was *Pankina v Secretary of State for the Home Department* [2010] EWCA Civ 719, [2011] QB 376. In that case Sedley LJ said in para 21 that the Parliamentary intention which lay behind the requirement that the rules must be laid before it was that the rules were being elevated to a status akin to that of law, and that it followed that only that which secured Parliament's authority by the absence of a negative resolution within 40 days after laying was entitled to the quasi-legal status of Immigration Rules. I shall attempt in the following paragraphs to summarise the way successive judges have attempted to apply that basic principle to a variety of objections raised by claimants whose applications have been refused on grounds that required reference to be made to material that was not disclosed in the rules themselves.

44. The point in *Pankina's* case related to the requirement that an applicant for leave to remain as a post-study migrant must have sufficient funds to maintain himself. Detailed maintenance provisions were set out in a Statement of Changes (HC 607). Paragraph 2 of Appendix C to the Immigration Rules (later amended by HC 1113 by inserting a new paragraph 1A) provided that the migrant must be able to show £800 in his bank account for "a period of time set out in the guidance" and to provide the specified documents, those being the documents specified by the Secretary of State in the policy guidance for the route under which the applicant was applying. Failure to produce those would mean failure to meet the requirement. The Secretary of State issued guidance within the period of 40 days while HC 607 was still before Parliament, but the guidance was not itself laid. It was stated in the guidance that the specified documents were personal bank accounts and building society statements showing that the applicant had held at least £800 for the three months immediately prior to the date of the application. The Court of Appeal affirmed the decision of the Asylum and Immigration Tribunal (see para 43, above). It held that the only relevant criterion was that the applicant should have £800 at the time of the application. As the policy guidance could be changed at any time in the discretion of the Secretary of State, the requirement that £800 must be held continuously for the three month period did not form part of the Immigration Rules and was of no effect.

45. In giving his reasons for this decision, with which Rimer and Sullivan LJJ agreed, Sedley LJ accepted that there was no absolute rule against the incorporation by reference of material into a measure which has legal effect, even when the measure is required to be laid before Parliament: para 24. But the case for the Secretary of State was that the requirement in the policy guidance that £800 had to be held during the three month period was by incorporation part of the Immigration Rules. That in itself required the three-month criterion to form part of the rules laid before Parliament. But the critical point was that the requirement was open to change at any time. That meant that a discrete element of the rules was placed beyond Parliament's scrutiny: para 29. In para 31 he said that the statutory recognition of rules which are to have the character and, on appeal, the force of law required them to be certain. That did not shut out extraneous forms of evidence of compliance, so long as they were themselves specified. But it did shut out criteria affecting an individual's status and entitlements which had not themselves been tendered for parliamentary scrutiny and, even if ascertainable at that point of time, might be changed without fresh scrutiny: para 33.

46. The decision in *Pankina* was soon followed by a number of other similar challenges. In *R (English UK) v Secretary of State for the Home Department* [2010] EWHC 1726 (Admin) the issue related to a provision in paragraph 120(a) of Appendix A which provided that one of the requirements that had to be met to obtain the requisite points was that the course must meet the minimum academic requirements as set out in sponsor guidance published by UKBA. The minimum

level of course specified in the guidance was later altered by specifying a different level of course as the minimum. Having considered *Pankina,* Foskett J said that its ratio appeared to him to be that a provision that reflected a substantive criterion for eligibility for admission or leave to remain must be the subject of a process that involved a true Parliamentary scrutiny, and that there was no doubt that the changed approach in the new guidance did operate to change materially the substantive criteria for entry for foreign students who wished to study English in the United Kingdom.

47. The next case to reach the administrative court was that of Mr Alvi: [2010] EWHC 2066 (Admin). As already noted in para 5 above, Lord Carlile of Berriew held that it was not the intention of Parliament that the skills list in the UKBA's list of skilled occupations should be an intrinsic part of the Immigration Rules or subject to specific Parliamentary approval. In para 29 he said that it should be borne in mind that the list of skilled occupations was a very large volume that would require to be amended and added to from time to time and would not be suitable for inclusion in the rules. It was enough that it was referred to in the rules, which were approved by Parliament. In para 31 he said that it would be unrealistic to require every job and skill to be listed in detail in the rules themselves and that this was certainly not a legal requirement.

48. In *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2010] EWHC 3524 (Admin) the issue was directed to a provision in the statement of proposed changes HC 59 relating to applications under Tier 1 of the points based system. Among the changes it introduced was a provision which enabled a limit to be set on the number of grants of entry clearance or leave to enter which might be granted in respect of a particular route during the relevant grant allocation period. It was stated that the interim limit for the purposes of Tier 1 would be published by the Secretary of State on UKBA's website. The fact that the actual limit to be imposed was not in the statement itself was the subject of adverse comment by the Merits Committee in the House of Lords in a report which was published on 16 July 2010. The information that was available on the website at that date did not disclose what the actual limit was. But on 15 October 2010, in response to a query as to what the limit actually was, UKBA amended its website to include the information that it was administering the limit on a monthly basis and that the limit was 600 issued Tier 1 (General) visas every calendar month. Similar information about limits on numbers which had not previously been disclosed was published with regard to Tier 2. The claimants challenged the lawfulness of the interim limits for Tier 1 and Tier 2 on the ground, among others, that the manner in which the limits were imposed was unlawful in the light of the decision in *Pankina*.

49. Sullivan LJ noted in para 38 that the court was bound by *Pankina.* But he said nevertheless that he would follow it, even if not bound. In para 42 he said that

he accepted the argument that there was a spectrum, and that in enacting section 3(2) Parliament did not intend that every alteration to the Secretary of State's practice, however minor, should be subject to the scrutiny of Parliament. But, accepting that there was a spectrum, both the overall limit and any changes to it were a critically important part of the rules: para 46. What the material that had been laid before Parliament failed to do was to specify the limits that were being applied to individual sponsors. It followed that no interim limits were lawfully published or specified by the Secretary of State for either tier and that there was not, and never had been, a limit on the number of applicants who might be admitted under either Tier 1 or in the number of certificates of sponsorship that might be issued to Tier 2 sponsors: para 47.

50. There then followed the decision of the Court of Appeal in the present case: [2011] EWCA Civ 681. The test that was applied by Jackson LJ, with whom the President and Tomlinson LJ agreed, was whether the specification of jobs as falling within paragraph 82(a)(i) of Appendix A was a "substantive" matter rather than a "minor" alteration to the Secretary of State's practice. He held that there was no doubt that the governing principle set out in the list that all jobs which qualify under section Q were at or above NVQ or SVQ level 3 was a substantive matter which had to be set out in the rules if it was to be valid.

51. In *R (Ahmed) v Secretary of State for the Home Department* [2011] EWHC 2855 (Admin), para 39 Singh J said that it seemed to him that the governing principle laid down by *Pankina* as understood and applied in subsequent cases was that a substantive or material change to the content of the Immigration Rules must be made by way of amending rules which must be laid before Parliament, and that it was not permissible to cross-refer to the possibility of further substantial or material changes in documents such as policy guidance statements which are not subject to the negative resolution procedure. In para 41 he said that the distinction was between the substantive requirements that an applicant has to meet and the means of proving such eligibility which can properly be the subject of policy guidance. In *R (Purzia) v Secretary of State for the Home Department* [2011] EWHC 3276 (Admin) Ian Dove QC, sitting as a Deputy Judge of the High Court held at para 17 that there is a spectrum that operates on the extent to which the requirement is substantive at one end of the spectrum and or relates to matters that are procedural at the other.

52. In *R (New London College Limited) v Secretary of State for the Home Department* [2012] EWCA Civ 51 the issue was whether the removal of a Tier 4 General (Student) Sponsor Licence issued by UKBA which enabled it to issue a visa letter or confirmation of acceptance of studies to non-EEA students lacked the necessary legislative authority because the system under which the decision was taken was contained in policy guidance, not in the Immigration Rules. Richards LJ, with whom Mummery and Rimer LJJ agreed, examined all the previous cases

on what he referred to as the *Pankina* issue. In para 48 he said that the ratio of *Pankina* was correctly identified by Foskett J in *English UK* as relating to the substantive criteria for entitlement to leave to enter or remain. The particular issue was whether a substantive criterion laid down in the rules could be qualified by changeable policy guidance. What Sedley LJ referred to in that case as "criteria affecting individuals' status and entitlements" was the content of the substantive criteria themselves, not extraneous factors which might affect the ability of an applicant to fulfil the relevant criteria. The substantive criteria governing entitlement to leave to enter or remain as a Tier 4 (General) Student were laid down in the rules and were not supplemented or qualified by guidance. Whether the sponsor held a sponsor licence did have an indirect effect on an applicant's entitlement, in that it affected his or her ability in practice to meet the criteria. It followed that the criteria for the grant, suspension or withdrawal of a sponsor licence would have that effect. But this was materially different from the substantive criteria and did not affect their content.

53. I make no comment as to whether the decisions that are not before us in this appeal were rightly decided. It should be noted that the *New London College* case is awaiting a decision as to whether permission should be given for an appeal to this court. What they do reveal however is a variety of approaches, and the use of a variety of expressions, to determine where the line must be drawn in order to determine whether material in an extraneous document which is not set out expressly in the rules can validly be relied on to determine an applicant's claim. Like Lord Dyson (see para 92, below), I do not find any of the suggested solutions to this difficult problem entirely satisfactory.

The test for validity

54. The picture that this rapid succession of cases presents is disturbing. The points-based system, which is the source of the problem, is not itself objectionable. But its effective operation is being put at risk by the opportunities it presents for challenges of this kind. Lord Bingham recognised in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 6, that the system of immigration control should be administratively workable. He also accepted that, in the administration of the system, a line had to be drawn somewhere. I think therefore that it would be right to approach the question as to the scope of the Secretary of State's duty under section 3(2) on the basis that it was not Parliament's intention that the procedure which it laid down should impede the administration of the system. Questions as to where the line was to be drawn with regard to the content of the rules were for the Secretary of State to determine as matters of policy. What Parliament was insisting on was that she should lay her cards on the table so that the rules that she proposed to apply, and any changes that were made to them, would be open to scrutiny.

55. To a large extent her approach to this task cannot be faulted. The enormous amount of detail that has been built into the Immigration Rules speaks for itself. And it makes good sense for guidance and codes of practice which are designed to assist those who must make the system work to be kept separate from the rules themselves. What the cases have revealed however is that the balance between what ought to be in the Immigration Rules themselves and what can properly be dealt with by referring to extraneous material has not always been struck in the right place.

56. The system of sponsorship, on which much of the points-based system depends, requires those who undertake the task of sponsoring an applicant to ensure that the applicant qualifies for sponsorship under the scheme. A certificate from a sponsor for a person who does not qualify will be rejected. Sponsors and those whom they are sponsoring need guidance as to what the qualifications are and how they are to meet the criteria that will be applied in determining the application. That is what the Occupation Codes of Practice on UKBA's website are designed to do. Some of the content of the Codes, which are described as "the official guidance for sponsors and caseworkers" (see para 17, above), is just guidance. The sponsor needs guidance as to how to fill in the certificate of sponsorship and, in cases to which this requirement applies, where to look to assess whether the resident labour market can supply workers to fill the job for which the skilled migrant is being sponsored. He also needs information about the minimum rate of pay that will be regarded as appropriate for the purposes of paragraph 82(a)(ii) of the Appendix, and as to what jobs are regarded as skilled for the purposes of paragraph 82(a)(i) and what are not. It is primarily to him that this information is addressed, as it is the sponsor who is required to complete the certificate of sponsorship. The caseworker too needs guidance when considering whether the application meets the relevant criteria.

57. The problem that Mr Alvi's case reveals, however, is that the Codes contain material which is not just guidance. They contain detailed information the application of which will determine whether or not the applicant will qualify. I agree with Lord Dyson (see para 94, below) that any requirement which, if not satisfied, will lead to an application for leave to enter or to remain being refused is a rule within the meaning of section 3(2). A provision which is of that character is a rule within the ordinary meaning of that word. So a fair reading of section 3(2) requires that it be laid before Parliament. The problem is how to apply that simple test to the material that is before us in this case.

58. I am inclined think that information as to where to look to assess the state of the resident labour market is not of that character. It is referred to in the preface to the list of occupations as "advice" and in paragraph 71 of Appendix A as "guidance". The language that the list itself uses is, of course, not determinative. A provision that is called "guidance" can nevertheless be a "rule" if it satisfies the

test which we have identified. But it seems to me that to call it guidance is apt in the case of this material. It tells the sponsor what procedure he should follow, and the kind of evidence he should examine, in order to fulfil his duties as sponsor to test the resident labour market in cases where that test must be satisfied. The rule in those cases is that the resident labour market must be tested, that it must be tested at Jobcentre Plus, that the job must be advertised and that the sponsor has to give details of where and when the post was advertised. Failure to carry out that procedure will, of course, have an effect on whether or not the sponsorship certificate will assist the applicant. It will lead to the refusal of the application because the rule has not been satisfied. Lord Dyson and I are agreed on that point. But it seems to me that information as to where the job may be advertised does not amount to the laying down of a rule that is determinative. As one would expect, the guidance as at April 2012 shows some changes in the list of newspapers, journals and websites which are regarded as relevant from those which were listed in February 2010. We do not need to decide the point in this case. But if a decision were needed, I would have been inclined to hold that changes of that kind do not require to be laid under section 3(2).

59. The references in the Codes to the appropriate rates for the job are, however, of an entirely different character. It will be recalled that the ground of refusal in the Secretary of State's letter of 18 June 2009 was that she was not satisfied that Mr Alvi's salary was appropriate for a job at the required level. As this ground was superseded by the letter of 9 February 2010 it has not been necessary to examine the point in this appeal. But it can be said that the lists of minimum salaries that the Codes set out, no doubt with the aim of protecting the UK labour market from being undermined by employing cheap labour from abroad, present two problems. The first is that this information is not set out in the rules themselves. All one has is the reference to "the appropriate rate for the job" in paragraph 82(a)(i). The second is that the rates themselves are susceptible to change because of the effects of wage inflation and perhaps for other reasons too. Reference to the guidance as at April 2012 shows that all the rates that were current in February 2010 have been increased. The criterion which has been used to arrive at these increases is not disclosed anywhere in the Immigration Rules.

60. As the migrant must be paid at or above the appropriate rate for the job to qualify, the conclusion that information as to what that rate is has the character of a rule seems to me to be inescapable. As the Codes are said to have been drawn up "based on" advice from the industry experts and the Migration Advisory Committee, the rates themselves must be taken to have been determined by the Secretary of State or on her behalf by UKBA. As the rules do not set out any objective criterion that is to be applied to determine the amount of any increases, the question whether there should be increases and, if so, by how much, is left to the discretion of the Secretary of State. As the rates themselves are to be seen as rules, any changes to them must be held to be changes to the rules within the

meaning of section 3(2) of the 1971 Act. It follows that the rates themselves and any changes to them must be laid before Parliament. It would be open to the Secretary of State to avoid having to lay changes if it was provided by the rules that an objective criterion, such as one of the recognised indices for measuring inflation, was to be used. But, as her ability to make changes is not limited by reference to any such criterion, each and every change to these rates must be regarded as falling with the scope of the obligation under section 3(2).

61. The list of jobs that the Occupation Codes of Practice set out both in the preface and in the Codes themselves, of which Code 3221 with which we are concerned in this case is an example, seem to me to be of the same kind. The statements that the job must be skilled at N/SVQ level 3 or above, and that the job of a physiotherapy assistant is below that level, set out criteria which have all the character of a rule, as the ground of refusal in the letter of 9 February 2010 made clear: see para 3, above. Whether the job that the applicant is applying for or occupies is above or below that level will determine whether or not it meets the requirements of the skilled migrant tier. It is a criterion which must be satisfied. The wording of paragraph 82(a)(i) is misleading, because UKBA's list of skilled occupations includes skilled occupations of both kinds. As it includes those which are below N/SVQ level 3 as well as those above, Mr Alvi's occupation as an assistant physiotherapist would appear – if the paragraph is to be taken at its face value – to satisfy the requirement. It also leaves it open to the Secretary of State to vary the level at which the occupation will satisfy the requirement, and to vary the descriptions of the jobs that are to be taken to be above or below that level, without disclosing those changes to Parliament.

62. The level of skill required for a skilled tier migrant is not just a technicality. It is a means of controlling the numbers of skilled migrants who may be given leave to enter or remain in this country. It is not inconceivable that from time to time it may be thought necessary for the level to be changed. I can see no good reason why the simple but very important statement that the preface to the Occupation Codes of Practice sets out could not have been included in paragraph 82(a)(i). I would hold that it should have been and that, because this statement has not been laid before Parliament, it is not open to the Secretary of State to rely on it as a ground for rejecting Mr Alvi's application. For the same reason, as the detailed information about which occupations are to be taken to be at or above the relevant skill level is open to change at the discretion of the Secretary of State, these details – and any changes that may be made to them in the future too – must be laid before Parliament.

63. Various expressions have been used to identify the test which should be used to determine whether or not material in the extraneous document is a rule which requires to be laid before Parliament. It is not easy to find a word or phrase which can be used to achieve the right result in each case. I agree with Lord Dyson

(see para 88, below) that it is not helpful to say that there is a spectrum. A more precise expression is needed. The word "substantive" was identified by Foskett J in *English UK* and by Singh J in *Ahmed*. But even this word needs some explanation. I would prefer to concentrate on the word "rule" which, after all, is the word that section 3(2) uses to identify the Secretary of State's duty and to apply the test described in para 57, above. The Act itself recognises that instructions to immigration officers are not to be treated as rules, and what is simply guidance to sponsors and applicants can be treated in the same way. It ought to be possible to identify from an examination of the material in question, taken in its whole context, whether or not it is of the character of a rule or is just information, advice or guidance as to how the requirements of a rule may be met in particular cases.

64. I see no escape from the conclusion that the question whether or not material in an extraneous document is a rule, or a change in the rules, will have to be determined on the facts of each case. But I hope that the test which we are suggesting will enable those who are responsible for the points-based scheme to identify which of the statements in the Occupation Codes of Practice or their current equivalent need to be included in the Immigration Rules, and to ensure that anything that is of that character which it is thought necessary to include in the Codes or any other extraneous document in the future will be disclosed in that way to Parliament also. But the fact that Lord Dyson and I differ as to whether changes in the list of newspapers, journals and websites where advertisements may be placed for the purposes of the resident labour test are changes to the rules may serve as a warning that the wiser course is to assume that everything that is contained in a rule-making document such as that which is before us in this case is caught by the requirement that section 3(2) sets out, and that any changes to any of the material that it contains must be laid before Parliament.

65. I am conscious of the burden which this finding will impose on the Scrutiny Committee: see para 35, above. The volume of the material it will have to look at, within what is necessarily a very short timetable, may be such as to defeat the object of section 3(2) of the 1971 Act which must be taken to have been to ensure that the rules, and any changes to them, were subject to effective scrutiny. The Committee cannot be expected to look at every detail. The greater the detail, the greater the risk that matters of real importance will be overlooked and not drawn to the House's attention. The situation that has created this problem is so far removed from what it was in 1971 that one wonders whether the system that was designed over forty years ago is still fit for its purpose today. The procedure by which material is laid before Parliament requires hard copies to be laid in each House and, as proof of laying is an essential requirement, this is probably unavoidable. But there are obvious benefits in making use of the ability of the UKBA website to disseminate changes to the rules at minimum cost in a way that is immediately accessible. I hope that it may be possible for a method to be devised of laying

changes which require reference to be made to extensive material in very large documents which can be accessed and searched electronically that will keep the number of documents to be laid and circulated in hard copy in each House each time a change is made to an absolute minimum. But any changes to the system must be a matter for Parliament.

Conclusion

66. The test to which I refer in para 57, above should be applied in preference to those described by Sedley LJ in *Pankina v Secretary of State for the Home Department* [2011] QB 376, para 33 and the subsequent cases referred to in paras 46-52. In my opinion the Court of Appeal was right to hold that Mr Alvi succeeds in his challenge to the Secretary of State's decision of 9 February 2010. The statements in the Code that all qualifying jobs must be skilled at N/SVQ level 3 or above and that the job of a physiotherapy assistant is below that level both set out rules that ought to have been laid before Parliament under section 3(2) of the 1971 Act. As they were not laid, it was not open to the Secretary of State to rely on them as part of the Immigration Rules. I would dismiss this appeal.

LORD DYSON

67. I agree with Lord Hope that this appeal should be dismissed.

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

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

> changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution…."

69. The question that lies at the heart of this appeal is: what is a "rule laid down by the Secretary of State as to the practice to be followed in the administration of this Act"? This seemingly simple question of statutory interpretation has given rise to much difficulty and has been answered in different ways in a number of recent court decisions. Section 33(1), which defines "immigration rules" as "the rules for the time being laid down as mentioned in section 3(2) above" does not shed any light on the problem.

The statutory scheme

70. The Secretary of State for the Home Department is charged with maintaining immigration control: see sections 1(4) and 3(2) of the 1971 Act. She is responsible for granting or refusing leave to enter and leave to remain in the United Kingdom for those who do not have the right of abode here. Section 4(1) provides that the power under the 1971 Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers and the power to give leave to remain or vary any leave shall be exercised by the Secretary of State. Part 1 of Schedule 2 to the 1971 Act contains general provisions in relation to immigration officers. Paragraph 1(3) provides that, in the exercise of their functions under the 1971 Act, immigration officers "shall act in accordance with such instructions (not inconsistent with the immigration rules) as may be given them by the Secretary of State".

71. In March 2006, "A Points-Based System: Making Migration Work for Britain" (CM 6741) was published. This set out proposals to bring in a points-based system for non-EEA nationals wishing to work or study in the United Kingdom. It specified five Tiers of workers, including Tier 1 (highly skilled individuals) and Tier 2 (skilled workers with a job offer to fill gaps in the United Kingdom labour force). Applications for leave to enter and leave to remain under this points based system are required to meet three sets of criteria. These are (i) the requirements of the specific rule itself (including the number of points necessary for a successful application); (ii) the requirements of specific appendices to the rules (Appendix A, for example, details the general attributes required to qualify under each Tier); and (iii) the requirements set out in material outside the rules (such as Codes of Practice).

72. Central to the new points-based system is the idea that those who benefit directly from migration, namely employers of migrants, should play their part in ensuring that the system is not abused. A system of sponsorship has therefore been

introduced whereby all migrants, with the exception of those in Tier 1, must be sponsored by an employer, educational institute or certain other bodies.

73. On 6 May 2008, the Secretary of State published a "Statement of Intent" for Tier 2 of the points-based system which explained how it was intended that Tier 2 would operate. All Tier 2 migrants would be required to have a certificate of sponsorship issued by a prospective employer who was a licensed sponsor. Migrants needed to obtain a total of 70 points to obtain entry clearance or leave to remain within Tier 2. The Statement of Intent provided that a job must be at National Vocational Qualification ("NVQ") or Scottish Vocational Qualification ("SVQ") Level 3 or above to be considered for Tier 2. The Statement of Intent provided that the United Kingdom Border Agency ("UKBA") would publish a list of occupations which were at or above NVQ/SVQ level 3 and a list of those which were below those standards. It also stated that the migrant had to be paid at the United Kingdom "appropriate rate" for the occupation.

74. On 17 September 2008, the Secretary of State published on the UKBA website Codes of Practice for Tier 2 Migrants. These are very detailed documents. They are divided into sections. Occupations are classified by reference to the Standard Occupational Classification 2000 ("SOC"). Each code includes (i) a list of skilled jobs at NVQ/SQV level 3 or above in each occupation for which sponsors are permitted to issue a certificate of sponsorship; (ii) the minimum appropriate salary rates; and (iii) the acceptable methods for meeting the resident labour market test. The Codes of Practice have been revised from time to time, but the revisions are not material to the issues that arise on this appeal.

75. At the time of Mr Alvi's application for leave to remain, an occupation was regarded as "skilled" if all jobs in that SOC code were at NVQ/SVQ level 3 or above. An occupation was "borderline" if some jobs in that SOC code were at NVQ/SVQ level 3 or above and some were below that level. An occupation was "lower-skilled" if there were no jobs in that SOC code at NVQ/SVQ level 3.

76. Section Q of the Codes of Practice deals with human health and social work activities. It identifies those health/social work roles that are skilled, borderline and lower-skilled. For those roles that are borderline, section Q indicates which roles are at or above NVQ/SVQ level 3 and which are not. Physiotherapists have the SOC code 3221. The relevant page states: "this page explains the skill level and appropriate salary rate for physiotherapists, and tells you how to meet the resident labour market test". Under the heading "Skill level" it states that physiotherapy assistants and technical instructors are below NVQ/SVQ level 3. Under the heading "Appropriate salary rate", it states "the job must be paid the minimum salary below" and the minimum rates are specified for the various jobs. Under the heading "Resident labour market test", it states that the market must have been

tested by means of advertisement in Jobcentre Plus, national newspapers, specified professional journals and one of a number of websites.

77. On 4 November 2008, the Secretary of State laid before Parliament a Statement of Changes in Immigration Rules (HC 1113). This inserted into Immigration Rules (HC 395) new paragraphs 245ZB-245ZH in relation to Tier 2 Migrants. The key provision for present purposes is paragraph 245ZF which is headed "Requirements for leave to remain" and provides:

> "To qualify for leave to remain as a tier 2 Migrant under this rule, an applicant must meet the requirements listed below. If the applicant meets those requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.
>
> Requirements:
>
> ………….
>
> (e) if applying as a Tier 2 (General) Migrant…….the applicant must have a minimum of 50 points under paragraphs 59 -84 of Appendix A."

78. Relevant details of Appendix A are set out by Lord Hope at paras 14 and 15 of his judgment.

The issue

79. Mr Alvi's application for leave to remain was refused because his job, as a physiotherapy assistant, was shown as an occupation that was below NVQ/SVQ level 3 and was therefore not included in the UKBA's list of skilled occupations. This meant that he could not satisfy the requirements of paragraph 245ZF because he could not obtain 50 points under paragraphs 59-84 of Appendix A. The issue is whether the statement in section Q of the Codes of Practice that a physiotherapy assistant is below NVQ/SVQ level 3 (and therefore attracts no points) is a rule within the meaning of section 3(2) of the 1971 Act.

Discussion

80. The primary submission on behalf of the Secretary of State is that there is no statutory duty to make immigration rules and lay them before Parliament. I would reject this for the reasons that I have stated in my judgment in *Munir and Rahman v Secretary of State for the Home Department* [2012] UKSC 32 at paras 27 to 29.

81. Mr Swift's next submission is that section 3(2) of the 1971 Act is not prescriptive as to the particular content of the immigration rules. He says that there is nothing in the language of the subsection that requires the rules to be an exhaustive statement of the criteria affecting the status and entitlement of individuals. It is a matter for the Secretary of State in the exercise of her discretion to decide what to include in the rules and what to exclude from them. This exercise of discretion is subject only to the control of Parliament itself and to court challenge on standard public law grounds.

82. I cannot accept this submission either. As I said in *Munir,* the whole point of section 3(2) is to give Parliament a degree of control over the practice to be followed by the Secretary of State in the administration of the 1971 Act for regulating immigration control. If she were free not to lay down rules as to her practice, the plain purpose of section 3(2) would be frustrated. Parliament has required of the Secretary of State that she lay *all* rules as to her practice, although the content of the rules is a matter for her. As Lord Windelsham said in the passage that I quoted in para 29 of my judgment in *Munir,* migrants are entitled to know under what rules they are expected to act and it would be impossible for the immigration service to operate otherwise than on the basis of published rules.

83. Nevertheless, section 3(2) raises a difficult question of interpretation. What is a rule "as to the practice to be followed in the administration" of the 1971 Act? Parliament drew a distinction between rules within the meaning of section 3(2) and "instructions (not inconsistent with the immigration rules)" given to immigration officers by the Secretary of State within the meaning of para 1(3) of Part 1 to Schedule 2 to the 1971 Act. Rules cannot, therefore, encompass the instructions and guidance issued to case-workers and other staff to assist them with processing applications, although in a sense these documents describe some of the practice followed in the administration of the 1971 Act. But the statute itself recognises that instructions to immigration officers as to how they are to apply the rules are different from the rules themselves. The recognition that the 1971 Act distinguishes between rules and instructions to immigration officers does not, however, shed light on where the statute draws the line between them. Various attempts have been made in recent cases to define rules. Lord Hope has referred to a number of the cases at paras 43 to 52 above.

Solutions suggested in other cases

84. In *Pankina v Secretary of State for the Home Department* [2011] QB 376, Sedley LJ said that "criteria affecting individuals' status and entitlements" were rules within the meaning of section 3(2) of the 1971 Act, whereas "the means of proving eligibility" were not: see paras 6 and 33. In *R (English UK) v Secretary of State for the Home Department* [2010] EWHC 1726 (Admin), Foskett J said that the ratio of *Pankina* was that a provision that reflects a "substantive criterion for eligibility for admission or leave to remain" is a rule (para 59). In *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2010] EWHC 3524 (Admin), Sullivan LJ said that there was a spectrum and that, in enacting section 3(2), Parliament did not intend every alteration to the Secretary of State's practice, however minor, to be subject to its scrutiny (para 42). He suggested that the UKBA's list of skilled occupations was at the lower end of the spectrum, such that alterations in them would not be subject to section 3(2).

85. In the present case, Jackson LJ said that there was a case for saying that the specification of particular jobs as falling within paragraph 82(a)(i) of Appendix A is a "substantive" matter rather than a "minor" alteration to the Secretary of State's practice. But he said that it was not necessary to explore that question, since the "governing principle" that all jobs which qualify under section Q are at or above NVQ/SVQ level 3 was a "substantive matter" which had to be set out in the immigration rules.

86. In *R (Ahmed) v Secretary of State for the Home Department* [2011] EWHC 2855 (Admin), Singh J said at para 41:

> "In essence the distinction which both as a matter of principle seems sensible and is supported by the authorities is that between (i) the substantive requirements which an applicant has to meet in order to obtain leave to enter or leave to remain under the immigration rules and (ii) the means of proving such eligibility: see paragraph 6 of Sedley LJ's judgment in *Pankina* itself. The former can only be changed by amending the immigration rules and in accordance with the negative resolution procedure. The latter need not be and can properly be the subject of policy guidance. "

87. In each of these cases, the court has attempted to amplify the meagre definition of a rule which Parliament has provided. This is no easy matter. The court has to do its best to interpret section 3(2) in a sensible manner which gives effect to what Parliament must be taken to have intended. I think that there are some limited clues in the statute itself. First, the word "rules" is not qualified. Parliament has not referred to "principal rules" or "rules containing the governing principles". It has simply referred to "the rules". Secondly, the fact that section 3(2) refers to rules "including any rules as to the period for which leave is to be

given and conditions to be attached in different circumstances" suggests that Parliament was interested in some aspects of detail and not merely broad principles. Thirdly, the fact that the laying of the rules was to be subject to the negative resolution procedure also suggests that Parliament contemplated that some of the rules might be relatively minor. If the rules were limited to important statements of general principle, it would have been surprising if Parliament had been willing to agree to the negative resolution procedure.

88. It goes without saying that the principle *de minimis non curat lex* (the law is not concerned with very small things) applies in the present context as in most others. Leaving that principle on one side, however, I do not consider that the metaphor of the spectrum is apposite here. It connotes some form of sliding scale. But how does one decide where on the spectrum a particular requirement lies? Where did Parliament intend the boundary to be drawn between a requirement that is a rule and one that is not? These questions admit of no obvious answer. The difficulty is well illustrated by the fact that in the *JCWI* case Sullivan LJ suggested that the list of skilled occupations was at the lower end of the spectrum (and not subject to section 3(2)). This is to be contrasted with the statement by Jackson LJ (at para 40) in his judgment in the present case that, "despite the observations of Sullivan LJ", there was "a case for saying" that the specification of particular jobs as falling within paragraph 82(a)(i) of Appendix A was a "substantive" rather than a "minor" alteration to Secretary of State's practice which (inferentially) was towards the higher end of the spectrum. I can find no warrant in the statute for a spectrum with all its attendant uncertainties.

89. But what about the distinction between (i) "substantive" criteria affecting individuals' status and entitlements and (ii) the evidential means by which those criteria are satisfied? At first sight, this seems to have much to commend it. The distinction between a substantive criterion and the means by which it is satisfied seems clear enough; and it is tempting to say that Parliament is unlikely to have intended that it should be concerned with matters of evidence at all. But I do not think that the distinction is as clear-cut as it might at first sight appear to be. I would readily accept, as a general proposition, that there is conceptual difference between a substantive requirement and the means by which it is satisfied. But the efficacy of the distinction depends on there being a clear definition of a substantial requirement. That is what is missing here. The 1971 Act contains no definition. In my view, without the fixed point of a defined substantive–requirement, the suggested definition of a rule becomes a chimaera.

90. Take the present case. What is the substantive requirement that Mr Alvi had to meet in order that his application should succeed? On one view, it is that he had to score 50 points for attributes; and the requirement that the job that he was to be employed to do was shown on SOC 3221 as at or above NVQ/SVQ level 3 was merely the evidential means by which that substantive requirement was satisfied.

But on another view, what Mr Alvi had to do in order to score 50 points was itself a substantive requirement. If the requirement that the job is at or above NVQ/SVQ level 3 is a substantive requirement, then it is difficult to see why the same cannot also be said of the statement at SOC 3221 that certain classes of physiotherapist are at or above that level and others (including physiotherapist assistants) are not.

91. As regards the appropriate salary rate, the same question arises. Is the minimum salary specified at SOC 3221 a substantive requirement that the migrant has to meet or is it merely the evidence required to satisfy the substantive requirement of entitlement to 50 points? On the other hand, as regards the payment of the appropriate salary, the requirement of proof by the production of a Certificate of Sponsorship Checking Service entry in accordance with paragraph 82(b) of Appendix A to rule 245ZF clearly is an evidential requirement. It is somewhat ironic that this requirement *is* in the immigration rules.

92. But for the reasons that I have given, I do not find that the suggested dichotomy between (i) a substantive requirement and (ii) the evidential means of meeting it is a satisfactory basis for deciding what is and what is not a rule within the meaning of section 3(2).

My preferred solution

93. So far, I have engaged in what may appear to be the rather negative exercise of explaining why I have difficulty in accepting the solutions that have been put forward hitherto. I accept that a line has to be drawn somewhere. The court has to do its best to provide a solution which (i) is consistent with such clues as are to be found in the statute, (ii) is not administratively unworkable and (iii) is reasonably certain and easy to apply, thereby minimising the risk of unwelcome litigation.

94. In my view, the solution which best achieves these objects is that a rule is any requirement which a migrant must satisfy as a condition of being given leave to enter or leave to remain, as well as any provision "as to the period for which leave is to be given and the conditions to be attached in different circumstances" (there can be no doubt about the latter since it is expressly provided for in section 3(2)). I would exclude from the definition any procedural requirements which do not have to be satisfied as a condition of the grant of leave to enter or remain. But it seems to me that any requirement which, if not satisfied by the migrant, will lead to an application for leave to enter or remain being refused is a rule within the meaning of section 3(2). That is what Parliament was interested in when it enacted section 3(2). It wanted to have a say in the rules which set out the basis on which these applications were to be determined.

95. It may be said that Parliament would not have been interested in scrutinising details such as increases in the appropriate salaries stated in SOC 3221 or changes in the requirements of the resident labour test or even changes in what constitutes a job at or below NVQ/SVQ level 3. I do not think that we can be confident as to what Parliament would have said if it had foreseen the possibility that immigration control would become as complicated as it has become. We know that Parliament wanted to control the making of immigration rules. The most important rules are those by which applications for leave to enter and remain are determined. I see no reason to think that Parliament would not have been interested in having the opportunity to scrutinise the critical aspects of those rules, in particular the provisions which set out the criteria which determine the outcome of applications.

96. It seems to me that this approach best reflects what Parliament must be taken to have intended when it enacted section 3(2). There is no evidence that it would be unduly burdensome, let alone administratively unworkable for the Secretary of State. It causes her no administrative difficulty to make the most detailed rules and lay them before Parliament. I acknowledge the burdens that would be imposed on the Scrutiny Committee to which Lord Hope refers at para 65. It is, however, a striking fact that the immigration rules are already hugely cumbersome. The complexity of the machinery for immigration control has (rightly) been the subject of frequent criticism and is in urgent need of attention. But that is not relevant to the present issue.

97. If the boundary is drawn where I have suggested, that should introduce a degree of certainty which ought to reduce the scope for legal challenges. The key requirement is that the immigration rules should include all those provisions which set out criteria which are or may be determinative of an application for leave to enter or remain.

98. I would conclude by saying that, if my interpretation of section 3(2) is unacceptable to the Secretary of State, she can seek to amend the 1971 Act and introduce a clear expanded definition of what constitutes a rule.

Guidance and rules

99. It was no part of Mr Swift's case that the key distinction is between a rule and guidance or that, for the most part, the content of the Codes of Practice is not rules but merely guidance which is primarily addressed to the sponsor and not the migrant. But as Lord Hope points out at para 56, sponsors and those whom they are sponsoring need guidance as to what the qualifications are and how they are to meet the criteria that will be applied in determining the application. As he says,

some of the content of the Codes is "just guidance" and it is primarily addressed to the sponsor. The sponsor needs to know how he is to fill in the certificate of sponsorship and he needs information about the minimum rate of pay that will be regarded as appropriate for the purposes of para 82(a)(ii) of the Appendix and so on.

100. But even if it is right to regard what appears in the Codes of Practice as guidance to a sponsor on how to meet the criteria that are applied in determining a migrant's application, it also sets out the criteria that the migrant must satisfy if his application is to succeed. These are requirements which are rules within the meaning of section 3(2) of the 1971 Act. Paragraph 245ZF of the Immigration Rules is headed "requirements for leave to remain". It identifies the requirements that the migrant must meet if his application is to succeed. Sub-paragraph (e) provides that an applicant for leave to remain "must have a minimum of 50 points under paragraphs 59 to 84 of Appendix A". Paragraph 59 states that an applicant must score 50 points for attributes. Para 82 of Appendix A provides:

> "No points will be awarded for sponsorship unless:
>
> (a) (i) the job that the Certificate of Sponsorship Checking Service entry records that the person is being sponsored to do appears on the United Kingdom Border Agency's list of Skilled occupations.
>
> ……
>
> (b) ….the salary that the Certificate of Sponsorship Checking Service entry records that the migrant will be paid is at or above the appropriate rate for the job as stated in the list of skilled occupations referred to in (a)(i)"

101. It is to the relevant Codes of Practice that one must go to find what these requirements are. Para 82 is not expressed in the language of guidance, unless the word "guidance" is used to mean no more than that the statements provide information to sponsors as to what they have to do. Rather, it is expressed in mandatory terms: unless the requirements are met, the applicant will be awarded no points and his application will be refused.

102. I would, therefore, hold that the statement in the first box in SOC 3221 that a physiotherapy assistant is below NVQ/SVQ level 3 is not guidance. Read in conjunction with para 82(a)(i) of Appendix A, it is an unequivocal statement that a migrant who seeks leave to enter or remain for the purposes of employment as a physiotherapy assistant will be awarded no points and, on that account, his application will be refused. Similarly, para 82(b) of Appendix A states explicitly that no points will be awarded unless the salary that the certificate of sponsorship states that the migrant will be paid is at or above the "appropriate rate for the job

as stated in the list of skilled occupations". The appropriate rate is the minimum salary set out in SOC 3221. I agree with Lord Hope (paras 59 to 61) that both of these requirements are rules within the meaning of section 3(2) of the 1971 Act.

103. But Lord Hope says at para 58 that information as to where to look to assess the state of the resident market is guidance and not a rule within the meaning of section 3(2). He says that "it tells the sponsor what procedure he should follow, and the kind of evidence he should examine, in order to fulfil his duties as sponsor to test the resident labour market in cases where that test must be satisfied". But he accepts that the requirement to test the resident labour market is a rule as is the requirement that the sponsor should give details of where and when the post was advertised. Nevertheless, he says, changes in the list of newspapers, journals and websites are not changes in the rules.

104. I respectfully disagree. As Lord Hope says (para 14), the requirement to meet the resident labour market test does not apply to Mr Alvi. That is because he had previously been granted leave to remain as a qualifying work permit holder and was therefore subject to Table 11 in Appendix A. What Lord Hope says at para 58 is, however, applicable to migrants who are subject to Table 10.

105. Para 63 of Appendix A provides "in order to obtain points under any category in the 'Sponsorship' column, the applicant will need to provide a valid Certificate of Sponsorship reference number for sponsorship in the sub-category of Tier 2 under which he is applying". Para 71 provides "in order for the applicant to be awarded points for a job offer that passes the resident labour market test, the Certificate of Sponsorship Checking Service entry must indicate that the Sponsor has met the requirements of that test, as defined in guidance published by the United Kingdom Border Agency, in respect of the job". Thus, in order to obtain any points at all, an applicant who is subject to Table 10 must provide a valid certificate of sponsorship; and the certificate must indicate that the sponsor has met the requirements of the resident labour market test as defined in the published guidance. This understanding is supported by the statement in the Codes of Practice (issued on 17 September 2008) under the heading "Occupation codes of practice under the skilled migrant tier":

> "Before you can sponsor a skilled migrant, you need to check that the job you are sponsoring them to do meets the *requirements* of the skilled migrant tier:
>
> - The job must be skilled at N/SVQ level 3 or above;
> - The job must be paid at the appropriate rate or above;
> - You must normally have carried out a resident labour market test for the job before sponsoring a skilled migrant.

> This section contains codes of practice for every occupation. The codes of practice give information on skill levels and appropriate rates, and advise on where to advertise the job. This is so that you can check that the job meets these *requirements*. If the job does not meet these *requirements* you cannot issue a certificate of sponsorship….." (emphasis added).

106. In my view, it follows that any migrant to whom Table 10 applies must meet the requirements of the resident labour market test as a condition of being granted leave to enter or remain on an application of the test that I have suggested at 94 above. This means that these requirements are rules within the meaning of section 3(2) and any changes in the requirements are changes in the rules. Since the requirements include advertising the post in the specified newspapers, journals and websites, it must follow that any changes in these requirements are changes in the rules. In other words, I agree with Lord Hope that a failure to give details of whether and when the post was advertised "will lead to the refusal of the application because the *rule* has not been satisfied" (emphasis added). This is a straightforward application of the test that I have suggested. The inevitable consequence of this is that any changes in the requirements as to the newspapers, journals and websites in which a post must be advertised is a change in the rules.

The present case

107. Lord Hope has set out the relevant part of the refusal letter at para 3 above. The ground of refusal was that the Code of Practice, at the time of Mr Alvi's application, stated that his job role as a physiotherapy assistant was below the NVQ/SVQ level 3. For that reason, he had not been awarded any points. In the Court of Appeal, Jackson LJ said at para 40 that "the governing principle is that all jobs which qualify under section Q are at or above NVQ or SVQ level 3". This governing principle was, therefore, a rule within the meaning of section 3(2).

108. For the reasons that I have given, I would dismiss this appeal on the grounds that the rules should have specified that a physiotherapy assistant was below NVQ/SVQ level 3 and they did not do so.

LORD WALKER

Disposal of the appeal

109. This is an important and difficult case touching on matters of deep and widespread public concern. I am grateful to Lord Hope and Lord Dyson for the close analysis and insights in their judgments. On the central points in the case, on which Lord Hope and Lord Dyson agree, I respectfully concur and have little to add. I also agree with Lord Hope's observations (paras 26 to 33) on the subject of the prerogative. Lord Hope and Lord Dyson differ on the issue of the resident labour market test. On that issue I prefer to express no opinion. I regard it as close to the borderline, and it is not necessary to the disposal of the appeal. For my part I hope that Parliament may soon have the opportunity of considering whether the simple terms of section 3(2) of the Immigration Act 1971 are still adequate, 40 years on, to cope with the problems of immigration control as they are today.

110. I would therefore dismiss the appeal. I wish to add a few general observations. They are not intended to cut down or qualify my agreement with Lord Hope and Lord Dyson on the central points on which they agree.

Flexibility or predictability?

111. This appeal is an unusually stark illustration of the tension, in public law decision-making, between flexibility in the decision-making process and predictability of its outcome. Both are desirable objectives. But the more there is of one, the less room there is for the other, and getting the balance right is often difficult. In recent decades there has been a marked tendency of government to favour predictability over flexibility. The points-based system for controlling immigration for purposes of employment is a paradigm example. Other examples that come to mind are the statutory rules as to child tax credit, recently considered by this Court in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18 [2012] 1WLR 1545 and the old system of child support, considered by the House of Lords in *Smith v Smith* [2006] UKHL 35 [2006] 1 WLR 2024.

112. As Lord Hope says in his judgment (para 42), there is much in this tendency that is to be commended. The pressure under which the system of immigration control now operates makes it desirable that outcomes of decision-making should be as predictable as possible, and the need for detailed consideration of individual cases reduced. But this comes at a considerable price in terms of rigidity and complexity.

113. Had Parliament foreseen this development, it might well have required the immigration rules to set out (a possibility to which Lord Dyson refers in para 87 of his judgment) only the "principal rules" or "the governing principles", with more detailed rules and guidance to be promulgated in some other way, without the need for their being laid before Parliament. But as it is such limited clues as section 3(2) gives tend to point the other way.

Rules, guidance and evidence

114. I do not find it particularly helpful to engage on the exercise of construing the word "rules" in section 3(2). That there is a difference in the general sense conveyed by "rules" (on the one hand) and "guidance" (on the other hand) is obvious. The general sense of "rules" is prescriptive and mandatory; that of "guidance" more open-textured and advisory. But there is no clear dividing-line between them. Lawyers and judges are very familiar with rules of all sorts – immigration rules, prison rules, civil procedure rules, insolvency rules, to mention but a few. Such rules may provide for the exercise of discretion, either generally or in exceptional cases. They may contain mandatory or non-mandatory procedural requirements or recommendations.

115. The inclusion of non-mandatory or advisory material cannot affect the validity of rules, although it may make them longer (and, possibly, less clear, in that the reader may have to work out whether some provision is mandatory or not). But the omission of a mandatory provision – that is, a condition which an applicant must satisfy if the application is to succeed – would be a serious defect. In this case, as we all agree, the immigration rules laid before Parliament should have specified (as they now do) that the position of physiotherapy assistant was below the level of NVQ/SBQ3 and so was not regarded as a skilled job.

116. Sedley LJ (in *Pankina v Secretary of State for the Home Department* [2011] QB 376) and Singh J (in *R(Abdullah Bashir Ahmed) v Secretary of State for the Home Department* [2011] EWHC 2855 (Admin)) have drawn a distinction between "(i) the substantive requirements which an applicant has to meet in order to obtain leave to enter or leave to remain under the immigration rules and (ii) the means of proving such eligibility" (Singh J in *Ahmed,* para 41, paraphrasing Sedley LJ in *Pankina*, para 6). That distinction can easily be recognised in much earlier versions of the immigration rules. To take a random example, the original Statement of Immigration Rules for Control after Entry (EEC and other non-Commonwealth Nationals) laid before Parliament on 25 January 1973 has three successive paragraphs which repeatedly refer to matters on which evidence is required. Para 19 (businessmen and self-employed persons) provides that persons admitted as visitors may apply to set up in business:

> "Permission will depend on a number of factors, including evidence that the applicant will be devoting assets of his own to the business, proportional to his interest in it, that he will be able to bear his share of any liabilities the business may incur, and that his share of its profits will be sufficient to support him and any dependants. The applicant's part in the business must not amount to disguised employment, and it must be clear that he will not have to supplement his business activities by employment for which a work permit is required. Where the applicant intends to join an existing business, audited accounts should be produced to establish its financial position, together with a written statement of the terms on which he is to enter into it; evidence should be sought that he will be actively concerned with its running and that there is a genuine need for his services and investment."

Para 20 provides for the position of someone such as a writer or artist who may be granted an extension of stay "if the applicant can produce satisfactory evidence that he is [without taking work for which a permit is necessary] supporting himself and his dependents." Para 21 provides for a woman entering the United Kingdom for early marriage to a man settled here. If the marriage does not take place within three months "an extension of stay is to be granted only if good cause is shown for the delay and there is satisfactory evidence that the marriage will take place at an early date."

117. When the immigration rules were in that form it would have been perfectly lawful, and of practical utility, for the Secretary of State to have issued guidance as to the sort of evidence which would normally be regarded as adequate. But the new points-based system is aimed at eliminating any need or possibility of further evidence being produced in support of an application. In this area at least, the aim is for the decision-making process to involve as little discretion or judgment as possible. In consequence the distinction between substantive requirements and evidence becomes largely irrelevant, as Lord Dyson illustrates (paras 89-92).

118. It might be possible to imagine a system of immigration control with the same underlying policy as the present points-based system, but with the essential elements expressed in general terms of one or more of

(i) job skills;

(ii) appropriate rate for the job;

(ii) shortage occupations; and

(iv) resident labour market test,

underpinned by non-mandatory guidance as to the evidence to satisfy the requirements promulgated in a form which was not part of the immigration rules and was not laid before Parliament. That would amount to “the means of proving such eligibility” – that is, meeting a requirement expressed in general terms. Such a system could have the advantage of providing flexibility in relation to variations in the employment market as between different industries and different regions. But it would be less easy to administer and less predictable in its decision-making. At present the position is that these four general requirements (or such of them as are relevant in a particular case) are to be conclusively determined by a detailed code which has not been laid before Parliament, and which the Secretary of State can and does change from time to time as she thinks fit. For that reason the appeal must be dismissed.

LORD CLARKE

119. I agree that this appeal should be dismissed. The question is what is meant in section 3(2) of the 1971 Act by the expression “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 relevant persons. I agree with Lord Hope and Lord Dyson that in this context a rule is something different from guidance but the question remains what is a rule. A statement which is referred to as guidance may be a rule within the meaning of section 3(2).

120. It seems to me that, as a matter of ordinary language, there is a clear distinction between guidance and a rule. Guidance is advisory in character; it assists the decision maker but does not compel a particular outcome. By contrast a rule is mandatory in nature; it compels the decision maker to reach a particular result. I agree with Lord Dyson’s views expressed at paras 84 to 92 that none of the tests so far suggested in the cases is of any real assistance. In particular, the distinction between (i) substantive criteria and (ii) the evidential means by which those criteria are met is not a satisfactory basis for deciding what is and what is not a rule within the meaning of section 3(2).

121. Lord Dyson uses different language in paras 94 and 97 to identify what is meant by a rule. In para 94 he says that

> "a rule is any requirement which a migrant must satisfy as a condition of being given leave to enter or remain, as well as any provision 'as to the period for which leave is to be given and the conditions to be attached in different circumstances'."

At paragraph 97 he summarises the test of a rule as including

> "all those provisions which set out criteria which are or may be determinative of an application for leave to enter or remain".

As I see it, there is no distinction between those two formulations of the principle.

122. In my view this is a principled, clear and workable approach. The touchstone is criticality: if a change in practice has the potential to determine the outcome of any application for leave to enter or remain then it must be laid before Parliament. Section 3(2) was designed to ensure effective Parliamentary oversight of the Secretary of State's power to promulgate rules regulating the power to grant leave to enter and leave to remain. Lord Dyson's approach accords with that aim.

123. I entirely agree with Lord Dyson's analysis in paras 99 to 106 under the heading "G*uidance and rules*". In para 102 he expressly agrees with Lord Hope (at paras 59 to 61), for essentially the same reasons, that the list of minimum salaries set out in the Codes of Practice and the statements that the job must be skilled at N/SVQ level 3 or above and that the job of a physiotherapy assistant is below that level are rules within the meaning of section 3(2) of the Act. It follows that I agree that the appeal must be *dismissed*.

124. However, Lord Hope and Lord Dyson do not agree that the requirements of the resident market test are rules: cf Lord Hope in paras 57 and 58 and Lord Dyson in paras 103 to 106. I respectfully prefer the views of Lord Dyson to those of Lord Hope. In particular, I agree with Lord Dyson's conclusions in para 106: (a) that any migrant to whom Table 10 applies must meet the requirements of the resident labour market test as a condition of being granted leave to enter or remain, (b) that those requirements include advertising the post in the specified newspapers, journals and websites, (c) that, as Lord Hope puts it at para 58, a failure to give details of whether and when the post was advertised will lead to the refusal of the application and (d) that it follows that a straightforward application of the criticality test leads to the conclusion that a change in the requirements as to the newspapers, journals and websites in which a post must be advertised is a change in the rules and must be laid before Parliament under section 3(2). Finally, I agree

with the conclusions and reasoning to the same effect set out by Lord Wilson at para 130.

125. I would only add that it was not suggested that a case involving the requirements of the resident labour market test is analogous to a case where the rules provide for changes to be made from time to time by reference to the use of a published index, such as RPI or CPI, which is independently produced and does not depend upon an assessment by the UKBA or the Secretary of State. If the initial rules which were laid before Parliament provided for alterations by reference to such an index, there would be no problem. That is not because of the size or extent of the alteration but because an ambulatory rule in such a form would have been approved (or at least not objected to) by Parliament and any subsequent alteration could be objectively ascertained by a reference to the index and would not be a change of rule made by the Secretary of State.

LORD WILSON

126. Under English law a "rule" can mean both a legal requirement and a particular instrument in which a legal requirement may be cast. In the crucial section 3(2) of the 1971 Act the word is used in the former sense. The early reference to "statements of the rules" makes it clear: the phrase would be tautological if the word "rules" was used in the latter sense.

127. In my view there is an unintended error on the part of the Queen's Printer in the punctuation of the crucial subsection. Its correction does not assist resolution of the task before the court but perhaps it remains worthwhile to point it out. As printed, the subsection provides that the Secretary of State "shall from time to time... lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to..." But the requirement to "lay before Parliament statements of the rules ... laid down by him" makes no sense. The comma after the phrase "changes in the rules" is in the wrong place. But, if it is moved down the sentence so that, instead, it follows the word "him", the provision makes perfect sense: the Secretary of State is then required to "lay before Parliament statements of the rules, or of any changes in the rules laid down by him, as to...".

128. Without enthusiasm I have become convinced by the reasoning of Lord Hope at para 57 and of Lord Dyson at para 97, endorsed by Lord Walker at para 109 and by Lord Clarke at para 122, that the rules to be laid pursuant to the subsection are, in the words of Lord Dyson at para 97, "all those provisions which set out criteria which are or may be determinative of an application for leave to enter or remain". Such is, as My Lords have well demonstrated, the only principled

conclusion. My lack of enthusiasm is born only of concern at the breadth of the duty thus imposed not only upon the Secretary of State in the light of the astonishingly prescriptive system which she has chosen to introduce but also, and in particular, upon Parliament in attempting to decide, within only 40 days, whether to disapprove a rule or (as Lord Hope helpfully explains at para 35) at least to require the Secretary of State to come and discuss it.

129. I write this judgment only because of a minor difference of opinion between, on the one hand, Lord Hope at para 58 and, on the other hand, Lord Dyson at paras 104 to 106 and Lord Clarke at para 125, in respect of which Lord Walker, at para 109, prefers not to express an opinion. The difference relates to some of the material, presently included by the Secretary of State only in codes of practice and other guidance, in relation to the resident labour market test. It has nothing to do with the facts of the case. But, since I have arrived at the view – again without enthusiasm and for the same reasons – that Lord Dyson and Lord Clarke are correct, I consider that I should say so: a majority view of this court on this point will not be binding because it will not form any part of the basis of the decision but in practice it might persuade the Secretary of State of a court's likely reaction to any contrary stance.

130. (a) Everyone who is not an EEA national can apply for a visa to enter or remain in the UK on the footing that he will be in skilled employment.

(b) To obtain such a visa he is required to score a minimum number of points.

(c) His prospective employer must be a licensed sponsor.

(d) Once a licensed sponsor has issued to him a certificate of sponsorship, identified by a reference number, the applicant can apply for a visa.

(e) By reference to the certificate of sponsorship, and to a checking service entry relating to the certificate which the sponsor will have made for her benefit on-line, the Secretary of State calculates whether the applicant has scored the requisite number of points.

(f) Many applicants for leave to enter or remain as a Tier 2 (General) Migrant are required to score points on the basis that the proposed employment passes the resident labour market test, i.e. that the

sponsor has made a genuine attempt to fill the vacancy with a settled worker.

(g) The sponsor's checking service entry must indicate that the sponsor has met the requirements of that test, as defined in guidance published by UKBA in respect of the job: para 78A of Appendix A to the rules currently in force.

(h) If either the sponsor or the applicant fails to satisfy a requirement set out in UKBA guidance and referred to in the rules, the applicant fails to meet the related requirement in the rules: Rule 245A(c).

(i) Paragraph 278 of the Guidance for Sponsors in relation to Tiers 2 and 5 of the Points-Based System, effective from 6 April 2012, states:

> "You must have advertised the vacancy as set out in this guidance and in the code of practice specific to the type of job. This includes mandatory advertising in Jobcentre Plus ... for jobs under Tier 2 (General), plus one other advertising method permitted by the relevant code of practice."

(j) Paragraph 280 states that the advertisements must remain for 28 days and paragraph 282 confirms that the use of one of the permissible methods of advertising other than at the Jobcentre is mandatory.

(k) The relevant code of practice for, let us say, a physiotherapist shows that the other mandatory method of advertising must either be in a national newspaper or in one or other of two specified professional journals or on one of 16 specified websites: Skilled Occupation Code 3221.

131. I am driven to the conclusion that a failure to place the other advertisement in one of the locations specified from time to time in the guidance will lead to the failure to pass the resident labour market test; and that in this respect the guidance is therefore identifying a rule which must be laid before Parliament under the subsection.