**18 July 2012**

**PRESS SUMMARY**

**R (on the application of Alvi) (Respondent) v Secretary of State for the Home Department (Appellant) [2012] UKSC 33**
***On appeal from [2011] EWCA Civ 681***

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

## BACKGROUND TO THE APPEALS

Mr Alvi is a citizen of Pakistan. In September 2003 he entered the UK 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 and for the next four years worked here as a physiotherapy assistant. On 9 February 2009 he applied for further leave to remain in the UK. A few months prior to that date the work permit regime had been replaced by a points-based system.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 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 he 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, which 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. This was because the job title was not a job that was at or above NVQ or SVQ level 3, as stated in the relevant Codes of Practice document.

Paragraph 82 of Appendix A to the Immigration Rules states that no points will be awarded for sponsorship unless (a) the job in question appears on the UK Border Agency's list of skilled occupations, and (b) the salary that the migrant will be paid is at or above the appropriate rate for the job as stated in that list of skilled occupations. The list of skilled occupations is found in Occupation Codes of Practice published by the Secretary of State on the website of the UKBA. In some cases, the migrant must also indicate that the sponsor has met the requirements of the resident labour market test, as defined in guidance published by the UKBA.

Mr Alvi applied for judicial review of the decision, on the principal ground that 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. That section requires the Secretary of State to '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…'. His claim was dismissed on 25 October 2010 by the High Court, which concluded that it was not the intention of Parliament that the list of skilled occupations, found on the UKBA's website in the Tier 2 Codes of Practice, should be an intrinsic part of the Immigration Rules or subject to specific Parliamentary approval. On 9 June 2011, the Court of Appeal allowed Mr Alvi's appeal and quashed the Secretary of State's decision of 9 February 2010 to refuse his application for leave to remain. The Secretary of State appeals to this Court.

## JUDGMENT

The Supreme Court unanimously dismisses the Secretary of State's appeal. The main judgments are given by Lord Hope and Lord Dyson. Lord Walker, Lord Clarke and Lord Wilson give short concurring judgments.

## REASONS FOR THE JUDGMENT

The question at the heart of the 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 s3(2) of the 1971 Act **[21]**?

First, the Court rejects the submission that it is open to the Secretary of State to control immigration in a way not covered by the Immigration Rules, at common law under the Royal prerogative. The rules are not subordinate legislation. They are to be seen as statements by the Secretary of State as to how she proposes to control immigration. But the scope of her 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 **[33]**.

Everything which is in the nature of a rule as to the practice to be followed in the administration of the Act must be laid before Parliament. Resort to the technique of referring to outside documents, which the Scrutiny Committee of the House of Lords 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 **[41]**. None of the solutions offered in previous cases as to where the line must be drawn in order to determine what is or is not a rule which requires to be laid before Parliament is entirely satisfactory **[53, 92]**. A more appropriate approach is to concentrate on the word 'rule': 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 **[63]**.

Some of the content of the Occupation Codes of Practice on the UKBA's website is just guidance for sponsors and caseworkers. But the Codes also contain material which is not just guidance, but detailed information the application of which will determine whether or not the applicant will qualify **[56-57]**. 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). So a fair reading of section 3(2) requires that it be laid before Parliament **[57, 94, 97, 122, 128]**.

Whether the job that the applicant is applying for or occupies is above or below N/SVQ level 3 will determine whether or not it meets the requirements of the skilled migrant tier. It is a criterion which must be satisfied **[61]**. Therefore, 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 **[66, 102, 115]**.

The question whether or not the required salary rates and the resident labour market test are rules for the purposes of section 3(2) does not require to be decided in order to dispose of this appeal. However, the Court unanimously considers that information as to what the required salary rate is has the character of a rule. 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. It follows that the rates themselves, and any changes to them, must be laid before Parliament **[59, 102]**.

As regards the resident labour market test, where it applies, Lord Dyson, Lord Clarke and Lord Wilson consider that, since the requirements include advertising the post in the specified newspapers, journals and websites, any changes in these requirements are changes in the rules which must be laid before Parliament **[106, 124, 129]**. Lord Hope agrees that the requirement to meet the resident labour market test is a rule, as it includes the requirement that the job be advertised and that the sponsor give details of where and when the post was advertised. However, he considers that information as to where the job may be advertised does not itself amount to a rule that is determinative **[58].** Lord Walker prefers to express no opinion on this issue **[109].**

It is acknowledged that the volume of material that will now have to be laid to give effect to the court's judgment will impose a heavy burden on Parliament, and on the Secondary Legislation Scrutiny Committee of the House of Lords in particular. Methods of communication today are very different from what they were in 1971 when the statutory requirement, which involves laying hard copies of every paper that has to be laid in each House, was introduced. The court questions whether the current system, which is now over forty years old, is still fit for its purpose today. But any changes to it must be a matter for Parliament **[65, 109, 128]**.

*References in square brackets are to paragraphs in the judgment*