Trinity Term
[2013] UKSC 51
On appeal from: [2012] EWCA Civ 51; [2013] EWHC Civ 31 (Admin)

JUDGMENT

R (on the application of New London College Limited) (Appellant) *v* Secretary of State for the Home Department (Respondent)

R (on the application of West London Vocational Training College) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Hope, Deputy President
Lord Clarke
Lord Sumption
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

17 July 2013

Heard on 5 and 6 June 2013

Appellant
Manjit Gill QC
Edward Nicholson
(Instructed by Chhokar & Co)

Respondent
Jonathan Swift QC
Robert Palmer
(Instructed by Treasury Solicitors)

Intervener (Migrant's Rights Network and Joint Council for the Welfare of Immigrants)
Richard Drabble QC
Shahram Taghavi
Charles Banner
(Instructed by Charles Russell LLP)

Appellant
Zane Malik

(Instructed by Mayfair Solicitors)

Respondent
Jonathan Swift QC
Cathryn McGahey
(Instructed by Treasury Solicitors)

LORD SUMPTION (with whom Lord Hope, Lord Clarke and Lord Reed agree)

Introduction

1. The Immigration Act 1971 is now more than forty years old, and it has not aged well. It is widely acknowledged to be ill-adapted to the mounting scale and complexity of the problems associated with immigration control. The present appeals are a striking illustration of the difficulties. They concern the system for licensing educational institutions to sponsor students from outside the European Economic Area under Tier 4 of the current points-based system of immigration control. The status of a licensed sponsor is central to the operation of the points-based system for international students. It is also of great economic importance to the institutions which possess it. It enables them to market themselves to international students on the basis that their acceptance of a student will in the ordinary course enable them to enter the United Kingdom for the duration of their studies. For institutions with a high proportion of non-EEA students, the status of licensed sponsor may be essential to enable them to operate as functioning businesses.

2. New London College was a licensed Tier 4 (General) sponsor until 18 December 2009, when its licence was suspended by the Secretary of State on the ground that it was in breach of its duties as sponsor. On 5 July 2010, the Secretary of State, after considering the College's representations, revoked the licence with immediate effect. Officials of the UK Border Agency subsequently agreed to review that decision, but in light of the review the Secretary of State decided on 19 August 2010 to maintain the revocation. These decisions are challenged by the New London College by way of judicial review. The grounds of challenge with which this court is concerned succeeded in part before Wyn Williams J, but failed in the Court of Appeal.

3. In April 2010, the Secretary of State introduced a new status for Tier 4 sponsoring institutions known as Highly Trusted Sponsor status. Highly Trusted Sponsors were allowed to offer a wider range of eligible courses, including some which comprised periods of work placements as well as study. They were also exempted from certain of the administrative requirements of the scheme. The importance of the new status was much increased after a review of the Tier 4 scheme in the summer of 2011 produced substantial evidence of abuse. As a result a number of changes were announced in March 2011. One of them was that Highly Trusted Sponsor status would become mandatory for all sponsoring educational

institutions from April 2012. In the meantime there was to be a limit on the number of new students that sponsors could accept without Highly Trusted Sponsor status.

4. The West London Vocational College fell foul of this requirement. It had become a licensed sponsor on 9 March 2011, initially with a B-rating, which meant that it was a probationer licensee subject to an enhanced level of supervision. It acquired an A-rating on 13 October 2011. On 26 March 2012, it applied for Highly Trusted Sponsor status, but its application was rejected on 23 August 2012. The effect, under the recent changes, was that it could not be a licensed sponsor at all. That rejection is challenged by way of judicial review in these proceedings. The challenge failed before the Divisional Court on the ground that the main question of law at issue had been decided against it by the Court of Appeal in the New London College case. The matter comes to the Supreme Court as a leap-frog appeal under section 12 of the Administration of Justice Act 1969.

5. Much the most significant question in both cases, and the only one for which the Appellants have permission to appeal to this court, is the lawfulness of the Tier 4 Sponsor Guidance issued by the Secretary State, which sets out the conditions for the grant and retention of a sponsor licence and of Highly Trusted Sponsor status. The Appellants contend that so far as the Sponsor Guidance contained mandatory requirements for sponsors, it had to be laid before Parliament under section 3(2) of the Immigration Act 1971. It was not. It follows, say the Appellants, that the Secretary of State acted unlawfully in making decisions affecting them by reference to it. It is no longer disputed that the Secretary of State was entitled to conclude that the New London College was in breach of the sponsorship duties set out in the Guidance. Nor is it disputed that the West London Vocational Training College failed to qualify for Highly Trusted Status in accordance with the criteria stated in the Guidance.

The statutory framework

6. Section 1(2) of the Immigration Act 1971 provides that those not having the right of abode in the United Kingdom may live, work and settle there only "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 this Act." Under section 1(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 provides for the regulation and control of immigration by the Secretary of State. Section 3(1) 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 this Act." Leave to enter or remain may be given for a limited or indefinite period and subject to any or all of a number of specified conditions, including "a condition restricting his studies in the United Kingdom". Under section 4(1), the power under the Act to give or refuse leave to enter the United Kingdom is exercisable by immigration officers, who at the relevant time were employees of the UK Border Agency, an executive agency of the Home Office. The power to give or to vary leave to remain for those who are already here is exercisable by the Secretary of State. At any one time, there is a substantial body of rules, discretions and practices laid down by the Secretary of State as the ultimate administrative authority responsible for the administration of the Act. Section 3(2) of the 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..."

They are then subject to approval under the negative resolution procedure.

7. In principle, the rules in question are contained in the Immigration Rules, which in successive editions and with frequent variations have invariably been laid before Parliament. But section 3(2) is not confined to the Immigration Rules formally so called. It extends to any instrument, direction or practice laid down by the Secretary of State which (i) contains or constitutes a "rule", and (ii) deals with the practice to be followed in the administration of the Act for regulating "the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter" or the period or conditions attaching to them. In *R (Munir) v Secretary of State for the Home Department* [2012] 1 WLR 2192, this court held that the power of the Secretary of State to make or vary rules falling within this description was not an exercise of prerogative power but was wholly statutory. Under the Immigration Act, the Secretary of State has a power and duty to make

them, and once made they may be the source of legal rights. It followed that no rule falling within the description in section 3(2) was lawful unless it was laid before Parliament.

8. In *R (Alvi) v Secretary of State for the Home Department* [2012] 1 WLR 2208, which was heard with *Munir* and decided on the same day, this court considered in detail what constituted a rule dealing with the practice to be followed for regulating entry into and stay in the United Kingdom. The principal judgments were delivered by Lord Hope and Lord Dyson. They were agreed upon the basic requirement of section 3(2) and on the test for distinguishing a "rule" from something that was merely advisory or explanatory, although not on every aspect of its application to the facts of that case. Lord Walker of Gestinghorpe, Lord Clarke of Stone-cum-Ebony and Lord Wilson delivered concurring judgments agreeing with both of them on the points on which they were agreed. Lord Hope put the point in this way at para 41:

> "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."

At para 94, Lord Dyson, in a conclusion expressly endorsed by Lord Hope, at para 57, said:

> "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."

The points-based system: Tier 4 sponsorship

9. In its original form, the points-based system of immigration control came into force in November 2008. It introduced a requirement that migrants intending to enter the United Kingdom should achieve a specified minimum number of points, broadly reflecting the migrant's qualifications for admission in the relevant category (or "Tier"). Tier 4 (General), which comprised migrants aged over 16 coming to the United Kingdom for study, was implemented in March 2009. Before that, the Immigration Rules had provided that all migrants seeking to enter or remain in the United Kingdom for the purpose of study had to have been accepted for a course at an institution appearing on a Register of Education and Training Providers maintained by the Department of Education. The essential requirement of the new Tier 4 system was that the migrant should have been sponsored by an educational institution holding a sponsor's licence. The scheme was described in two documents. The first was Part 6A of the Immigration Rules, which deals with the requirements to be satisfied by migrants applying for leave to enter or remain. The second was the Tier 4 Sponsor Guidance, which dealt with the requirements to be satisfied by educational institutions seeking to qualify for a sponsor's licence. The former were laid before Parliament under section 3(2), but the latter were not. It is the absence of tacit Parliamentary approval for the Guidance which lies at the heart of these appeals.

Part 6A of the Immigration Rules

10. For present purposes the relevant versions of the Immigration Rules are those which came into force on 30 March 2009 and 5 July 2010, and applied at the time of the decisions which the Appellants challenge. They are in the same terms in every relevant respect. Paragraphs 245ZT to 245ZY relate to Tier 4 (General) migrants.

11. Paragraph 245ZV of the Rules provides:

> "To qualify for entry clearance as a Tier 4 (General) Student, an applicant must meet the requirements listed below. If the applicant meets these requirements, entry clearance will be granted. If the applicant does not meet these requirements, the application will be refused."

Paragraph 245ZX contains corresponding provisions relating to applications for leave to remain by those who have already gained entry clearance.

12. In each case, the requirements in question include at least 30 points under paragraphs 113 to 120 of Appendix A. These paragraphs provide that the 30 points are scored if (and only if) a "visa letter" or a "Confirmation of Acceptance for Studies" (or "CAS") has been issued in respect of a course of study satisfying the academic requirements set out in paragraph 120. A visa letter was an unconditional offer letter from an educational institution for the relevant course of study. In the course of 2010, the visa letter was superseded by the CAS, which performed the same function on-line. A CAS is not a physical document. It is an entry made by the sponsor in an electronic database to which the sponsor and the UK Border Agency's staff both have access. What the migrant receives is a unique reference number, which he supplies to the Border Agency on applying for leave to enter or remain in the United Kingdom, and which enables the agency to access the electronic file relating to him.

13. Paragraphs 116-117 of the Appendix A lay down conditions for the validity of a CAS. They provide, so far as relevant,

> "116. A Confirmation of Acceptance for Studies will only be considered to be valid if:
>
> ...
>
> (d) it was issued by an institution with a Tier 4 (General) Student Sponsor Licence,
>
> (e) the institution must still hold such a licence at the time the application for entry clearance or leave to remain is determined
>
> (f) it contains such information as is specified as mandatory in guidance published by the United Kingdom Border Agency.

...

117. A Confirmation of Acceptance for Studies reference number will only be considered to be valid if:

(a) the number supplied links to a Confirmation of Acceptance for Studies Checking Service entry that names the applicant as the migrant and confirms that the Sponsor is sponsoring him in the Tier 4 category indicated by the migrant in his application for leave to remain (that is, as a Tier 4 (General) Student or a Tier 4 (Child) Student), and

(b) that reference number must not have been cancelled by the Sponsor or by the United Kingdom Border Agency since it was assigned."

14. It should be noted that the issue of a valid CAS and the scoring of the thirty points associated with it, are not the only "requirement listed below" which paragraphs 245ZV and 245ZX require to be satisfied. It is not, therefore, in itself a guarantee of entry. In the first place, the other requirements of Rule 245ZV include a requirement that the student should not fall for refusal under the general grounds of refusal. These grounds, which are set out at paragraph 320 of the Immigration Rules, include refusal on the ground of the applicant's failure to produce specified documentation or information, or on the ground of the applicant's past convictions or breaches of immigration law, or on the ground that for some other reasons the applicant has been or should be excluded for the public good or, more generally, on the ground (see para 320(1)) that "entry is being sought for a purpose not covered by these Rules." All of these are matters for decision (subject to appeal) by an immigration officer. Secondly, Appendix A, paragraph 118 of the Immigration Rules, requires the applicant as a condition of being awarded his 30 points, to supply any documentary evidence of his or her previous qualifications which he used to obtain the offer of a place on a course offered by the sponsoring educational institution. Broadly summarised, the effect of these provisions is that a migrant with a CAS may still be required to satisfy an immigration officer upon applying to enter that he is genuinely entering for the purpose of study, that there was a proper basis for his application for a place from the sponsor, and that there are no character issues which require his exclusion. Certain of these requirements also apply under paragraph 322 to applications for leave to remain.

The Tier 4 Sponsor Guidance

15. The Sponsor Guidance is a large and detailed document issued on behalf of the Secretary of State, which may be amended at any time and has in fact been amended with bewildering frequency. The relevant editions of the Guidance are those applying from 5 October 2009, 3 March 2010, 6 April 2010 and 5 September 2010. They differ in detail, but not in their broad lines. In what follows, I shall refer (unless otherwise stated) to the paragraph numbers of the Guidance which came into force on 6 April 2010.

16. Their tenor and purpose is conveyed by the opening paragraphs (in all three relevant editions):

> "WHAT IS SPONSORSHIP?
>
> 1. Sponsorship is based on two fundamental principles:
>
> • those who benefit most directly from migration (that is, the employers, education providers or other bodies who are bringing in migrants) should play their part in ensuring that the system is not abused; and
>
> • we need to be sure that those applying to come to the United Kingdom to do a job or to study are eligible to do so and that a reputable employer or education provider genuinely wishes to take them on.
>
> 2. Before a migrant can apply to come to, or remain in the United Kingdom to study, he/she must have a sponsor. The sponsor will be an education provider in the United Kingdom that wishes to provide education to a migrant. Sponsorship plays two main roles in the application process:
>
> • it provides evidence that the migrant will study for an approved qualification; and
>
> • it involves a pledge from the sponsor that it will accept the duties of sponsoring the migrant."

17. I need not set out the substantive provisions in detail. For present purposes it is enough to note that the Guidance lays down mandatory requirements

governing (i) the criteria for the award of a sponsor's licence, (ii) the obligations of those to whom a license has been awarded, (iii) the criteria to be applied by a licensed sponsor in issuing a CAS, and (iv) the procedure and criteria for suspending, downgrading or withdrawing a sponsor's licence. In the first category, there are provisions relating to the academic standards of the sponsor's courses, the qualifications to which they lead, the adequacy of its facilities and key staff, and its general efficiency. In the second category come provisions relating to the duties of sponsors, including their duties to monitor student attendance, report significant absences, and maintain proper records of these matters. Para 163 sets out a number of specific tests which must also be satisfied. In particular, it imposes a maximum acceptable proportion of enrolled migrant students who have abandoned their studies at specified stages of the course. In the third category come requirements to assess and report upon migrant students' command of English, their ability to follow their chosen course, and their possession of sufficient resources to maintain themselves in the United Kingdom during their studies. In the fourth category, the provisions regarding the withdrawal of a licence distinguish between cases in which a sponsor's licence "will" be withdrawn (paragraphs 344-345), cases in which it "will normally" be withdrawn (paragraphs 346-9), and cases in which it "may" be withdrawn (paragraphs 350-352). These corresponded to breaches of greater or lesser gravity of the institution's obligations as a sponsor or its failure to satisfy the licence criteria on a continuing basis.

18. In 2011, after the announcement that Highly Trusted Status was to become mandatory, the criteria for granting it were tightened up. The new criteria were included in the edition of the Tier 4 Sponsor Guidance which came into force on 5 September 2011. One of the more significant changes was the introduction of an additional test, namely that where an institution had been licensed for twelve months, not more than 20 per cent of Tier 4 (General) migrants to whom it had given a CAS should have been refused leave to enter or remain when in due course they applied. The West London College's failure to satisfy this test was the ground on which it was refused Highly Trusted Status.

Unlawful delegation

19. The Appellants' first argument is that paragraphs 245ZV and 245ZX of the Immigration Rules constituted an unlawful delegation to the sponsoring institutions of the Secretary of State's powers to control entry into or stay the United Kingdom. It is correct that when the points-based system was introduced for Tier 4 migrants, a number of matters on which students had previously been required to satisfy immigration officers or the Secretary of State, such as a bona fide intention to study, were now to be examined by the sponsoring institution as a condition of being entitled to issue a CAS. But the short answer to the suggestion that this involved an unlawful delegation is that leave to enter or remain continues to be the responsibility of immigration officers and the Secretary of State, who

retain the last word in each individual case by virtue of the general grounds of refusal. These include a right to refuse on the ground that the Immigration Officer or the Secretary of State is not satisfied with the material used by the migrant to obtain his offer of a place on the sponsor's course, or on the ground that notwithstanding the CAS the migrant is not seeking to enter or remain for a purpose (i.e. study at an appropriate institution) which is covered by the Rules. I have summarised the relevant provisions at paragraph 14 above. The evidence shows that a significant number of Tier 4 (General) migrants with a CAS are in fact refused leave to enter or remain on these grounds. The upshot is that the grant of a CAS by an educational institution is not tantamount to leave to enter or remain. It is strong but not conclusive evidence of some of the matters which are relevant upon the migrant's application for leave to enter or remain.

Absence of statutory power

20. This, although placed second in the order of argument, was really the Appellants' main point and was the focus of the decisions of the courts below. Under the points-based system, the control of immigration under Tier 2 (skilled workers), Tier 4 (students) and Tier 5 (temporary workers) depends critically on the sponsorship of migrants by licensed sponsors. The requirement that a migrant in the relevant category should be sponsored by an institution with a sponsor licence is laid down in the Immigration Rules, in the case of Tier 4 (General) by Appendix A, paragraph 116 (d) and (e). A "Sponsor Licence" is defined in paragraph 6 of the Rules as "a licence granted by the Secretary of State to a person who, by virtue of such a grant, is licensed as a Sponsor under Tiers 2, 4 or 5 of the Points Based System." But there are no provisions in the Rules dealing with the qualifications and obligations of a licensed sponsor. The system for licensing sponsors is wholly governed by the Guidance issued for the relevant tier on behalf of the Secretary of State. This includes, it is said, mandatory requirements for obtaining and retaining a sponsor licence which qualify as "rules" and determine whether the migrant will obtain leave to enter or remain in the United Kingdom. Therefore, they must be laid before Parliament under section 3(2) of the Act. In the absence of tacit Parliamentary approval, the Secretary of State is not entitled to have regard to them in making decisions about the status of sponsors.

21. There is a conceptual difficulty for the Appellants in this argument. Their objective in this litigation is to recover the sponsor licence (in the case of the New London College) and to obtain Highly Trusted Status (in the case of the West London Vocational Training College). If the sponsor licensing scheme is unlawful for want of tacit Parliamentary approval, it must follow that the Secretary of State was not entitled to grant licences in accordance with it. On that footing, the Secretary of State cannot be bound to confer a licence under it on the West London Vocational Training College, or to allow the New London College to retain a licence once granted. Moreover, since under Part 6A of the Immigration Rules

migrants in Tier 4 require a CAS from a licensed sponsor as a condition of obtaining leave to enter or remain, it must follow, if the system of sponsor licensing is unlawful, that leave to enter or remain in the United Kingdom cannot be granted to students whom they have accepted, except possibly on the footing of an administrative relaxation of the relevant parts of the Immigration Rules.

22. The Appellants brought a fair amount of ingenuity to the task of escaping this dilemma. New London College argued that the grant of a sponsor license was lawful, whereas its withdrawal was not. Both Appellants argued that the sponsor licensing scheme could remain valid on the footing that the mandatory requirements for the grant or retention of sponsor licences or Highly Trusted Sponsor status were excised, leaving only those parts of the criteria which were discretionary or advisory. But none of this is realistic. The criteria under paragraphs 344-345 of the Guidance are mandatory in exactly the same way as the criteria for granting it is in the first place. The mandatory requirements, whether they relate to the grant or the withdrawal of a license or of Highly Trusted Sponsor status, cannot be severed from the rest of the licensing scheme, because they are fundamental to its whole operation. It follows that either the sponsor licensing scheme is wholly unlawful by reason of its inclusion of mandatory requirements for sponsors, or it is lawful notwithstanding those requirements. Neither alternative will result in these Appellants being licensed. There is no half-way house.

23. Mr Drabble QC, who appeared for the Interveners (the Migrants' Rights Network and the Joint Council for the Welfare of Immigrants), was understandably concerned not with the position of these Appellants but with the state of English law and the general operation of the system of immigration control. So while recognising the Appellants' problem, he had no reason to be inhibited by it, and put the case in its purest and most radical form. Mr Drabble submitted that the Sponsor Guidance does not fall within sections 1(4) or 3(2) of the Act, because it is not directed to regulating the grant of leave to enter or remain in the United Kingdom but to the licensing and regulation of the sponsoring institutions themselves. It did not therefore need to be laid before Parliament. But, he says, because the control of immigration is wholly statutory and there is no power to control it otherwise than by rules falling within section 3(2), there is no power to operate a system of sponsor licensing at all. Only on the footing that (contrary to this submission) the requirements for sponsors did fall within sections 1(4) and 3(2) of the Act, was he able by way of alternative to give at least partial support to the Appellants' argument.

Absence of statutory authority

24. The first question is accordingly the scope of section 3(2) of the Act. It does not apply to all "rules", but only to those which relate 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." *Alvi* is authority for the proposition that it extends only to requirements which "if not satisfied by the migrant, will lead to an application for leave to enter or remain being refused": see para 94 (Lord Dyson). I would readily accept that the mandatory criteria for the award and retention of a sponsor licence are rules. But, subject to one reservation (considered below), they are not rules calling for compliance by the migrant as a condition of his obtaining leave to enter or remain. The Sponsor Guidance is wholly concerned with the position of the sponsor. The point may be illustrated by imagining an appeal by the migrant under section 84(1) of the Nationality, Immigration and Asylum Act 2002 on the statutory ground that his application to enter or remain was refused on a ground "not in accordance with immigration rules". This provision is the main reason why the Rules have been treated as giving rise to legal rights, which in turn was a significant part of the analysis in *Alvi*: see paras 9, 38, 39, 42 (per Lord Hope); cf. *MO (Nigeria) v Secretary of State for the Home Department* [2009] 1 WLR 1230 at para 6 (per Lord Hoffmann). As far as the migrant is concerned, the only relevant rule is that to obtain leave to enter or remain he must have received a CAS from a licensed sponsor. That rule is contained in the Immigration Rules. If the issue on a hypothetical appeal under section 84(1) was whether the migrant had a CAS from a licensed sponsor, that would fall within the proper scope of the appeal, because the requirement to have a CAS from a licensed sponsor was laid down by the Rules. But if the issue was whether the course-provider ought to have been licensed, it would plainly not fall within the proper scope of the appeal, for that was not a requirement falling to be satisfied by the migrant and could have formed no part of the ground of refusal. Compare the situation in *Alvi*, a Tier 2 case in which the applicant was refused leave to remain because his occupation was not included in a list of skilled occupations. Because the list of skilled occupations was liable to be changed by the Secretary of State and was not part of the Immigration Rules laid before Parliament, it was not lawful to make a decision by reference to it. An appeal under section 84(1) of the Act of 2002 would therefore have been competent. For this purpose, the critical feature of the list of skilled occupations was that it was part of the criteria for granting leave to enter or remain which the migrant had to satisfy and which determined the fate of his application. This is not true of the criteria for sponsor licensing. This is not a technical or adventitious distinction. It is logically coherent, entirely consistent with the purpose of the Immigration Rules and dictated by the language of section 3(2) of the Act.

25. The reservation arises out of the cross-references to the Sponsor Guidance in the Rules. Since the Guidance is liable to be changed without Parliamentary scrutiny at the discretion of the Secretary of State, the Rules cannot lawfully incorporate by reference from the Guidance anything which constitutes a rule that if not satisfied will lead to the migrant being refused leave to enter or remain: see *Alvi*, at para 39 (per Lord Hope). The relevant cross-references are concerned with documentation. Appendix A, paragraph 116(f) of the Rules requires the CAS to

contain, as a condition of its validity, "such information as is specified as mandatory in guidance published by the United Kingdom Border Agency". This is a reference to the information specified at paragraphs 170 of the Guidance. Paragraph 170 provides that when assigning a CAS the sponsor "must complete all of the relevant details within the sponsorship management system, for example the student's personal details, course level and information about fees, etc." It goes on to draw attention to the importance of completing in detail the "evidence provided" section stating, for example, how it has assessed the student's command of English and his ability to follow the course. Paragraph 245AA(a) of the Rules provides that where Appendix A requires specified documents to be provided, this means documents specified by the Secretary of State in the Sponsor Guidance. Paragraph 245AA(a) provided that "if the specified documents are not provided, the applicant will not meet the requirement for which the specified documents are required as evidence." Paragraph 245AA(c) (in effect from 5 July 2010) provided that "if the Sponsor or applicant does not satisfy the requirements set out in guidance and referred to in these Rules, the applicant will not meet the related requirement in these Rules." The effect of these provisions is simply to require the sponsor to enter on the migrant's electronic file information which the migrant will himself have had to produce to obtain the offer of a place on the sponsor's course. Appendix A, paragraph 118 of the Rules, requires the migrant to produce the same material in support of his application for leave to enter or remain. It follows that none of the sections of the Guidance incorporated by reference in the Rules raises the bar against migrants any higher than the Rules themselves do.

26. For these reasons I accept Mr. Drabble's starting point, that the criteria for sponsor licensing contained in the Guidance did not fall within sections 1(4) or 3(2) and did not therefore fall to be laid before Parliament. This disposes of the Appellants' argument.

27. I turn therefore to Mr Drabble's principal submission, namely that on the footing that the criteria for sponsor licensing do not fall within sections 1(4) and 3(2), there is no power to have such a system at all. He submitted that this was implicit in the decisions of this court in *Munir* and *Alvi*. In particular, he relied on Lord Hope's observation in *Alvi*, at para 33, that the obligation under section 3(2) to lay statements of the rules and any changes in the rules before Parliament "excludes the possibility of exercising prerogative powers to restrict or control immigration in ways that are not disclosed by the rules." I do not accept that *Munir* and *Alvi* go that far. The only mode of restricting or controlling immigration which was in issue in those cases was the regulation of entry into and stay in the United Kingdom. The decisions are authority for the proposition that the power of the Secretary of State to make rules relating to the practice to be followed for regulating the entry into and stay in the United Kingdom is implicit in the obligation imposed on her by section 3(2) to lay such rules before Parliament. It has no other legal basis. Section 3(2) is concerned only with rules of that

description, and it was only with the control of immigration by the grant or refusal of leave to enter or remain that Lord Hope, like the rest of the court, was concerned. The court was not concerned with the existence or extent of any power that the Secretary of State might have to do something which was not within the scope of section 3(2).

28. So in my opinion Mr. Drabble's submission is unsupported by authority. But is it right in principle? In my view it is not. It has long been recognised that the Crown possesses some general administrative powers to carry on the ordinary business of government which are not exercises of the royal prerogative and do not require statutory authority: see B.V. Harris, "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 *LQR* 225. The extent of these powers and their exact juridical basis are controversial. In *R v Secretary of State for Health Ex p C* [2000] 1 FLR 627 and *Shrewsbury and Atcham Borough Council v Secretary of State for Communities and Local Government* [2008] 3 All ER 548, the Court of Appeal held that the basis of the power was the Crown's status as a common law corporation sole, with all the capacities and powers of a natural person subject only to such particular limitations as were imposed by law. Although in *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681, para 47 Lord Hoffmann thought that there was "a good deal of force" in this analysis, it is open to question whether the analogy with a natural person is really apt in the case of public or governmental action, as opposed to purely managerial acts of a kind that any natural person could do, such as making contracts, acquiring or disposing of property, hiring and firing staff and the like. But the question does not need to be resolved on these appeals because the statutory power of the Secretary of State to administer the system of immigration control must necessarily extend to a range of ancillary and incidental administrative powers not expressly spelt out in the Act, including the vetting of sponsors.

29. The Immigration Act does not prescribe the method of immigration control to be adopted. It leaves the Secretary of State to do that, subject to her laying before Parliament any rules that she prescribes as to the practice to be followed for regulating entry into and stay in the United Kingdom. Different methods of immigration control may call for more or less elaborate administrative infrastructure. It cannot have been Parliament's intention that the Secretary of State should be limited to those methods of immigration control which required no other administrative measures apart from the regulation of entry into or stay in the United Kingdom. If the Secretary of State is entitled (as she plainly is) to prescribe and lay before Parliament rules for the grant of leave to enter or remain in the United Kingdom which depend upon the migrant having a suitable sponsor, then she must be also be entitled to take administrative measures for identifying sponsors who are and remain suitable, even if these measures do not themselves fall within section 3(2) of the Act. This right is not of course unlimited. The Secretary of State cannot adopt measures for identifying suitable sponsors which

are inconsistent with the Act or the Immigration Rules. Without specific statutory authority, she cannot adopt measures which are coercive; or which infringe the legal rights of others (including their rights under the Human Rights Convention); or which are irrational or unfair or otherwise conflict with the general constraints on administrative action imposed by public law. However, she has not transgressed any of these limitations by operating a system of approved Tier 4 sponsors. It is not coercive. There are substantial advantages for sponsors in participating, but they are not obliged to do so. The rules contained in the Tier 4 Guidance for determining whether applicants are suitable to be sponsoring institutions, are in reality conditions of participation, and sponsors seeking the advantages of a licence cannot complain if they are required to adhere to them.

30. Brief submissions were addressed to us on the question whether the fee charged by the Border Agency required and if so whether it had specific statutory authority. Since the answer to that question cannot affect the lawfulness of the principles on which a sponsor's licence is refused, downgraded or withdrawn, I say nothing about it one way or the other.

Conclusion

31. It follows, in my opinion, that both appeals should be dismissed.

32. Under paragraph 323A(a) of the Immigration Rules, if a migrant's sponsor ceases to hold a sponsor's licence, his leave to enter or remain is not automatically annulled but may be curtailed. One would assume that the Secretary of State would respond with reasonable sensitivity to the difficulties faced by international students in a situation which is not necessarily of their own making.

LORD CARNWATH

33. In agreement with Lord Sumption, but for rather different reasons, I would reject Mr Drabble's extreme submission that the establishment of the sponsor licensing system is outside the scope of the 1971 Act altogether. It is clear (following *R (Munir) v Secretary of State for the Home Department* [2012] 1 WLR 2192) that the Secretary of State's powers of immigration control are confined to those conferred expressly or impliedly by the 1971 Act. They may include both powers expressly conferred and powers reasonably incidental to them (see *Wade and Forsyth, Administrative Law* 10th Ed p 181; *Bennion, Statutory Interpretation* 5th Ed pp 494ff). The obvious source of such incidental powers in the present context, in my view, is to be found in section 1(4), which imposes on the Secretary of State the duty to establish arrangements which allow admissions for the

purposes of study. Fairly incidental to that is the establishment of a system for vetting educational institutions who may be permitted to participate. A useful parallel can be found in *R (Barry) v Liverpool Council* [2001] EWCA Civ 384, where it was held that a scheme for registering and vetting door-staff was incidental to the council's power for licensing places for public entertainment.

34. I cannot accept Mr Swift's submission (if I understood it correctly) that there is some alternative, unidentified source of such powers, derived neither from the prerogative nor from any specific provision in the Act, but from the general responsibilities of the Secretary of State in this field. No authority was cited for that proposition and to my knowledge none exists. Mr Swift did not seek to rely on a possible "third source" of powers, by reference to the "controversial" line of authority mentioned by Lord Sumption (para 28). In my view he was wise not to do so (for the reasons given in my judgment for the majority in the *Shrewsbury* case [2008] 3 All ER 548, 562-4). (This sensitive issue has also been the subject of recent consideration by the House of Lords Select Committee on the Constitution: *The pre-emption of Parliament* HL Paper 165 – 1 May 2013).

35. Lord Sumption relies instead on a broader application of the incidental powers approach, which appears to be a variant of Mr Swift's main submission. The Secretary of State's power to administer the system of immigration control must, it is said, extend to "a range of ancillary and incidental powers", including administrative measures for identifying suitable sponsors, "even if these measures do not themselves fall within section 3(2) of the Act". This formulation, as I understand it, treats the licensing process as linked not to the specific provisions for regulating entry under section 1(4), but to the general system of immigration control under the Act. It thus takes it outside the scope of the section 3(2) procedure altogether.

36. I find this more difficult to accept. In *Hazell v Hammersmith LBC* [1992] 2 AC 1, considering the analogous principle in section 111 of the Local Government Act 1972, Lord Templeman extracted from the authorities, starting with *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473 –

> "... the general proposition that when a power is claimed to be incidental, the provisions of the statute which confer and limit functions must be considered and construed." (p 31D)

In that case the alleged power to enter into swap transactions had to be considered in the context of the specific provisions governing local authority borrowing. Similarly, in *Barry* the scheme for vetting door-staff was incidental, not to the council's regulatory powers in general, but to the particular power for licensing

places for public entertainment. In each case the source of the incidental power was found in a specific provision conferring specific functions.

37. So in the present context, in my view the sponsorship licensing scheme is an adjunct, not of the immigration control system in general, but of the specific function of providing for entry for study under section 1(4). That is its only purpose within the statutory scheme. Section 1(4) states that such provision is to be "in such cases and subject to such restrictions as may be provided by the rules". On its face that leads back to section 3(2) which prescribes the procedure for making the rules.

38. That view appears also to accord with the approach of those responsible for drafting the relevant rules and regulations. They did not treat the licensing scheme as falling outside the scope of the rules altogether. On the contrary the concept of such a licence, as defined in the rules, is an essential feature of Appendix A to which Lord Sumption has referred. They must therefore be taken as authorising the Secretary of State to maintain arrangements for the grant of licences. They do not as such provide for her to withdraw licences once given. However, it is apparent from rule 323A that the grant of a licence is not permanent, so that a power to revoke for good reason may not be difficult to imply (see eg *R v Hillingdon LBC Ex p LRT* Times, 20.1.99, cited in *Wade and Forsyth, op cit* p 194). What are missing from the rules are the detailed arrangements for the grant or review of licences, or the criteria under which they are to be carried out.

39. Consistently with this approach, the fees regulations, in their earlier form, defined "sponsor licence" as "a licence granted by the Secretary of State *under the immigration rules*…" (Immigration and Nationality (Fees) Order 2011 SI 2011 No 445 art 2, emphasis added). It is true that the wording was not preserved in 2013 regulations (SI 2013 No 617), which refer simply to "a licence granted… to a person who, by virtue of such a grant, is licensed as sponsor"; but this change may itself have been a response to the potential problems highlighted by *Pankina v Secretary of State for the Home Department* [2011] QB 376.

40. The next question is whether, assuming that that the power to issue the guidance is derived from section 1(4), it falls outside the scope of the rules which are to be submitted to Parliament under section 3(2). It is not in dispute, as I understand it (para 24), that parts at least of the guidance are of the nature of "rules" in the ordinary meaning of that word. Lord Clarke said in *Alvi*:

> "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."

By that test, there are parts of the guidance which are clearly "mandatory" in nature, and so described in the document. I did not understand Mr Swift to argue otherwise. However, I would not necessarily accept that such compulsion is an essential characteristic of "rules" in the ordinary use of that word. For example, rule 323A to which I have referred, providing for the circumstances in which leave to enter "may be curtailed", is properly included in the body of "rules", even though its effect is not to compel a particular result in any case, but rather to define the criteria governing the exercise of the discretion.

41. The more difficult issue, to my mind, is whether, as Mr Swift has argued and the majority accept, the term "rules" in the present context is to be read in a more limited sense, defined by Lord Dyson in *Alvi* (para 94) confined to "any requirement which, *if not satisfied by the migrant*, will lead to an application for leave to enter or remain being refused…" (my emphasis). Left to myself, I would have needed some convincing that *Alvi* was determinative of the present case, not least because the issue was different. The court was concerned with a group of provisions which were admittedly within the general scope of section 3(2), the only issue being the proper categorisation of individual provisions within that group. It was not concerned, as we are, with the categorisation of a complete and self-contained regulatory code for sponsoring educational institutions. However, the other members of the court, including two members of the majority in *Alvi*, do not share my doubts on this point. Accordingly, I see no purpose in introducing a note of dissent on what should as far as possible be a clear-cut test.

42. Finally, I would offer a brief comment on what would have been the practical consequences of a successful appeal on this point. It was part of Mr Swift's case (echoed by Lord Sumption – para 21) that the appellants' arguments in effect proved too much for their own good. If the guidance is unlawful, then so must be the licence originally issued to NLC in reliance on it. Similarly, in the West London case, setting aside the present decision to refuse HT status cannot turn it into a positive decision in their favour; nor can they pick and choose between different parts of the guidance in support of a new application.

43. In respect of West London College, I agree that success on the section 3(2) point would not have offered any obvious advantage. Setting aside the refusal of HTS status would not in itself result in a more favourable outcome. Although the concept of such status is in the rules, the criteria by which it is to be granted are in the guidance. If the existing guidance, or material parts of it, were held to be invalid, the Secretary of State would need the opportunity to validate it, with the

assistance of Parliament if necessary. Until then, the status of the college may have to remain undetermined.

44. In respect of New London College, in my view, the position is different. The relevant decision in that case was not one to confer a status which they did not have, but to revoke an existing licence. An order setting aside that decision, if it goes no further, would simply leave the existing licence in place. There is nothing unlawful in the concept of such a licence, as such, which as I have noted is created by the rules. Nor, as I understand, is there anything on the face of the licence (whether in paper or digital form) to undermine its validity. It may well be true, as Mr Swift submits, that the grant of that licence was influenced by criteria in the guidance. But that does not mean that the licence itself is now to be taken as invalid, in circumstances where no interested party has sought to challenge it, either at the time or since.

45. Taken to its logical conclusion, Mr Swift's argument would extend not just to the present guidance, but to all the previous versions since the points-based system was introduced, and indeed to all licences issued under them. Happily, however, that is not how public law remedies work. It is sufficient to refer to the valuable discussion in *Wade and Forsyth*, previous versions of which have themselves influenced the development of the case-law in this area. The general principle which emerges is summarised as follows (under the heading "Nullity and relativity"):

> "The truth is that the court will invalidate an order only if the right remedy is sought in the right proceedings and circumstances. The order may be a 'nullity' and 'void' but these terms have no absolute sense: their meaning is relative, depending upon the court's willingness to grant relief in any particular situation. If this principle of legal relativity is borne in mind, the law can be made to operate justly and reasonably in most cases through the exercise of remedial discretion…" (p 253)

46. If the appellants had succeeded on the legal issue, the result would have been the setting aside of the Secretary of State's decision revoking the licence. Neither NLC nor the Secretary of State (nor any other interested party) has sought to challenge the original licence. That in my view would have remained in effect unless and until the Secretary of State could put in place valid procedures for its revocation and exercise them accordingly. Until then, the College and its students would have been unaffected.