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Case No: CO/3854/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2010

Before :

MR JUSTICE FOSKETT

- -

Between :

The Queen on the application of English UK	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

- -
- -

Judith Farbey and Sharif Hamadeh (instructed by **Penningtons Solicitors LLP**) for the **Claimant**
Neil Sheldon (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 29th and 30th June 2010
Judgment: 9th July 2010

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Approved Judgment

Mr Justice Foskett:

Background

1. The Common European Framework of Reference for Languages ('CEFR') is the product of an initiative of the Council of Europe. The first paragraph of the lengthy document that comprises the CEFR describes its essential purpose as follows:

> "The Common European Framework provides a common basis for the elaboration of language syllabuses, curriculum guidelines, examinations, textbooks, etc. across Europe. It describes in a comprehensive way what language learners have to learn to do in order to use a language for communication and what knowledge and skills they have to develop so as to be able to act effectively. The description also covers the cultural context in which language is set. The Framework also defines levels of proficiency which allow learners' progress to be measured at each stage of learning and on a life-long basis."

2. The purpose of the CEFR is described in this way:

> "The Common European Framework is intended to overcome the barriers to communication among professionals working in the field of modern languages arising from the different educational systems in Europe. It provides the means for educational administrators, course designers, teachers, teacher trainers, examining bodies, etc., to reflect on their current practice, with a view to situating and co-ordinating their efforts and to ensuring that they meet the real needs of the learners for whom they are responsible."

3. The way in which "levels of proficiency" are categorised and defined in the CEFR is somewhat complex, but essentially it divides the various levels of proficiency into categories A, B and C, Category A being the least proficient and Category C the most proficient. Category A reflects the abilities of the "Basic User", Category B reflects those of the "Independent User" and Category C those of the "Proficient User". Each category is sub-divided into two separate sub-categories. The sub-categories relevant to this case are A1 and 2 and B1 and 2.

4. The abilities of those in Category A are classified as follows:

A1

> Can understand and use familiar everyday expressions and very basic phrases aimed at the satisfaction of needs of a concrete type. Can introduce him/herself and others and can ask and answer questions about personal details such as where he/she lives, people he/she knows and things he/she has. Can interact in a simple way provided the other person talks slowly and clearly and is prepared to help.

A2

> Can understand sentences and frequently used expressions related to areas of most immediate relevance (e.g. very basic personal and family information, shopping, local geography, employment). Can communicate in simple and routine tasks requiring a simple and direct exchange of information on familiar and routine matters. Can describe in simple terms aspects of his/her background, immediate environment and matters in areas of immediate need.

5. The abilities of those in Category B are set out in this way:

B1

> Can understand the main points of clear standard input on familiar matters regularly encountered in work, school, leisure, etc. Can deal with most situations likely to arise whilst travelling in an area where the language is spoken. Can produce simple connected text on topics which are familiar or of personal interest. Can describe experiences and events, dreams, hopes and ambitions and briefly give reasons and explanations for opinions and plans.

B2

> Can understand the main ideas of complex text on both concrete and abstract topics, including technical discussions in his/her field of specialisation. Can interact with a degree of fluency and spontaneity that makes regular interaction with native speakers quite possible without strain for either party. Can produce clear, detailed text on a wide range of subjects and explain a viewpoint on a topical issue giving the advantages and disadvantages of various options.

6. Unfortunately, in this case there does not seem to be complete unanimity about how those classifications translate into what would be expected within the current UK examination system. The Claimant asserts that A2 is roughly equivalent to GCSE grades D-F, B1 is roughly equivalent to a GCSE in a foreign language at grade A*-B and B2 is broadly equivalent to AS-level going on to A-level. UKBA (the United Kingdom Border Agency) described B2 in its News Release on 10 February (as indeed it did in the report to which reference is made in paragraph 20 below) as the equivalent of having "just below a GCSE in a foreign language" whereas the Secretary of State in his written Ministerial statement of the same date described it as "roughly the equivalent of GCSE standard". In a document entitled "The Languages Ladder: Steps to Success", prepared by the Department for Education and Skills in September 2007, A2 and B1 are equated to "Foundation GCSE" and B2 as "AS/A/AEA". I am not able, nor am I called upon, to resolve these differences. It is common ground that, whatever the true UK examination equivalent level may be, the decision that lies at the heart of this case raised the relevant level for intending students from overseas.

7. One of the uses to which the classifications within the CEFR has been put by the UK Government is effectively to provide the minimum attainment required by a non-EEA national to qualify for entry to the UK to study. The study may be for any subject, but English language is, of course, one such subject.

8. What lies behind the present application to the court is a decision taken by the then Secretary of State in February this year (in the circumstances set out below) effectively to increase the minimum attainment required for certain students who wish to come to the UK to study English. Until the decision made in February was implemented with effect from 3 March it was possible for international students to come to the UK (subject to the terms of the Points Based System: see paragraph 24 below) to study English at the minimum level of level A2 whereas after the decision the minimum level at which study would be permitted was level B2.

9. This has had the practical effect of requiring that a student who hitherto had needed merely to demonstrate proficiency at level A1 in order to study at level A2 or above would henceforth have to show competence at level B1 in order to study at level B2 or above. Transitional provisions provide for those already accepted on courses, but as from 3 March the new requirements were in place.

10. No objection is taken in these proceedings to the decision to impose a B1 minimum standard for students not intending to take an English course – in other words, for those who will be studying other subjects in the UK where the language in which the subject is taught is English. The objection is to the effective imposition of a B1 standard on intending English language students.

11. The decision (driven by concerns that the previous arrangements were giving rise to abuse by those who wished to come to the UK illegally) caused some controversy in Parliament prior to the recent General Election (see, for example, paragraph 74) and the present proceedings were commenced before the new Government took office. Given that these proceedings are contested and that no new consultation or review is, so far as I am aware, proposed, it must be taken that the present Secretary of State wishes to adopt the position taken by her predecessor. Since the essential decisions were made by the then Secretary of State (Mr Alan Johnson MP), I will refer to the Secretary of State as 'he' or 'him' throughout.

12. As will appear (see paragraphs 30-38 below), the change was effected by a change in the guidance given by the UKBA to "sponsors" of intending students (in effect, the educational establishments which had accepted the particular student for a course of study) on the operation of the Points Based System; it was not effected by any direct change or changes in the Immigration Rules.

The nature of the challenge to the decision

13. The challenge made in these proceedings is made effectively on a threefold basis:

(a) That the change in the minimum level of English language tuition permitted ought to have been introduced by a change to the Immigration Rules and was not capable of being introduced by a change in the UKBA's Guidance. Reliance is placed on the decision of the Court of Appeal in *Secretary of State for the Home*

Department v Pankina [2010] EWCA Civ 719, in which the judgment was handed down on 23 June.

(b) That the decision is, in any event, *Wednesbury* unreasonable and/or irrational because the evidence did not warrant the conclusion that immigration control required that international students be prohibited (save for certain exceptions) from entry to courses below level B2.

(c) That the Immigration Rule relevant to the present claim (paragraph 120(a) of Appendix A to HC 395) is being utilised in a way that amounts to an unlawful delegation of the Secretary of State's powers and/or an unlawful ouster of the Court's jurisdiction. On that latter basis the Rule is, it is argued, to this extent and in its current form, *ultra vires*.

14. Although the original Grounds put the order in which these arguments were to be deployed somewhat differently, the order in which they are set out above is the order in which they were advanced in the oral argument before me. Miss Judith Farbey, who appears for the Claimant, argued forcefully, both in her oral submissions and in her Supplemental Skeleton Argument prepared in the light of *Pankina*, that the Defendant's case cannot survive *Pankina*. That became her principal submission.

15. I will deal with the arguments in that order. If, of course, the first argument prevails, the others would not, strictly speaking, arise.

The Claimant

16. According to its Chief Executive, Mr Tony Millns, English UK is a registered charity whose key aim is the advancement of the education of international students in the English language. The organisation was created in 2004 as a national association of accredited English language centres in universities, further education colleges, independent schools, educational trusts and charities and the private sector. It presently has 441 members. In broad terms, about 400,000 students who come to the UK each year to study English are taught at English UK centres. This, he says, represents a very sizeable proportion of the total number of international students coming to the UK.

17. It is important to say at the outset that, whilst the Claimant challenges the decision taken by the Secretary of State, it does so on the basis that the decision has not been subjected to the proper processes and/or that it is sufficiently "off the mark" to be irrational. The Claimant as an organisation does not support or condone illegal immigration or colleges that provide bogus facilities to assist illegal immigration. Mr Millns says that for many years it has been warning about the dangers of a large number of poor-quality or bogus "colleges" which were able to enrol international students. This warning derived partly because of their deleterious effect on the UK's reputation for high-quality education - the UK's key selling point in recruiting international students - but also because of the risk that such colleges have posed to immigration control. The Claimant is recognised as an entirely *bona fide* institution with a proper appreciation of the need to guard against bogus activities, something Mr Neil Sheldon, who represents the Secretary of State, was happy to state openly and publicly.

18. Whilst inevitably the Claimant's interest in bringing these proceedings is driven by the financial interests of its members, it is well-placed to bring forward the appropriate arguments and probably much better placed to do so than an individual litigant who may have been affected by the decision made by the Secretary of State. Mr Millns is personally very well qualified to contribute to the evidence that impinges on the issues in the case.

The economic background

19. Although there are differences in the figures advanced, it is not in dispute that the teaching of English in the UK provides a significant contribution to the British economy. Mr Millns notes in his witness statement that the International Passenger Survey records that the total number of people who say that they have taken an English language course during their stay in the UK has varied from around 520,000 to nearly 600,000 a year in the years since 2000 (although the survey is not conducted every year). He also says that about 400,000 students who come to the UK each year to study English are taught at English UK institutions. The students who do come to the UK to study English make a direct contribution of around £1.5 billion in foreign earnings according to a study carried out in 2004 by Professor Geraint Johnes, Professor of Economics at Lancaster University Management School, based on data from 2002-3 (*The Global Value of Education and Training Exports to the UK Economy,* DfES/Lancaster University Management School). At a time when the UK economy is struggling, and foreign earnings are critical to recovery, the English language sector is, Mr Millns says, a success story.

20. In the Executive Summary of the joint UKBA and Department for Business, Innovation and Skills review that led to the decision under challenge, the foregoing figure was recorded without challenge save to observe that the number of students included "a significant number of EEA students and students on short courses who use the Student Visitor route". (I will refer to 'the Student Visitor route' later at paragraphs 93-94.)

21. On any view, however, the teaching of English to foreign students, whether on short or longer courses, is a significant source of revenue for the UK economy.

22. It is against that background that the Claimant secured expedition of the claim for judicial review following the grant of permission by Collins J on 24 March 2010.

The immigration background and the Points Based System

23. It is plain that any legitimate route for entry for study in the UK could be open to abuse by those who have no genuine intention to study if they could demonstrate the minimum entry requirement without too much difficulty. It could represent an avenue by which entry to the UK is secured, only for the entrant to "disappear" as an economic migrant and work illegally to the detriment of unemployed UK nationals.

24. Various steps have been taken to shore up the entry arrangements to try to prevent abuse of this nature at the same time as endeavouring to ensure that genuine students can access the appropriate teaching facilities in the UK. In March 2008 the Points Based System ('PBS') for UK immigration was introduced. Mr Nigel Farminer, a Deputy Director of UKBA responsible for temporary migration policy, has said that

the PBS system involved "a major change to the UK's immigration system" and described it in this way:

> "Approximately 80 immigration routes have been consolidated into a five tier system, one of which is suspended (Tier 3 – unskilled workers). The PBS is a simplified one-stop migration process for all those from outside the European Economic Area (EEA) who wish to work, train or study in the UK. Prospective migrants are judged using clear and objective criteria to ensure consistency. These criteria are set out in guidance and an on-line self-assessment tool allows applicants to assess the likelihood of the success of an application even before it is made. The PBS provides greater control over migration as well as increased transparency for the benefit of applicants and the potential employers and education providers who act as their sponsors under the system. It has been introduced in phases, following extensive consultation with other government departments and stakeholder organisations. Tier 1 for Highly Skilled migrants was introduced in February 2008, Tiers 2 and 5 for Skilled workers and temporary workers followed in November 2008 and the implementation of Tier 4 for Students began in March 2009."

25. Those intending to come to the UK for any purpose provided for by this system need to pass a points-based assessment before they can achieve permission to enter or remain in the United Kingdom. It is, of course, Tier 4 that matters for the purposes of this case: it replaced the previous student immigration route and provides for the entry of non-EEA students (both children and adults) wishing to follow an approved course of study in the UK. I shall say more about the legal foundation of the PBS in due course (see paragraph 39 *et seq*), but for present purposes it is simply necessary to see how the system works. It is common ground that the system concerning the operation of Tier 4 prior to the changes made as a result of the challenged decision is set out accurately in paragraph 16 of the Grounds of Defence which is in these terms:

i) In order to gain sufficient points to qualify for entry under Tier 4 of the PBS a prospective student must produce a valid visa letter from a Tier 4 licensed institution and evidence of sufficient funds to cover course fees and maintenance.

ii) The institution concerned is responsible for assessing the ability and the intention of the prospective student to follow the course of study concerned. Only if it is so satisfied may the institution issue a visa letter.

iii) UKBA staff in post overseas and in the UK verify that the applicant is in possession of the necessary documentation and evidence of financial support. Provided that the applicant's documentation is in order and none of the additional grounds for refusal apply (e.g. criminal record; previous deportation) then the visa or leave to remain will be granted.

26. The "evidence of sufficient funds to cover course fees and maintenance" is afforded by the requirement that the applicant "must have a minimum of 10 points under paragraphs 10 to 13 of Appendix C" of the Immigration Rules. Paragraph 11 sets out the detailed requirements of the funds that an applicant must have, or have access to, during the currency of the course he or she intends to pursue and of the documentary evidence necessary to establish the availability of those funds. It is to be noted that, in addition to being able to meet the full cost of the fees of the course (which, of course, will vary from course to course) specific sums are mentioned in paragraph 11 that must be available to meet maintenance costs. As things stand, £800 per month for the duration of the course (up to a maximum of 9 months) must be demonstrated. In the light of the arguments based on *Pankina* (see paragraphs 55-82 below), it is to be noted that Paragraph 13 provides as follows:

> "Guidance published by the United Kingdom Border Agency will set out when funds will be considered to be available to an applicant, including the circumstances in which the money must be that of the applicant and the extent to which a sponsorship arrangement that provides the required funds will suffice."

27. As from 22 February 2010 the Tier 4 route required Tier 4 sponsors to provide their prospective students with a 'Confirmation of Acceptance for Studies' ('CAS') which is an electronic, secure reference number generated once the sponsor has filled in all the appropriate details about the applicant on the secure IT Sponsor Management System ('SMS') which can be accessed by all licensed sponsors. The requirement to provide a CAS had been anticipated since the inception of the Tier 4 system, but was dependent on the availability of the SMS. The compulsory use of the SMS and the provision of a CAS (in place of the visa letter) were put in place to reduce the vulnerability of Tier 4 to abuse by way of forged documentation.

28. There is no challenge to that feature of the changed arrangements: indeed the Claimant has welcomed it. The challenge is to the decision to raise the effective minimum threshold of attainment in English language that an intending student of English must have achieved before a Tier 4 licensed institution can issue a CAS.

29. Before turning to the procedure adopted for implementing the challenged decision, it is right to observe, as Mr Sheldon submitted, that the challenged decision is only one aspect of a number of measures introduced to deal with what were perceived to be deficiencies in the initial form of the PBS as it related to Tier 4. I will be mentioning that matter further when dealing with the rationality challenge (see paragraphs 83-100). One of the proposals that was brought forward as part of the package was the Highly Trusted Sponsor ('HTS') Scheme for sponsors under Tier 4 by virtue of which a new category of licence is to be awarded to Tier 4 sponsors if they have a proven track record of recruiting genuine students who comply with the UK's immigration rules. Another feature of the new arrangements for Tier 4 (General) students when they are in the UK is that they will be permitted to work only up to 10 hours per week rather than the 20 hours a week (and full-time during holidays) permitted under the pre-existing arrangements. That latter change was effected by means of a rule change pursuant to the Statement of Changes to Immigration Rules laid before Parliament (HC 367) on 10 February.

How the challenged decision was implemented

30. I have already indicated in broad terms that the challenged decision was effected by a change in the guidance issued to sponsors by the UKBA. It is necessary to trace that process in a little more detail before looking at the legal framework governing the issue of the validity or invalidity of that approach.

31. The original minimum level at which a course in the UK could be undertaken by foreign students was not itself set out in an immigration rule as such. The immigration rule introduced by the Statement of Changes in Immigration Rules laid before Parliament on 9 March 2009 (HC314) provided as follows in respect of the minimum requirements:

> Points will only be awarded for a visa letter (even if all the above requirements are met) if the course in respect of which it is issued meets each of the following requirements:
>
> (a) The course must meet the United Kingdom Border Agency's minimum academic requirements, as set out in sponsor guidance published by the United Kingdom Border Agency ....

32. It is accepted by Mr Sheldon that throughout the 40-day period required by section 3(2) (see paragraph 40 below) when this change to the rules was laid before Parliament, guidance from the UKBA specifying that the minimum level of course was at the A2 level was in existence and could have been available to members of the legislature. That fact may be of relevance in circumstances to which I will return below (see paragraph 68).

33. It is, of course, accepted that the stipulation concerning the minimum level of course that could be applied for by an international student was not specified in the rules as such.

34. Further Statements of Changes in the meantime provided for the requirement of a CAS in each case and that was the situation by the time the challenged decision came to be made so that paragraph 120(a) of Appendix A to HC 395 (which is the relevant immigration rule for present purposes) reads as follows:

> "Points will only be awarded for a Confirmation of Acceptance for Studies (even if all the above requirements are met) if the course in respect of which it is issued meets each of the following requirements:
>
> (a) The course must meet the United Kingdom Border Agency's minimum academic requirements, as set out in sponsor guidance published by the United Kingdom Border Agency...."

35. With effect from 3 March, the relevant paragraph of the UKBA's Tier 4 Sponsorship Guidance (paragraph 174) was in these terms:

> "Courses of study offered to students under the Tier 4 (General) Student sub-category must meet certain requirements. Sponsors can only assign confirmations of acceptance for studies to general students for courses at a minimum level of:
>
> ...
>
> Level B2 of the Common European Framework of Reference for Languages (CEFR) for English language students. The only exceptions to this are:
>
> > for Government sponsored students who can study English Language at any level; and
>
> > for a pre-sessional English language course which a student undertakes immediately prior to taking up an unconditional offer of a full time course of study at NQF level 6 or above, and where both courses are covered by a single confirmation of acceptance for studies assigned by the Higher Education provider acting as the student's sponsor. In these cases the pre-sessional English language course can be at any level; and
>
> > for a pre-sessional English language course which will allow a student, if he/she successfully completes it, to pursue his/her chosen full time course of study at NQF level 6 or above, for which he/she already has a conditional offer from a Higher Education provider and where the same Higher Education provider is to be the sponsor for both courses, and has assigned the confirmation of acceptance of studies for the first course. In these cases the pre-sessional English language course can be at any level ...."

36. The guidance thus formulated stated the general position and identified the three exceptions to the general position, those exceptions having emerged as recommendations during the review process that commenced with the Prime Minister's statement on 12 November 2009.

37. That is how the matter was dealt with formally. The intention to make these changes had been announced in Parliament by the Secretary of State on 10 February having signalled his intention to do so on the Andrew Marr Show on 7 February.

38. I must now turn to the principal issue, namely, whether that was a valid way of achieving the proposed changes.

The legal framework

39. The general legal framework is largely uncontroversial. The essential background was described by Lord Bingham of Cornhill in *Regina (BAPIO Action Ltd and another) v Secretary of State for the Home Department and another* [2008] 1 AC 1003 at [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 this country in recent times the power has been exercised, on behalf of the Crown, by the Secretary of State for the Home Department. The governing statute is the Immigration Act 1971 . This provides in section 1(2) that those not having a right of abode
>
> "may live, work and settle in the United Kingdom 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 ..."
>
> It is further provided, in 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 of the 1971 Act contains general provisions for the regulation and control of immigration. Thus a non-British citizen ordinarily requires leave to enter the country, which may be subject to a temporal limit and to the imposition of conditions concerning employment and other matters. The Secretary of State is required to lay before Parliament statements of the rules, and changes in the rules, as to the practice to be followed in the administration of the Act for regulating the entry into and stay in the UK of non-nationals requiring leave to enter, including any rules about time limits or conditions, and such statements are subject to annulment by negative resolution in either House of Parliament."

40. As indicated in that quotation, the statutory requirement to lay before Parliament statements of the rules, and changes in the rules, appears in section 3 of the Immigration Act 1971, specifically in subsection (2). Since it underlies the issues in this case, as it did in *Pankina*, I should set it out:

> 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).

41. *Bapio* was a case in which the Immigration Rules were amended with effect from 1 April 2003 to expand a programme introduced in January 2002 called the "Highly Skilled Migrant Programme" ('HSMP'). The object of the amendment was to facilitate the entry into the country of highly-skilled non-nationals (including international medical graduates) who would be an asset to the UK economy. Unlike an earlier scheme, it applied to <u>all</u> skilled occupations and was not confined solely to the medical profession, although the selection criteria were such that most international medical graduates would meet them. However, by about 2005, as a result of steps taken to increase very substantially the number of students (most of them British or EEA nationals) graduating in medicine in the UK, the need to recruit international medical graduates to fill the ranks of junior doctors in the NHS had evaporated, or at least diminished very significantly, and their further recruitment would deny junior doctor posts to potentially large numbers of home-grown medical graduates. The Department of Health wanted to debar international medical graduates from employment as junior doctors so as to keep these posts open for graduates who were British or EEA nationals. It sought the agreement of the Home Office that the HSMP be restricted so as to exclude international medical graduates at postgraduate training level from the programme. This was not agreed and, accordingly, in April 2006 the Department issued some informal "guidance" the purpose of which was to restrict the operation of the Immigration Rules such that only those international medical graduates whose limited leave extends beyond the period of the post on offer should be considered in the same way as UK/EEA nationals.

42. This "guidance" was the subject of a successful challenge, Lords Bingham and Carswell holding that it was impermissible to seek to alter the effect of the Immigration Rules in this way, although Lords Rodger of Earlsferry and Mance took a different approach, holding that the guidance amounted to an unfair exercise of power by the Secretary of State for Health, as one emanation of the Crown, which was inconsistent with the legitimate expectations generated by the Secretary of State for the Home Department, as another emanation of the Crown. Lord Scott of Foscote dissented. The net effect was that the guidance was not upheld.

43. Even before the emergence of the decision in *Pankina*, it was to be Miss Farbey's submission that *Bapio* provides support for the proposition that guidance outside the Immigration Rules cannot operate to change the effect of the rules. I will refer to the arguments about *Bapio* when I have reviewed the other authorities to which my attention has been drawn including, of course, *Pankina* itself.

44. As a precursor to the decision in *Pankina* I should, however, refer to two statements in the House of Lords that illustrate the status of the Immigration Rules in the eyes of the law. In *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230, Lord Hoffmann said this at [6]:

> "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...."

45. In the same case Lord Brown of Eaton-under-Heywood said this:

> "33 In deciding what simple fairness demands in the present context it is important to recognise first and foremost that, so far from asking here what *Parliament* intended, the question is what the *Secretary of State* intended. The rules are her rules and, although she must lay them before Parliament, if Parliament disapproves of them they are not thereby abrogated: the Secretary of State merely has to devise such fresh rules as appear to her to be required in the circumstances.
>
> 34 Secondly, as Mr Ockelton put it in the tribunal's decision here, "the immigration rules are essentially executive, not legislative"; the rules "are essentially statements of policy". Longmore LJ said much the same thing in the Court of Appeal (para 27): "the rules are statements of executive policy at any particular time ... Policy statements change as policy changes." This to my mind is the core consideration in the case. This, and the fact that, save in those few specific cases (such as HC 395 in 1994) when express transitional provisions were included in the rule changes, decisions invariably have been taken according to the up to date rules.

> 35 The immigration rules are statements of administrative policy: an indication of how at any particular time the Secretary of State will exercise her discretion with regard to the grant of leave to enter or remain. Section 33(5) of the 1971 Act provides that: "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." The Secretary of State's immigration rules, as and when promulgated, indicate how it is proposed to exercise the prerogative power of immigration control."

46. *Odelola* concerned the construction of the Statement of Changes in Immigration Rules (2006) (HC 1016), which came into force on 3 April 2006. Until then, a foreigner with any medical qualification was entitled to apply for leave to remain in the United Kingdom as a postgraduate doctor. The new rule confined the entitlement to those with medical qualifications from UK institutions. As Lord Hoffmann indicated at [3], the issue was whether the new rule applied to all cases in which leave still had to be granted or only to doctors who had not yet applied. The distinction was vital to Dr Odelola whose qualification was gained in Nigeria. She had applied on 17 January 2006, and thus before the new rule came into force, but her application had not yet been determined when it did so.

47. The House of Lords held that changes in the Immigration Rules took effect whenever they said they came into effect so that, unless there was a statement to the contrary, new rules came into immediate effect and applied to all leave applications, whether pending or yet to be made. That was the natural meaning of the language of HC 1016 so that it came into immediate effect and extended to pending applications. Accordingly, Dr Odelola's application could not succeed notwithstanding the apparent unfairness to her.

48. That case did not, of course, involve any suggestion that an immigration rule was modified or altered by some external guidance, but it illustrates and confirms at an authoritative level the status of the Immigration Rules.

49. A case which does raise directly the effect that guidance (in the form of Immigration Directorate Instructions – 'IDIs') can have upon the implementation of the Immigration Rules is *Ahmed Iram Ishtiaq v Secretary of State for the Home Department* [2007] EWCA Civ 386. IDIs contain guidance to caseworkers as to how they should apply the Rules when they make decisions in individual cases. The case raised a possible conflict between what was stated in the Rules and the associated IDI.

50. Paragraph 289A(iv) of the Immigration Rules sets out the requirements to be met by a person who is the victim of domestic violence and who is seeking indefinite leave to remain in the UK. It sets out certain requirements concerning time spent in the UK and then requires the applicant "to produce such evidence as may be required by the Secretary of State to establish that the relationship was caused to permanently break down before the end of [the relevant] period as a result of domestic violence." In section 4 of chapter 8 of the Immigration Directorate Instructions it is provided that an applicant should produce evidence in the form of one or more of the documents specified. The applicant was able to prove that her marriage had permanently broken down as a result of domestic violence, but was unable to do so by producing evidence

in the form of one or more of those documents. The issue was whether that was fatal to her application for indefinite leave to remain in the UK.

51. The Court of Appeal held that it was not fatal to her application. The basis for that decision is contained in the following paragraphs of the judgment of Dyson LJ, as he then was, with which Chadwick and Thomas LJJ agreed:

> "31 In my judgment, para 289A(iv) should be construed so as to further the policy of enabling persons whose relationships have permanently broken down as a result of domestic violence before the end of the probationary period to be granted indefinite leave to remain. A construction which precludes an applicant, whose relationship has in fact broken down as a result of domestic violence, from proving her case by producing cogent relevant evidence would defeat the evident purpose of the rule. The purpose of para 289A(iv) is to specify what an applicant has to prove in order to qualify for indefinite leave to remain during the probationary period: viz that the relationship has been caused to break down permanently as a result of domestic violence. It is not the purpose of para 289A(iv) to deny indefinite leave to remain to victims of domestic violence who can prove their case, but cannot do so in one of the ways that have been prescribed by the Secretary of State in his instructions to caseworkers.
>
> 32 If it had been intended that applicants could only prove that they have been the victims of domestic violence by producing documents of the kind specified in the IDI, this could have been achieved easily enough in the rule. One way of doing it would have been to specify the necessary documents in the rule itself. This is the technique that was adopted in a different context in section 88 of the 2002 Act, which provides that a person may not appeal against an immigration decision which is taken on the grounds that he (or a person of whom he is a dependant) does not have an "immigration document of a particular kind". Section 88(3) defines "immigration document".
>
> 33 Another way of doing it would have been to state in terms that an application may succeed only if the applicant produces one or more of the documents specified in the IDIs or similar instructions issued by the Secretary of State to caseworkers. In that way, it would have been clear that the decision as to what kind of evidence to require was taken out of the hands of the caseworkers. If it had been done in either of these ways, Parliament would have had the opportunity to consider the point when scrutinising the Rules. It might not have approved a rule which took away from the caseworker the discretion to decide in the particular case what evidence to require for the purposes of para 289A(iv), a discretion whose exercise would be susceptible to review on appeal: see section 86(3)(b) of the 2002 Act. The exercise of discretion in formulating policy in

> the shape of instructions such as the IDIs is not susceptible to appeal, although I accept that it could be the subject of challenge by way of judicial review.
>
> 34 In view of the purpose of para 289A, and since subparagraph (iv) does not clearly provide that an applicant may only prove the necessary facts by producing evidence of the kind prescribed by the Secretary of State in instructions to caseworkers, I would hold that it does not have that effect."

52. Both Miss Farbey and Mr Sheldon seek to derive support for their respective submissions from that case. Miss Farbey submits that, whilst it recognises that the Secretary of State can advert to "procedural requirements" (as she describes them) in supplemental statements which are not of themselves subject to Parliamentary approval, it goes no further than that and cannot be taken as conferring on the Secretary of State power to alter by the use of extrinsic documents the effect of a policy reflected in the rules themselves. Mr Sheldon submits that the distinction Miss Farbey seeks to draw between the substantive and procedural matters is one that cannot be made, but in any event argues that the one thing that is clear from paragraph 33 of Dyson LJ's judgment is that, had he wished to do so, it would have been permissible for the Secretary of State to put in a proposed immigration rule change laid before Parliament a provision that an application could succeed only if certain documents specified in extrinsic instructions to caseworkers were produced by the applicant. If Parliament had approved that course, Mr Sheldon argues, then the effect would be that the requirements of that extrinsic document would govern the position.

53. Mr Sheldon submits that this is precisely what the Secretary of State did in the present case when the original version of what is now rule 120(a) was promulgated. Parliament approved the rule which permitted the minimum educational requirement for a foreign student to attain before being admitted to a course in the UK to be defined by guidance issue by the UKBA and that what he did by permitting the issue of new guidance in March this year was simply implementing what he said he would do. What he was doing, Mr Sheldon argues, was done with the sanction of Parliament given by its acceptance of the original formulation of the rule.

54. That is Mr Sheldon's fundamental proposition in this case and the proposition upon which he relies to distinguish the present case from *Pankina*. Whether it is or is not supported by *Ishtiaq* is a matter to which I will return when I have reviewed *Pankina* to which I must now turn.

55. The specific issues raised in the case related to Tier 1 migrants, specifically Tier 1 (post-study work) migrants. This category of migrant comprises "international graduates who have studied in the UK" who are encouraged to stay on to do skilled or highly skilled work. One of the requirements of the PBS in relation to such a migrant who is seeking leave to remain in the UK is that he or she must "have the level of funds shown in the table below and [provide] the relevant documents". It was also provided that the applicant had to have the funds specified "at the date of the application and … for a period of time set out in the guidance specifying the specified document …". The rules provide that the "specified documents" were "documents specified by the Secretary of State in the Points Based System Policy Guidance as being specified documents for the route under which the applicant is applying".

56. The table to which reference is made in the rules contains a single figure of £800. In the original policy guidance issued when the rule was promulgated certain documents were specified covering the 3-month period immediately before the application was made which were required to show, among other things, "that there are sufficient funds present in the account (the balance must always be at least ... £800 ...)". When that requirement was revisited some six months later it was re-cast in the following terms:

> "Applicants ... must have at least £800 of personal savings which must have been held for at least 3 months prior to the date of application".

57. Most of the applicants in *Pankina*, who were otherwise qualified for leave to remain in the UK, failed to be able to show by reference to their bank statements that they had the sum of £800 for three unbroken months preceding their applications. The question arose as to the efficacy of this new guidance.

58. It was accepted (or at least the court concluded) that what was called the "three-month test" did not form part of the rules laid before Parliament (paragraph 22) and that "it goes well beyond simply specifying the means of proving eligibility and introduces a substantive further criterion which did not form part of the statement of rules laid before Parliament" (paragraph 6). Mr Sheldon accepted that this was a correct conclusion. There could, he said, be no question that Parliament had, either expressly or by implication, approved a requirement that applicants should have a balance of £800 in a bank or building society account for three months prior to the application.

59. The Court of Appeal held that the revised criterion could not be put in place by virtue of the process of issuing guidance. The *ratio* of the decision appears to me to be that a provision that reflects a substantive criterion for eligibility for admission or leave to remain must be the subject of a process that involves a true Parliamentary scrutiny: see paragraphs 6, 22 and 33 of the judgment. The statutory foundation for such a conclusion is section 3(2) of the Act.

60. It would follow from this that, if a change to current practice (even if reflecting the requirement of a rule) did not involve any alteration of a substantive criterion for admission or for leave to remain, there would be no objection to the change being effected in some form of extrinsic guidance.

61. Mr Sheldon said that he was not proposing to argue before me that *Pankina* was wrongly decided and accepted that it was binding upon me. He did tell me, however, that permission to appeal to the Supreme Court has been sought in the case. Since I was told that I have been informed by the parties that the Court of Appeal has refused permission to appeal. The Secretary of State is apparently considering whether to seek permission to appeal from the Supreme Court. Mr Sheldon suggested that any appeal might at least in part be pursued to try to reconcile the analysis of the status of the immigration rules put forward in *Pankina* (see paragraph 62 below) and the analysis put forward in *MB (Somalia) v Entry Clearance Officer* [2008] EWCA Civ 102 and in *Odelola*. He tactfully reminded me that I was bound by each of those decisions. In embarking on the journey with a view to arriving at the correct conclusion in this case, all this makes the choice of platform from which to depart somewhat less than obvious. However, if it is the case (as seems to be accepted on

behalf of the Secretary of State) that I am bound by the *ratio* in *Pankina*, I will be bound to declare unlawful the revised approach to Tier 4 students set out in the recent UKBA guidance unless I am persuaded that Mr Sheldon's primary argument that there is a fundamental distinction between the situation obtaining in this case and that obtaining in *Pankina* is valid.

62. The legal analysis of the status of the immigration rules to which Mr Sheldon was referring was that set out by Sedley LJ at paragraph 17 of his judgment which reads as follows:

> " ... In my judgment the time has come to recognise that, by a combination of legislative recognition and executive practice, the rules made by Home Secretaries for regulating immigration have ceased to be policy and have acquired a status akin to that of law. Because they derive from no empowering primary legislation, they cannot be subordinate legislation or therefore open to conventional ultra vires challenges. But as an exercise of public power, which they undoubtedly are, they can be no more immune to challenge for abuse of power or for violation of human rights than any other exercise of the prerogative power, including prerogative Orders in Council: see *R v CICB, ex p Lain* [1967] 2QB 864; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61; [2007] EWCA Civ 498."

63. Mr Sheldon contrasts that statement with the quotations from *Odelola* to which I have already referred in paragraphs 44 and 45 above, and in *MB (Somalia)* where Dyson LJ said this:

> "... although they are subject to a negative resolution by either House of Parliament, the rules are laid down by the Secretary of State "as to the practice to be followed in the administration of this Act": see section 3(2) of the Immigration Act 1971. They are statements of policy: see *MO(Nigeria) v Secretary of State for the Home Department* [2007] UKAIT 00057 para 14."

64. Mr Sheldon has submitted that it is clear that Sedley LJ's conclusion as to the status of immigration rules formed the basis of the analysis that followed it. I am not sure that this is correct if my analysis of the true *ratio* in *Pankina* is correct (see paragraph 59 above). However, if and to the extent that there is a difference between these various statements and if Sedley LJ's statement (with which, of course Rimer and Sullivan LJJ agreed) is thought to be at variance with the others, it may well be that the differences are largely differences of emphasis. But, as it seems to me, even if it is an issue that requires resolution, it is not an issue that affects my decision in this case. I do not doubt that the changed approach in the new guidance does operate to change materially the substantive criteria for entry for foreign students who wish to study English in the UK and, subject to Mr Sheldon's principal argument (see paragraphs 65-66 below), that cannot be achieved by a change in guidance – it must be achieved through the medium of a rule change.

65. I have foreshadowed his principal argument in paragraph 53 above. In placing paragraph 120(a) before Parliament for its approval, Mr Sheldon argues, the Secretary of State was stating his intention to impose a minimum educational requirement. However, the rule says nothing about what that requirement would be save than that it will be set by way of guidance issued by the UKBA.

66. He contrasts that with the position in *Pankina* and indeed the *Bapio* case. In *Pankina* he submits that the court was faced with a situation where a proposed introduction of a more restrictive set of conditions than those contemplated by Parliament when the rules were laid before it was attempted by means of guidance. He suggests that that was the same situation as in *Bapio* where the question was whether or not the guidance issued by the Department of Health, which had the effect of extending immigration control significantly beyond the provisions of the Immigration Rules, was unlawful in circumstances. He submits the effect of *Bapio* and *Pankina* is that if the Secretary of State lays a set of rules before Parliament under the negative resolution procedure that set out in terms the requirements that will have to be met before an application to enter or remain will be successful, it is not open to the Secretary of State to introduce further and more restrictive requirements by way of guidance.

67. Before I indicate my conclusions on this argument, I should draw attention to one argument that Mr Sheldon has addressed that I am unable to accept. He submitted that the effect of the Claimant's argument would be to render unlawful *any* minimum educational requirement imposed by UKBA guidance, the basis for that argument being that there can, he submits, be no logical distinction between the current guidance and any of its predecessors. Accordingly, he suggests that the effect of acceptance of the Claimant's analysis would be to defeat the scheme clearly set in place by the Secretary of State (approved by Parliament) and there would be no minimum academic requirement in force at all.

68. I do not consider that this Doomsday scenario should be the result of a declaration that the revised guidance has not achieved what it set out to achieve. In my judgment, the existing guidance would continue to apply until changed in a manner approved by Parliament. My reason for so concluding is this: it is accepted, as *Pankina* itself confirmed, that there is no absolute rule against the incorporation by reference of material into a measure required to be laid before Parliament. In paragraph 24 of the judgment in *Pankina* reference was made to the case of *R v Secretary of State for Social Services, ex parte Camden LBC* [1987] 1 WLR 819 on that basis and, given that there was UKBA guidance in existence whilst the original measure was laid before Parliament (see paragraph 32 above), I can see no reason in logic or in legal principle why an ineffective attempt to change that guidance should result in the original guidance becoming of no effect.

69. In his illuminating article entitled 'Incorporation by reference in legislation', (2004) Statute Law Review 180, Keyes says that "[one] of the most significant, and often contested, aspects of incorporation by reference concerns whether a reference extends to material as it exists at a particular time (a 'static' reference) or, alternatively, as it may exist from time to time (an 'ambulatory' reference)." He continues thus: "With static references, changes made to the material (including repeal) after its incorporation by reference do not affect the operation of the incorporating legislation. It continues to incorporate the original version despite the subsequent changes. With

ambulatory references, subsequent changes made to the incorporated material by the person or body responsible for making it are incorporated as well and take effect from the time they are made." If Mr Sheldon is right in his principal contention, rule 120(a) would have to be treated as "ambulatory" on this analysis. If, however, it is to be treated as "static" then, as I have said, I do not understand why it should be said that the original version of the guidance is no longer operative. In my judgment, it would continue to be operative.

70. The true issue seems to me to be whether, as formulated, rule 120(a) is ambulatory or static. As I observed during the argument, if rule 120(a) had read "as set out in sponsor guidance published *from time to time* by the United Kingdom Border Agency", the matter would have been put beyond doubt. However, it does not read in that way. Section 12(1) of the Interpretation Act 1978 provides that where an Act "confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires." It seems to me to be a moot point as to whether the power to issue guidance in this context is truly conferred by a statute: it follows that section 12(1) does not obviously provide the answer. (Incidentally, it is interesting to note in this context that the express statutory obligation of the Secretary of State under section 3(2) is that he "shall from time to time ... lay before Parliament statements ... of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act ...".) As formulated, rule 120(a) does not seem to give an indication either way. Is there any clue to be found in the way other references to UKBA guidance are made in the rules?

71. I invited Mr Sheldon to draw my attention to other provisions of the Immigration Rules where a similar formulation appears. Without claiming that his research was exhaustive, he was able to refer me to about 15 or 16 provisions where references were made to guidance given by the UKBA. Those to which my attention was drawn were rules 144, 245ZE, 245ZZA, 245ZZC and rules 61, 69, 70, 71, 79, 92, 100, 116 and 120 of Appendix A, rule 5 of Appendix B and rules 13 and 16 of Appendix C. They were not examined in detail and a cursory analysis does not reveal any use of words that would indicate whether a particular provision was intended to be ambulatory or static. It does seem that all references to guidance from the UKBA are neutral in that respect.

72. Is there any contextual clue? I do not think there is any particular feature of the rules which would indicate that the guidance referred to was simply the guidance available at the time the rule was promulgated rather than guidance that may change from time to time. For reasons I will touch upon shortly, there does not appear to be any particular pattern to explain why a matter becomes the subject of guidance rather than being referred to specifically in a rule.

73. Within the context of the rules that deal with the 'Attributes for Tier 4 (General) Students' (namely, rules 113-124), the only potentially noteworthy variation on the theme of reference to UKBA guidance is that in some rules (rules 116(f) and 124(g)) reference is made to "information [that] is specified as mandatory in guidance published by the United Kingdom Border Agency" (my emphasis) whereas in others the use of the word "mandatory" does not appear. However, even where that word does not appear (for example, in rule 120(a) itself), the rule is expressed in mandatory

terms: "The course must meet the United Kingdom Border Agency's minimum academic requirements ..." (again, my emphasis).

74. At the end of the day, this analysis becomes more sophisticated than it probably needs to be. The full history has not been explained to me, but Parliament is plainly accustomed to using a structure within the operation of the Immigration Rules that makes use of reference to guidance given by the UKBA. It appears that it is well recognised that the opportunity to challenge changes in guidance does not exist within the legislative process. My attention was drawn to an observation made by Baroness Hamwee in a debate initiated by Lord Avebury on 6 April about the changes being made. She is reported as saying this:

> "Many of these changes come in the guidance, and I question whether guidance is the appropriate vehicle for some of this. My noble friend is drawing the House's attention to changes in the Immigration Rules, but the guidance is a step lower in that we cannot even challenge it through the legislative process."

75. As I have said, it is plain that the use of guidance permeates the operation of the Immigration Rules and it must be a familiar formula for those in the legislature who interest themselves in this particular area. Indeed so complex is the whole structure of immigration control through the Immigration Rules that one can well understand that guidance outside the statutory framework of the rules is an important component of the overall structure. One particular advantage of guidance is that it can be changed relatively quickly to accommodate urgent (or, perhaps, unforeseen) events. The difficulty, however, arises when something is done by means of a change in existing guidance which arguably constitutes a change in the practice adopted by the Secretary of State in the administration of the rules regulating the entry into the UK of non-nationals. In the first place, the word "guidance" itself would ordinarily connote something less prescriptive than a rule. In other words, one would not normally expect "guidance" to stand in the place of a rule or expect a rule to be changed by "guidance". Secondly, the Secretary of State is bound by section 3(2) of the Act to follow the negative resolution procedure where a change to the practice in the administration of the Act is contemplated. The whole purpose of that provision is to enable proper debate within the legislature about any such change.

76. As things stand, that debate is denied in the context of the Tier 4 Review in respect of the minimum level of educational attainment required of any intending student, yet is permissible in respect of the issue of the number of hours that a student admitted to the UK under its provisions may work. Equally, had any change to the financial requirement of £800 been contemplated (see paragraph 26 above), that could have been the subject of full Parliamentary scrutiny.

77. All these features have led me to the conclusion that, whatever Parliament may have intended by the phraseology of rule 120(a), it cannot be taken to have intended that a material change to the minimum educational attainments of would-be students that was in the extant guidance when the rule was formulated should be changed without the full Parliamentary scrutiny afforded by the negative resolution procedure.

78. In one sense, this is no more than applying in this context the approach adopted by the Court of Appeal in *Pankina* and supported in large measure by *Bapio*. For my part, I am unpersuaded that the distinction Mr Sheldon seeks to make between that case (where there was no reference to UKBA guidance in the original rule) and the present case (where such reference was made) can legitimately be drawn. I am acutely conscious that Parliament decides how it deals with these matters and it is not for the court to intervene. However, it is the court's task to decide if the end result of a process is in accordance with the law: see paragraph 25 of the judgment in *Pankina*. A material or substantive change in the administration of immigration control is, by virtue of section 3(2), to be placed before Parliament for consideration pursuant to the negative resolution procedure. There is nothing wrong with an immigration rule that refers to the use of guidance provided that the guidance is not then used to change in a material way the effect of the rule or the effect of extrinsic guidance available at the time of its promulgation. To that extent, I do not accept Mr Sheldon's contention that the logical consequence of the submissions made on behalf of the Claimant is that rule 120(a) is *ultra vires* section 3(2). All that would be unlawful would be the making of a material change in immigration policy pursuant to guidance permitted by the rule. If the rule expressly permitted such guidance to be issued "from time to time", different considerations may arise because Parliament could arguably be said to have approved a course that left open the possibility of making a material change by guidance. Nonetheless, even that course could founder in the light of the express terms of section 3(2). However, that issue does not fall to be determined in this case.

79. For those reasons, I consider that I am bound, by virtue of the reasoning in *Pankina*, to declare as unlawful the changed minimum educational requirements of those applying to study English in the UK. Since no challenge is made to any other aspect of the changes made, any declaration of invalidity (if that is considered the appropriate relief) should be confined to that feature of the changes.

80. For the sake of completeness, I should say that I do not consider this conclusion to be inconsistent with what was said in *Ishtiaq* (see paragraph 49 above). If I am wrong about that, it would be for the Court of Appeal to say so. However, the comments of Dyson LJ were, as always, context-specific. I do not read them as favouring an approach that, as the Court of Appeal held in *Pankina*, would result in "a discrete element of the rules [being] placed beyond Parliamentary scrutiny and left to the unfettered judgment of the rule maker". His comments, as I read them, concern the method of proof of a particular factor, not the factor itself. The way in which the Court of Appeal in *Pankina* interpreted the guidance was that it effectively changed the factor in question, and not just the means of proving that factor.

81. Equally, I do not think that there is anything in this approach that is intrinsically inconsistent with *Odelola*.

82. I will turn now to the two other grounds relied upon. If my conclusion on the principal ground advanced prevails, arrangements will doubtless be made for the placing before Parliament of a suitable rule which will enable the merits of the proposal to be debated properly. Since that is where, in my judgment, this matter should be (and is far more appropriately) debated, I am anxious to restrict my observations on the irrationality challenge to the minimum necessary. However, I cannot avoid dealing with it to some extent because it is, as things stand, maintained as a separate ground.

The irrationality argument

83. The essential argument here is that the decision is *Wednesbury* unreasonable and/or irrational because, it is said, there is no evidence to warrant the conclusion that immigration control requires that intending students of English in the UK should be prohibited (save for those exceptions specified in the Written Statement to Parliament) from entry to courses below level B2 and/or that now that the evidence base has been provided, the response to the evidence by the Secretary of State was disproportionate.

84. Miss Farbey drew attention to the fact that prior to the commencement of the present proceedings the Defendant had not published any evidence at all to support his decision and she demonstrated that the House of Lords Committee on the Merits of Statutory Instruments had expressed its dissatisfaction with the lack of evidence about HC 367 and its associated changes including the decision under challenge. The impact assessment relating to the results of the Tier 4 Review was not published until over a month after the decision was implemented and indeed after the present proceedings were commenced. Furthermore, it was not until 21 May that the Defendant disclosed the report of the Tier 4 Review upon the basis of which the various decisions were made. This was made available for the first time as part of the Defendant's evidence for the substantive hearing of this claim.

85. Whilst all this is arguably unsatisfactory, the evidence upon which the relevant decisions, including the challenged decision, were taken is now available for scrutiny.

86. It is accepted that the threshold for sustaining an argument of this nature is a high one: see, for example, *R v SSHD ex parte Launder* [1997] 1 WLR 839, 854F-G, per Lord Hope of Craighead. Equally, where there is a significant policy element in a decision, the court will be even more cautious when considering a rationality argument. As Sir Thomas Bingham MR, as he then was, said in *Regina v Ministry of Defence, ex parte Smith* [1996] QB 517, 556 -

> "The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense."

87. Mr Sheldon is correct in submitting that the issue is whether the decision taken by the Secretary of State was one that was reasonably open to him on the material before him at the time. Putting it another way, was the decision so unreasonable that no reasonable decision-maker could have arrived at it? He contends that the decision to raise the minimum educational requirement was one that required the balancing of a number of policy considerations and that it is quite possible for there to be range of legitimate opinion as to how best to balance these competing considerations. Miss Farbey does not, I think, argue against the parameters within which my review of the decision must take place, but contends that it is clear on the material now available that the decision was beyond the range of reasonable responses to the evidence said to justify action.

88. Examination of the Tier 4 Review reveals that the decisions made were led principally by concerns about a sharp rise in student applications since Tier 4 was introduced, the most significant rises in numbers coming from areas where historically much illegal immigration was generated. The Tier 4 Review runs to some 41 pages and I will not endeavour to summarise it save to a limited extent. An overview is provided by the Executive Summary which I will quote in full:

> "The review of the student route, announced by the Prime Minister on 12 November 2009, was prompted because of concerns about the unprecedented rise in adult student applications being seen in some parts of the world following the launch of the new Tier 4 route for students on 31 March 2009.
>
> During 2009/10 UKBA has experienced a global increase of student applications of approximately 18%, despite the fact that the number of institutions bringing students into the UK under Tier 4 has halved. Much bigger increases have been experienced in China (up by over 100% in South China) and India, and with Nepal and Bangladesh also now adding to the surge (up by 250%).
>
> This is clear evidence that the student route is being used as a route to illegal migration and a backdoor to low skilled economic migration. This may be adding 40,000 each year to the illegal population of the UK. It is not possible to take enforcement action against all of these and to do so would cost in the region of £440m per year.
>
> Balancing this picture of abuse, the education sector and genuine international students make an important contribution to the UK economy and an effective visa system is required to ensure that this continues. For the university sector in particular, international students and the income they generate is a significant part of their overall income. International students across the education sector also make a significant contribution to the local economies where they study. It is estimated that the value to the economy from EU and international HE students is some £5.3 billion a year (Source: The Impact of universities on the UK economy, Nov 2009). The UK is the 2nd most popular destination with 11.6% of the market. On a like-for-like basis, international student numbers have doubled since 1997. The Prime Minister announced on 11 January a new ambition to double the value of Britain's higher education exports."

89. Adding a little flesh to the bare bones of that overview, it is necessary to focus on what is said about the increase in applications made from certain areas, bearing in mind that in the two years prior to the introduction of Tier 4 foreign student applications had been declining. The report indicates that within China, the Fujian province has generated a fourfold increase in applications under Tier 4. Miss Farbey

has characterised this phenomenon as "the Fujian spike". The report says that the Fujian province has historically been the source of illegal migration to the UK and notes that in 2008 58% of the Chinese nationals who were removed from the UK were from Fujian. Investigations had revealed, the report indicates, that significant numbers of forged documents were utilised in an endeavour to facilitate immigration into the UK. The report indicates that 91% of all student forgeries in Guangzhou (the post that processes applications for the Fujian province) in 2008 were from Fujian. The report further indicates that students applying from Fujian are typically enrolling with private English language schools on low level English language courses for which previous study of English at school was being accepted as sufficient proof of ability to study, even when no further study had been undertaken for several years. These matters have plainly given rise to concerns that this particular area represents a source of potential significant illegal immigration as a result of the low threshold entry requirements to study English.

90. The other principal area of concern recorded in the report was South Asia, principally India, Bangladesh and Nepal. It is recorded that student applicants are typically applying for a range of courses between A-level standard and a Masters degree with significant numbers studying at pre-degree level. The courses, offered mainly by private colleges, often include a paid work placement element and, the report indicates, as such are more attractive to economic migrants. The concerns arising from the UKBA's investigations are that the language skills of those applying for such courses (which are not courses in English as such) are too low to meet the needs of completing the courses satisfactorily. That, of course, leads to the inference that the applicants are not genuine applicants.

91. Miss Farbey has argued with some vigour that reacting to the "Fujian spike" by raising the minimum threshold level before admission to a course teaching English in a way that may prevent other perfectly genuine applicants from coming to the UK is irrational and disproportionate. A policy change for all nationalities, she argues, is well beyond what is reasonable or proportionate. What, of course, lies behind the Claimant's concern in this case is that a blanket and, as it would contend, indiscriminate policy of raising the threshold could have a significant impact on those educational institutions it represents that do cater for *bona fide* students who wish to study the English language at a lower level initially. This self-interest of the colleges is, of course, also to be seen as a reflection of the potential significance of the change to the UK economy and also to the perception of those considering coming here for genuine reasons as to whether they would be welcome.

92. The other side of the coin, as Mr Sheldon would contend, is that the Secretary of State was presented with clear evidence of abuse of the Tier 4 system that required rapid action to prevent the risk of many economic migrants damaging the UK economy and costing the State a great deal of money in removing them from the jurisdiction.

93. He drew attention to features of the Tier 4 review that reflected on the effect of the changes on genuine students, including the Review Team's assessment that the impact on genuine student numbers of the change would be relatively small. That assessment was supported by two principal considerations, namely, the availability of the Student Visitor route for those who wish to study a low-level English course in the UK and the specific exemptions provided in the revised guidance.

94. As to the first of these matters, someone could apply for a Student Visitor visa for that purpose and, Mr Sheldon said, there is respectable research that shows that the 6-month duration of a Student Visitor visa would be sufficient to enable a student to reach the standard of English required to support a Tier 4 application – approximately 350-400 Guided Learning Hours are required to reach level B2. This route is also said to be considerably less attractive for economic migrants for a number of reasons. For example, a would-be economic migrant would find it considerably more difficult to find work in the UK if he had entered pursuant to a Student Visitor visa because of its form and the 6-month time limit. Furthermore, the decision whether or not to grant a Student Visitor visa is reposed in Entry Clearance Officers based abroad who are experienced in assessing applications and have the advantage of being able, if necessary, to interview the applicant and assess his or her intentions. That is an advantage that educational institutions in the UK do not have when assessing Tier 4 applications. All that the new arrangements ensure, Mr Sheldon argues, is that genuine students will still come to the UK to study English, bogus ones will be discouraged from doing so and the revenue that was previously attributable to bogus students will be lost.

95. As to the second matter, the Review Team recommended, and the Secretary of State accepted, that special allowance should be made for government-sponsored students and students who wished to take an English course as a prelude to taking up a course of higher education (pre-sessional students).

96. Miss Farbey contrasts those arguments with two particular paragraphs in the Tier 4 review. They are as follows:

> "59. Raising the bar for EL [English Language] and offering the SV [Student Visitor] route as an alternative for genuine students is likely to have an impact on the overall numbers coming to the UK to study English. The exact impact is difficult to estimate as genuine students will still have the ability to study as student visitors and so the main impact will be on those who need to work to supplement their studies or who use the route to work.
>
> ....
>
> 64. Presentationally, it seems very odd to say that you have to have knowledge of English to be able to come to this country to learn English – the best way to learn and to learn rapidly is by immersion in the language and the culture of the country where the language is spoken. In many cases students from non-native EL environments have very little high quality EL provision within their local education systems. Whilst there might be some expectation that language schools would adapt their provision to any new rules and simply provide more courses at the higher levels, there will be inevitably be some students who opt instead for another English-speaking country and who will be lost as potential further or higher education students in the UK."

97. As she correctly observes, those paragraphs talk about students, not bogus students. She submits that, contrary to one part of the Impact Assessment to which she has drawn attention, there will be a loss of revenue from genuine students.

98. Miss Farbey also suggests that the Tier 4 report, which was prepared for the eyes of the relevant ministers, made little of the objections received from institutions such as the Claimant and over-emphasised the factors pointing in a different direction.

99. One only has to record these various contentions to see that there are, as is usually the case, two sides to the argument. The Secretary of State contends, on the one hand, that urgent action was necessary, but that it was not intended to affect *bona fide* students and, if it does, it is a relatively small price to pay for achieving a more important objective. The Claimant (and doubtless others) would argue that too little regard was paid to the adverse effects that the introduction of such an all embracing policy would have.

100. Consistent with the well-established approach to which I have referred above (see paragraph 86), considerable caution needs to be shown before concluding that what was essentially a policy decision on the part of the Secretary of State was irrational, particularly, one might add, in an area of policy that is of considerable contemporary public concern. The court is not the appropriate place for balancing the competing arguments and in many respects it is ill-equipped to do so. The place for the arguments to be deployed and evaluated is in Parliament and, if the conclusion to which I have come on the principal ground advanced by Miss Farbey is correct, that is where these issues can be fully and properly considered. However, whether that is the correct conclusion or not, I am not able to say that the high threshold that it is necessary for the Claimant to cross for the court to declare that the decision of the Secretary of State was irrational has been crossed. To that extent, I would not have been persuaded that this ground of challenge could succeed.

Unlawful delegation of the Secretary of State's powers and/or an unlawful ouster?

101. The final argument deployed on behalf of the Claimant is that the requirement that a student must study at a minimum of CEFR level B2 (i) is a decision which has substantive effect on immigration control and (ii) has the effect that the Defendant has devolved the decision whether this requirement is met to the sponsor institution. This is because, it is argued, the sponsor may issue a CAS if it assesses that the student's English is at level B1 and is thus able to take a course at level B2 and must not issue a CAS for any student below B1 whatever course that student may wish to take. In the absence of a CAS, an application for entry or stay in the UK is bound to fail and a student may be denied an immigration benefit through a sponsor's decision that a CAS ought not to be issued. As a result, it is argued, the Defendant has used paragraph 120(a) to achieve an unlawful delegation under the principle in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, CA.

102. By a similar process of reasoning it is argued that since there is no recourse against a sponsor's decision to withhold a CAS the scrutiny of the High Court in a matter that bears substantively on immigration control is removed which is not permitted by the 1971 Act and thus amounts to an unlawful ouster of the Court's jurisdiction.

103. Mr Sheldon's short response to these arguments is that there is nothing objectionable, either in law or common sense, to a system which requires academic institutions to assess the standard of the courses they provide and determine whether applicants to those courses meet the appropriate standard. There is nothing in this practice inconsistent with the 1971 Act and, given that the Claimant's analysis would apply equally to the regime prior to the amendment of the guidance, it is to be noted that the Claimant had never previously sought to advance the analysis that this amounts to an unlawful ouster of the Court's jurisdiction. Finally, it is argued that it is difficult to envisage circumstances in which the scrutiny of the High Court might be sought by an aggrieved applicant in these circumstances.

104. I agree with those arguments. I do not consider that leaving the decision to issue CASs to the sponsor institutions constitutes any form of delegation of the Secretary of State's powers or any form of unlawful ouster of the Court's jurisdiction. There is, therefore, nothing *ultra vires* about rule 120(a) in its present form.

Conclusion

105. It follows that the principal ground upon which the Claimant relies succeeds and that the others do not.

106. I should say, lest the effect of this decision is misunderstood, that I do not see it as in any way undermining the use generally of guidance by or on behalf of the Secretary of State. Guidance is plainly of great value in the administration of a difficult and important area of Government policy. The decision is confined to one particular provision within the Immigration Rules although the reasoning that leads to it, if it is correct, is simply that extrinsic guidance cannot be used in the manner in which it was sought to be used in this case to make a material or substantive change in existing immigration policy without the negative resolution procedure set out in section 3(2) of the Immigration Act being implemented. That is what, as I perceive it, *Pankina* decided in the light of section 3(2) and I am bound by that decision notwithstanding the way in which rule 120(a) is formulated.

107. I should like to repeat my genuine thanks to Miss Farbey and Mr Sheldon for their excellent oral and written submissions.