

**SLS LEGAL PUBLICATIONS (NI)**

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**IMMIGRATION LAW IN NORTHERN  
IRELAND**

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**THE JURIDICAL STATUS OF  
IMMIGRATION RULES AND SOME  
RECENT DEVELOPMENTS**

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**SEMINAR**

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**COURT OF JUDICATURE OF NORTHERN IRELAND**

**CHAIRMAN, NORTHERN IRELAND LAW COMMISSION**

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## I IMMIGRATION RULES: STATUTORY CONTEXT

[1] Practitioners and judges alike can be readily forgiven for overlooking, from time to time, both the juridical status of Immigration Rules and the correct approach to the interpretation thereof. I have been attracted by the “back to basics” philosophy which underpins some reflections on this topic of fundamental importance.

[2] Those who practice in the field of immigration law will be familiar with the speed and frequency with which the Immigration Rules are extended and amended. Such practitioners will also have some familiarity with the opening statement to be found in every version of the Immigration Rules:

*“The Home Secretary has made changes in the Rules laid down by him as to the practice to be followed in the administration of the Immigration Acts for regulating entry into and the stay of persons in the United Kingdom and contained in the Statement laid before Parliament on 23<sup>rd</sup> March 1990 (HC251) (as amended). This Statement contains the Rules as changed and replaces the provisions of HC251 (as amended)”.*

[3] Some weeks ago, I downloaded an updated version of the Immigration Rules for the purpose of hearing a series of cases in the United Kingdom Upper Tribunal [Immigration and Asylum Chamber]. This was an honour and privilege for me, as I am the first Northern Ireland High Court Judge to have done so. Some two hours after I began the exercise, deploying a relatively efficient computer, it was completed. Over 500 pages of rules (many incorporating extensive subparagraphs) and appendices, some of them couched in frighteningly detailed terms (Appendix F probably being the worst offender) was the end product. This of itself speaks volumes for the challenge posed to those legal practitioners who purport to provide services in the field of immigration law. I would add that it is virtually inevitable that the updated version of the Immigration Rules which I downloaded last month is no longer current: this is the very nature of the beast.

[4] The parent statute is, of course, the Immigration Act 1971 (“the 1971 Act”). It is worth recalling its cornerstone provision, expressed, appropriately, in the opening part of Section 1:

*“(1) All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person”.*

Notably, Section 1 continues:

*“(2) Those not having that right 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 ...”*

This is followed by what is, for present purposes, the key provision 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 the 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 ... or as dependants of persons lawfully in or entering the United Kingdom”.*

Herein lies the genesis of the Immigration Rules which, nowadays, dominate the broad array of rights, duties and discretions in the sphere of immigration law and practice.

## **II IMMIGRATION RULES: THE STATUTORY MECHANISM**

[5] The mechanism whereby the Immigration Rules come into operation and are duly amended or substituted is contained in Section 3(2) of the 1971 Act, which 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; 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)."*

One recalls the general rule enshrined in Section 3(1), which is that were a person is not a British citizen, he shall not enter the United Kingdom unless given leave to do so in accordance with the Act or any provisions made pursuant thereto. Section 3(1)(b) provides for the discretionary grant of leave to enter the United Kingdom to non-British citizens, for either a limited period or indefinitely. By Section 3(1)(c), limited leave to enter or remain in the United Kingdom may be granted subject to any or all of a series of conditions (regarding employment) maintenance of self and dependants, registration with the police, reporting to an Immigration Officer and residence. The language of Section 3(2) is noteworthy: it provides for the making of the rules which are to govern "*the practice*" which will be followed in the administration of the Act for regulating entry into and stay in the United Kingdom for non-British citizens. The mechanism established by Section 3(2) has a certain novelty, not replicated with frequency in other statutes.

### **III STATUTORY HISTORY**

[6] It is instructive to reflect on the statutory antecedents of the 1971 Act. The first Aliens Act was made in 1905. Its subject matter was the administration of the prerogative power of immigration control. It established the post of Immigration Officer, whose function was to decide whether an alien (immigrant) was undesirable. There was a right of appeal against such decisions. By 1920, the basic statutory provision was that aliens must fulfil the requirements prescribed in instructions given by the Home Secretary to Immigration Officers. This model survived for approximately fifty years. It was reproduced in the Aliens Order 1953 (SI 1953/1671) and in the Commonwealth Immigrants Acts 1962 and 1968. Specialised adjudicators made their first appearance in 1969, pursuant to the Immigration Appeals Act of that year. This established a judicialised system of adjudicators, with an appeal line to the Immigration Appeal Tribunal, in all cases concerning decisions adverse to Commonwealth citizens. Notably, by Section 8(1) of this

statute, the route to a successful appeal was to establish that the decision or action under challenge was "... not in accordance with the law **or** with any immigration rules applicable to the case" [my emphasis]. Notably, Section 24(1) provided the following definition of Immigration Rules:

*"Rules made by the Secretary of State for the administration of [control on and after entry], being rules which have been published and laid before Parliament"*.

Section 24(1) was very obviously the precursor of Sections 1(4) and 3(2) of the 1971 Act. Of equal note also was Section 8(2), which provided that for the purposes of an appeal -

*"... no decision or action which is in accordance with Immigration Rules shall be treated as having involved the exercise of a discretion by the Secretary of State by reason only of the fact that he has been requested ... to depart, or to authorise an officer to depart, from the Rules and has refused to do so"*.

This provided important context for the questions which later arose in relation to Sections 1(4) and 3(2) of the 1971 Act.

#### **IV PANKINA -v- HOME SECRETARY**

[7] The juridical status of Immigration Rules was examined extensively in *Pankina (and Others) -v- Secretary of State for the Home Department* [2011] QB 376 and [2010] EWCA. Civ 719. In that case, the Applicants had graduated from approved United Kingdom tertiary educational institutions. Having done so, they sought leave to remain and work in the United Kingdom. This engaged paragraph 245Z of the Immigration Rules, which prescribed compliance with a series of requirements, including a demonstration of sufficient self-funding (paragraph 245 of the Rules has over 50 subparagraphs!). This rule, which had been inserted in 1994 [per HC 395] provided:

*"To qualify for leave to remain as a Tier 1 (Post Study Work) Migrant, an applicant must meet the requirements listed below ...*

*If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused."*

One of the specified requirements was that the Applicant has a minimum of 10 points under Appendix C. The latter, as substituted, provided:

*“(1) An applicant applying for leave to remain as a Tier 1 (General) Migrant must score 10 points for funds.*

*(2) 10 points will only be awarded if an applicant has [£800] and provides the specified documents”.*

In passing, this provides a useful illustration of the increasing resort to points based requirements and mechanisms in the Immigration Rules during recent years.

[8] When the applications in question were made, the relevant instrument was the Statement of Changes in Immigration Rules (2008) [HC 607]. This had, in accordance with Section 3(2) of the 1971 Act, been laid before Parliament by the Home Secretary. At the same time, the Home Secretary devised certain guidance, which was independent of HC 607 and, therefore, was not laid before Parliament. The legality of this simultaneous ministerial act became the centrepiece of the litigation which ensued. This ministerial guidance indicated that the *“specified documents”* were personal bank and building society statements evidencing that the applicant had held a minimum of £800 continuously during the period of three months preceding the date of the application. In the six cases in question, permission to remain and work in the United Kingdom was refused. In one of the cases, the applicant could not demonstrate minimum savings of £800 at any time. The Asylum and Immigration Tribunal (*“the Tribunal”*) allowed his appeal, on the basis that the Home Secretary’s Guidance was tantamount to a substantive requirement which had not been laid before Parliament and was, therefore of no effect. In the other five cases, the applicants were able to demonstrate minimum savings of £800 for periods of less than three unbroken months. The Tribunal (notably, differently constituted) dismissed their appeals. Further appeals to the Court of Appeal ensued.

[9] In the group of five appeals, the central question to be determined was the juridical status of the Immigration Rules. It was argued on behalf of the Home Secretary that the Immigration Rules have the character of an expression of executive policy and lacked the character of a statutory instrument. It was contended that they do not constitute *“subordinate legislation”* within the meaning of the Interpretation Act 1978. Delivering the judgment of the Court of Appeal, Sedley LJ observed that it fell to the court to determine *“an issue of constitutional importance and of real difficulty”*, which he formulated thus:

*“The issue is whether the executive, in rules which are required, subject to parliamentary oversight, to set out how it proposes to exercise its statutory functions, can lawfully reserve to itself the power to add to or modify those rules.”*

This central issue, his Lordship noted, raised questions about the constitutional status of the Immigration Rules, their relation to departmental policy and human rights. The constitutional territory into which this brought the court was described as “*still not fully explored*”. Having reviewed some of the statutory history Sedley LJ observed that by 1969, Immigration Rules had

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*“... shed the primary characteristic of policy – flexibility – and were required to have at least tacit parliamentary approval ...*

*Its immediate result was that the prior existence of a system of departmental rules and instructions, with a status distinct from that of ordinary policy, enabled Section 1(4) of the 1971 Act to begin with the definite article.”*

The proposition that Section 3(2) introduced a measure of parliamentary scrutiny was incontestable. Sedley LJ noted:

*“[11] ...thus care was taken to preserve Immigration Rules as an established category. In other words, although the 1969 Act was repealed and replaced by the 1971 Act, the Rules by then had a life of their own”.*

[10] Surprisingly, prior to the decision in *Pankina*, the precise status of the Immigration Rules had received little attention. In *MO (Nigeria) -v- Secretary of State for the Home Department* [2009] 1 WLR 1230, Lord Hoffmann stated:

*“[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”.*

In *Pankina*, Sedley LJ described the parliamentary mechanism for the making of Immigration Rules at “*not merely unusual, but unique*”: paragraph [13]. In his analysis, he noted that the 1971 Act had made “*two other dramatic constitutional innovations, both unprecedented in peace time*”. Firstly, by virtue of Section 3(8), in relation to issues of nationality the statute reversed the principle of habeas corpus which required the State to justify any deprivation of liberty (a core element of the doctrine of habeas corpus for many

centuries). Secondly, the statute introduced administrative detention of persons subject to deportation: by paragraph 2(2)(3) of Schedule 3.

[11] In our legal system there are certain familiar models. These include codes made pursuant to statute (an especially popular mechanism in legislation belonging to the last couple of decades) and ministerial policies which must be considered in decision making. There is also the category of subordinate legislation. In all of these models, the ultimate control of legality is vested in the courts. However, the Immigration Rules are not precisely comparable with any of them. Although described in the 1971 Act as rules, Sedley LJ reflected on whether, properly analysed, they are a reflection of **policy** viz. –

*“... the principles upon which departmental officials, acting in the Minister’s name, will deal with matters which they have to decide and which are not determined or constrained by law”.*

(Paragraph [15]).

It is trite to observe that policies are an indispensable element of contemporary government. In particular, ministerial/departmental policies are an inevitable product of both the density and the nature of contemporary parliamentary statutes. Reflecting on this topic, Sedley LJ, with his customary eloquence and analytical rigour, observed that policies embody –

*“... virtues of flexibility which rules lack and virtues of consistency which discretion lacks. Indeed, without policies to guide the exercise of particular powers and discretions, modern departments of state would be repeatedly challenged at law for inconsistency or arbitrariness”.*

His Lordship’s analysis continues:

*“[16] But the immigration rules are today different from and more than policy. On appeal to the tribunal they acquire the force of law: the first ground of appeal under s.84(1) of the 2002 Act is that the Home Office decision ‘is not in accordance with immigration rules’. The ineluctable effect is that departmental decision-makers too are required to abandon any idea of listening, as Lord Reid said they must, to any commonsense or special reason for applying policy flexibly and to stick in every case to the letter of the rules. And that is what one sees in practice. Indeed the parliamentary drafter has been drawn into the stealthy elevation of the rules to a status of quasi-law: s.86(3)(a) of*

*the 2002 Act speaks of "the law (including immigration rules)."*

[12] Previously, it had frequently been stated that the Immigration Rules are *sui generis*. However, the difficulty with this analysis is that it does not speak to the *genus*. The heart of the analysis of Sedley LJ is contained in the following passage:

*"[17] 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".*

[Emphasis added].

His Lordship was impelled to this conclusion by, *inter alia*, the consideration that the requirement of parliamentary scrutiny enshrined in Section 3(2) cannot be labelled accidental or gratuitous. Today's Government Ministers, Sedley LJ observed, are "... constitutionally forbidden to make law except with the express authority of Parliament ...": paragraph [19]. Absent such authority, their purported acts of lawmaking will be tainted with the same invalidity as proclamations by the Sovereign (see the *Case of Proclamations*) [1611] 12 Co. Rep 74. *Rex was not lex*: rather, *rex* was a servant of *lex*. The analysis of Sedley LJ continues:

*"[20] If therefore the 1971 Immigration Bill was going to follow the 1969 Act in making the Home Secretary's rules of practice a code to be followed and a source of legal rights, some form of parliamentary authority for the rules was constitutionally necessary. Surprisingly, the drafter's notes on clauses in the National Archives, are silent on the reason for clause 3(2): they say simply "The Secretary of State is to lay before Parliament 'immigration rules' governing the administration of the control". The Parliamentary debates on the Bill, while much fuller, are directed to the form of parliamentary scrutiny and shed no more light on why scrutiny was needed.*

[21] *But in my judgment there was a potent constitutional reason, whether it was overtly acknowledged or not, for Parliament's insisting in 1969 and again in 1971 that the Home Secretary's rules of practice must be open to a negative resolution: the rules were being elevated to a status akin to that of law and made the source of justiciable rights - something which, in the domestic sphere (as distinct from the administration of its overseas possessions), the Crown as executive has no power to do. It can make law only with the authority of Parliament. It follows that only that which enjoys or secures Parliament's authority, in the present instance by the absence of a negative resolution within 40 days after laying, is entitled to the quasi-legal status of immigration rules.*"

[13] By virtue of their content, the Immigration Rules are replete with references to external sources. This is exemplified by Part 6A of the Rules and captured by paragraph 245A(a), which provides:

*"Where Part 6A or Appendices A – C, or E of these Rules state that specified documents must be provided, that means 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. If the specified documents are not provided, the applicant will not meet the requirement for which the specified documents are required as evidence".*

In the realms of entry clearance and leave to remain in particular, the mechanism of "*specified documents*" features repeatedly in the Rules and entails consideration of the relevant ministerial policy guidance, which the Rules incorporate by reference. Documentary evidence can encompass matters as wide ranging as income, age and course accreditation. The incorporation by reference in the Rules of ministerial policy guidance prompts some reflection on the truism that ministerial policies can, of course, alter from time to time. However, as Sedley LJ noted in *Pankina*:

*"[27] ... the objection is not to rules which rely on outside sources for evidence of compliance. It is to rules which purport to supplement themselves by further rules derived from an extraneous source, whether that source is the rule-maker himself or herself or a third party".*

The distinction between legal rules (or pure law) and policies is crucial. In the latter sphere, there is scope for discretion, giving effect to the well known decision in *British Oxygen -v- Board of Trade* [1971] AC 610. However, as Sedley LJ noted, where the relevant requirement is contained within a rule

“... there is no discretion and no judgment to be exercised”: paragraph [28]. I interpose here the observation that every legal rule, whatever its status (primary, secondary etc.) and whatever instrument in which it is contained must, of course, be construed. Once again, it is the courts who are the ultimate arbiter in this exercise.

[14] In *Pankina*, the next step in the analysis of Sedley LJ places due emphasis on the requirement of **certainty**:

*“[33] But the operation of the rules qua rules is one thing; what they contain as a matter of law is another. In my judgment the statutory recognition of rules which are to have the character and, on appeal, the force of law requires such rules to be certain. That does not shut out extraneous forms of evidence of compliance, so long as these are themselves specified, but it does in my judgment shut out criteria affecting individuals' status and entitlements which – coming back now to the questions in paragraph 23 above – (a) have not themselves been tendered for parliamentary scrutiny, and (b) even if ascertainable at that point of time, may be changed without fresh scrutiny. As to (b), while the fact that the criterion absorbed into the rules comes from a policy document makes nonsense of the notion of policy, this is not critical: the vice would be the same if the reference in the rules were to a categorical criterion in some external but impermanent or undetermined source.”*

Describing Section 3(4) of the 1971 Act as a “*hybrid provision which conforms to no previously understood model*”, Sedley LJ continued:

*“[35] ... But the law, faced with it, cannot simply abandon a constitutional principle which for four centuries has stood as a pillar of the separation of powers in what is today a democracy under the rule of law. The answer has to be that ministers are to be expected to do what is required of them: Parliament will expect the Home Secretary to lay before it any rules by which he or she proposes to manage immigration; the courts will expect such rules, like any other source of law, to be those and only those which have Parliament's approval; and appellate tribunals will expect to find in the rules the certainty which rules must have if they are to function as law. If for some reason this model breaks down, the courts or the legislature will have to decide how to fix it.”*

Notably, recourse to the rule of law and the doctrine of the separation of powers was the ultimate and, arguably, most fundamental step in His

Lordship's analysis and conclusions. The pre-eminence of these doctrines, elementary but of supreme importance at one and the same time, is one of the striking features of the recent evolution of public law. Principles of constitutional law provided the ultimate answer.

[15] The outcome was that the applicants in the group of five cases succeeded, on the ground that the three month requirement was of no legal effect as it was introduced in the form of extra-statutory guidance and not contained in the relevant instrument of Immigration Rules. The sixth case contained the applicant who could not demonstrate minimum savings of £800 at any time. She succeeded before the Tribunal. The outcome of the Home Secretary's appeal against this determination is instructive as it hinged on Article 8 ECHR. The Court of Appeal held, firstly, that the Home Secretary was required to give effect to the Convention rights of the person concerned. In this case, the Convention right engaged was Article 8. This, the court held, would require the Home Secretary to evaluate the extent and quality of the individual's family and private life in the United Kingdom and the implications, for both the person concerned and the United Kingdom, of truncating their career. This in turn would require the Home Secretary to evaluate the significance of the criteria by which the person's eligibility had been measured. The financial criterion of minimum savings of £800 was considered to be a rough and ready measure of a person's ability to live without resort to public funds. Sedley LJ continued:

*"[46] It is one thing to expect an applicant to have the necessary academic and linguistic qualifications: here a miss is likely to be as good as a mile. It is another for an applicant to fall marginally or momentarily short of a financial criterion which in itself has no meaning: its significance is as a rough and ready measure of the applicant's ability to continue to live without reliance on public funds. Having £800 in the bank, whether for three continuous months or simply at the date of application, is no doubt some indication of this; but people who are able to meet the test may fall on hard times after obtaining indefinite leave to remain, and others who fail it would, if allowed to remain, never become a charge on public funds. The Home Office has to exercise some common sense about this if it is not to make decisions which disproportionately deny respect to the private and family lives of graduates who by definition have been settled here for some years and are otherwise eligible for Tier 1 entry. If the Home Secretary wishes the rules to be blackletter law, she needs to achieve this by an established legislative route.*

[47] *So long as the rules are what the Immigration Act 1971 says they are, they must in my judgment be operated in conformity with s.6 of the Human Rights Act."*

The introduction of career considerations into this analysis is noteworthy, as one of the discernible aims of the Tier 1 Post Study Work Scheme is to encourage international graduates who have studied in the United Kingdom to remain here for the purpose of undertaking skilled or highly skilled posts.

[16] One particularly striking feature of the analysis and conclusions in *Pankina* is the contrast which emerges between the rigidity of Immigration Rules (on the one hand) and the elasticity of Article 8 ECHR (on the other). The Court of Appeal concluded, in terms, that Immigration Rules are imbued with the rigidity of any legal rules (emanating from whatever source), standing in marked contrast with ministerial/departmental policy which, both by its very nature and as a matter of law (the *British Oxygen* principle), is to be interpreted and applied with a suitable degree of flexibility. In the specific case of Immigration Rules, the flexibility which the decision in *Pankina* appears to extinguish resurfaces abruptly in those cases where Article 8 ECHR arises. Article 8 is open textured, in both its language and its interpretation and application by the courts. Its influence in any given case is also unavoidably fact sensitive. Viewed through this prism, Article 8 may be seen as the mechanism potentially restoring the flexibility which the *Pankina* analysis appears to remove from the Rules. In short, Article 8, where engaged, arguably provides a foil for the austere 'legal rules' analysis in the *Pankina* decision. This is exposed starkly in the case of the sixth Appellant. This lady was unable to satisfy the requirement enshrined in the Rules. However, her case succeeded via the Article 8 route. This, one might say, sounded a notable triumph for the doctrine of proportionality over black letter law. This discrete outcome is also, independently, an interesting illustration of the impact of HRA 1998 in the sphere of immigration law.

[17] It remains to be seen whether this landmark decision will have any impact on the approach of the courts and tribunals to *construction* of the Immigration Rules. In *Odelola -v- Secretary of State for the Home Department* [2009] 1 WLR 1230, Lord Hoffmann stated:

*"Like any other question of construction, this ... depends upon the language of the rule, construed against the relevant background. That involves a consideration of the Immigration Rules as a whole and the function which they serve in the administration of immigration policy".*

In *Ahmed Mahad -v- Entry Clearance Officer* [2009] UKSC 16, Lord Brown noted this passage and continued:

*“The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognizing that **they are statements of the Secretary of State’s administrative policy** ...*

*[The] is to be discerned objectively from the language used, not defined by reference to supposed policy considerations”.*

[Emphasis added].

I have emphasized the words appearing in bold print for the simple reason that, *ex facie*, the detailed and erudite analysis and conclusions of Sedley LJ in *Pankina* may suggest a different approach. This question will undoubtedly surface in future cases.

[18] A mundane, though notable, illustration of the court’s approach to the construction of the Immigration Rules is provided in the recent decision in *Nuamah -v- Secretary of State for the Home Department* [Upper Tribunal, Immigration and Asylum Chamber – IA/30868/2009, May 2011] where paragraph 245ZX of the Immigration Rules (Tier 4 General Student Scheme) and paragraph 116 of Appendix A featured. The latter provision states:

*“116. A Confirmation of Acceptance for Studies will only be considered to be valid if:*

*(a) it was issued no more than 6 months before the application is made,*

*(b) the application for entry clearance or leave to remain is made no more than 3 months before the start date of the course of study as stated on the Confirmation of Acceptance for Studies,*

*(c) the Sponsor has not withdrawn the offer since the Confirmation of Acceptance for Studies was issued,*

*(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, and*

*(f) it contains such information as is specified as mandatory in guidance published by the United Kingdom Border Agency.”*

The Upper Tribunal construed paragraph 116(a) as follows:

*“[12] In our opinion, there is a material distinction between paragraph 116(a) and 116(e). The latter is clearly concerned with a requirement pertaining to the date when the Secretary of State determines the application. In contrast, we consider that there is nothing in the language of paragraph 116(a) to preclude reliance, post-application or at a subsequent appeal hearing, upon a second or subsequent CAS letter issued after the date of application, in order to show that the substantive requirements of the Immigration Rules were satisfied at the date of the application.”*

The Tribunal continued:

*“[13] We should make clear our view that paragraph 116(a) clearly requires an applicant to make a conscientious and determined attempt to submit with his application for leave a CAS letter which is fully compliant with the Immigration Rules. However, the only time limit stipulated in paragraph 116(a) is concerned with the vintage of the CAS letter. It must have been issued no more than six months before the application. This is the only limitation provision in paragraph 116(a). We find no warrant for implying a further limitation provision to the effect that in circumstances where the original CAS letter is defective in whole or in part it cannot be cured or substituted by a second or subsequent letter issued after the date of the application. The critical requirement will always be that a fully compliant CAS letter – which could, conceivably, be constituted by a combination of letters – exists on the date when the Secretary of State determines the student’s application for extended leave to remain in the United Kingdom or on the date when the Tribunal determines any subsequent appeal.”*

Finally, the Tribunal sought, in the construction exercise which it undertook, to ascertain the underlying purpose of paragraph 116(a) and the mischief to which it is directed:

*“[14] In construing paragraph 116(a) of The Immigration Rules in the manner outlined above, we have given*

*consideration to the underlying purpose of this provision and the mischief to which it is directed. In our view, the most clearly identifiable mischief is that of non-existent or otherwise unavailable courses of study. Paragraph 116(a) is designed to ensure that the course of study in question exists and is available. A construction of paragraph 116(a) which permits reliance upon a further CAS letter issued on a date postdating the application will promote the underlying purpose and, simultaneously, address the mischief. Furthermore, this construction is harmonious with the notion that immigration control is not designed to disadvantage or exclude those who can satisfy the substance of the relevant qualifying requirements. In other words, this construction does not undermine or otherwise frustrate the Secretary of State's immigration policy in this discrete sphere. We would add that to construe paragraph 116(a) in this manner also promotes elementary fairness to applicants."*

Although the concepts of underlying purpose and mischief do not feature expressly in the formulations of Lord Hoffmann and Lord Brown (*supra*), I would suggest that there is no disharmony.

## **V LUMBA -v- HOME SECRETARY and KAMBDIZI -v- HOME SECRETARY**

[19] One of the more noteworthy recent decisions in the field of immigration law is that of the Supreme Court in *Lumba -v- Secretary of State for the Home Department* [2011] UKSC 12. In this decision one finds a notable fusion of black letter statute law and principles of public law. Section 3(5)(a) of the Immigration Act 1971 (the 1971 Act) confers on the Secretary of State for the Home Department a power to deport foreign nationals. Schedule 3 of the 1971 Act empowers the Secretary of State, in certain specified circumstances, to detain foreign nationals pending deportation. From at least 1991, the Secretary of State had maintained a published policy on the application of the power to detain. This policy presumed in favour of release whilst justifying detention in some circumstances. However, following adverse publicity in April 2006, the Secretary of State adopted a new policy which was not published. Between April 2006 and September 2008, the Secretary of State applied this unpublished policy which imposed a near blanket ban on release of FNPs. On 9 September 2008, the Secretary of State amended the published policy to replace all references to a presumption of release with a presumption of detention. However, on 22 January 2009 following the decision of Davis J in the current proceedings, the published policy was amended again to omit references to a presumption of detention. By a majority, the Supreme Court held that that the Secretary of State is liable to

both appellants in the tort of false imprisonment as the statutory power to detain them was exercised in breach of public law duties (Lords Phillips, Brown and Rodger dissenting). The appellants are, however, only entitled to nominal damages assessed at £1 (Lords Hope, Walker and Lady Hale dissenting). They are not entitled to exemplary damages. The court remitted to the High Court the question whether Mr Lumba was detained for longer than a reasonable period in breach of the principles in *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704 (the *Hardial Singh* principles).

[20] As regards liability in false imprisonment, the Supreme Court held unanimously that it is lawful for the Secretary of State to operate a policy which sets out the practice that she will normally follow in deciding whether or not to detain FNPs pending their deportation provided that the requirements of public law, *Hardial Singh* and Article 5(1)(f) of the ECHR are respected: [40]-[55]. However, as regards the application of the statutory power to detain, it is unlawful in public law for the Secretary of State to maintain an unpublished policy which is inconsistent with her published policy and which applies a near blanket ban on the release of FNPs: [26]-[38]. Such a policy was applied to the appellants between April 2006 and September 2008. As regard liability in false imprisonment, the court held that the breach of a public law duty on the part of the person authorising detention is capable of rendering that detention unlawful and did render it unlawful in this case: [62]-[88], [198]-[207], [221]. Trespassory torts (such as false imprisonment) are actionable *per se* regardless of whether the victim suffers any harm. Accordingly, by a majority, the court holds that the fact that the appellants would have lawfully been detained in any event does not affect the Secretary of State's liability in false imprisonment: [62], [64]-[88], [197], [208]-[211], [221], [239]-[247]. Lords Phillips and Brown (with whom Lord Rodger agrees) dissent and hold that because the appellants would have been lawfully detained the Secretary of State is not liable to them in false imprisonment. With regard to the issue of damages, the court held, again by a majority, that the fact that the appellants would have been lawfully detained is relevant to damages rather than to liability. Since the appellants have suffered no loss they should recover no more than nominal damages of £1: [90]-[96]. They are not additionally entitled to damages to vindicate the importance of the right and the seriousness of the infringement: [97]-[101], [222]-[237], [253]-[256] (Lords Hope, Walker and Lady Hale dissenting: [176]-[180], [195], [212]-[217]). Further, the court holds unanimously that the appellants are not entitled to exemplary damages. The final issue addressed was that of the reasonableness of the detention periods under the *Hardial Singh* principles. The court held unanimously that the risk of reoffending and the legal challenges pursued by the detainee are relevant. The relevance of a refusal to voluntarily return is limited: [106]-[128]. It is for a court of first instance to decide whether Mr Lumba's detention for almost 56 months was in breach of the *Hardial Singh* principles. Accordingly, his claim was remitted to the High Court.

[21] The same merger of statute law and public law, noted above, re-emerged swiftly in the decision of the Supreme Court in *Kambdzi -v- Secretary of State for the Home Department* [2011] UKSC 23 (where judgment was given on 25<sup>th</sup> May 2011). In this case, there was a failure by the Home Secretary to review the detention of the Appellant in accordance with the former's policy. In short, only ten of the twenty-seven reviews required by the policy had been conducted and, of those, only six had been carried out by officials of the requisite seniority – and, of those six, two were vitiated by material errors of fact. On a purely substantive analysis, the Appellant's detention throughout the relevant period was lawful. However, the Home Secretary and his officials had infringed the policy which they applied to the power of detention enshrined in paragraph 2(2) of Schedule 3 to the 1971 Act. The Supreme Court, by a majority of 3/2, reached the same conclusion as in *Lumba*. In short, it decided that the Appellant's detention was unlawful during those periods when no review was carried out. The court decided, secondly, that the Appellant enjoyed a cause of action in false imprisonment in respect of these periods. Finally, noting that the full facts remain to be established, the Supreme Court held that if, ultimately, it is found that the Appellant would not have been released if reviews had been conducted in accordance with the policy, only nominal damages will be recoverable.

## VI THE DECISION IN TANZANIA

[22] I would also highlight the decision of the English Court of Appeal in *R (Tanzania) -v- Secretary of State for the Home Department* [2011] EWCA Civ 193, which examined the tests which govern the application of Rule 353 of the Immigration Rules and Section 94 of the Nationality, Immigration and Asylum Act 2002 (*"the 2002 Act"*). The judgment of Maurice Kay LJ opens with an interesting lament:

*"[1] There was a time when the development of the law by judicial decision progressed at a measured pace and had the appearance of being methodical. Today the pace can be frenetic and it sometimes happens that cases are decided without reference between them because, in the torrent of information, one court is left unaware of what another has decided. Steps are taken to try to ensure that this does not happen but they are not always successful. This appeal is concerned with a recent example."*

Rule 353 of the Immigration Rules provides:

*"When a human rights or an asylum claim has been refused ... and any appeal relating to that claim is no longer pending, the decision maker will consider any further*

*submissions and, if rejected, will then determine whether they amount to a fresh claim."*

It is further provided that in order to constitute a fresh claim, the representations in question must be "*significantly different from the material that has already been considered*" and possessed of "*a realistic prospect of success*" before a putative Immigration Judge. Where these tests are satisfied, an "in-country" right of appeal to the Tribunal is generated. Where the further submissions are rejected by the Home Secretary, the only method of challenge is by judicial review. The Court of Appeal traced the various pieces of a far from homogenous jigsaw, noting the introduction of Section 94 of the 2002 Act, which empowers the Home Secretary to certify asylum and human rights claims as "*clearly unfounded*". In determining the appeal, it had to grapple with two conflicting decisions of a differently constituted Court of Appeal: *TK -v- Secretary of State for the Home Department* [2009] EWCA. Civ 1550 and *YH -v- Secretary of State for the Home Department* [2010] 4 All ER 448 and [2010] EWCA. Civ 116. The court made three main conclusions:

*"[14] First, the omission to have regard to TK in YH seems to me to be immaterial for present purposes. The ratio of YH is limited to section 94 cases. Accordingly no question of per incuriam in relation to Rule 353 cases arises."*

Its second conclusion was:

*"[15] Secondly, the clash of recent authorities in relation to Rule 353 cases is really between TK and KH (Afghanistan). We have received erudite submissions on the question whether a later decision is per incuriam when, at the time of its promulgation, the transcript of an earlier decision has not yet been approved. I tend to the view that the date of the approval of the transcript is not the crucial date. If it were, it would have a potential for uncertainty verging on chaos. If I am right about this, then KH (Afghanistan) may be said to have been decided per incuriam. However, even if I am wrong, we are left with inconsistent recent decisions of this Court. The first exception to the rule in *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718 is that this Court "is entitled and bound to decide which of two conflicting decisions of its own it will follow": per Lord Greene MR, at 729. On this basis I would unhesitatingly follow TK because (1) it was identified specifically to address this issue which seems to have been no more than a secondary issue in KH (Afghanistan); (2) I agree with Laws LJ that a careful analysis of ZT does not provide authority for the proposition that anything other than *Wednesbury* is the correct test for review in Rule 353 cases; and (3) to the extent that*

*Longmore LJ in KH (Afghanistan) reached the contrary conclusion, he did so on the basis that "it is now clear from ZT (Kosovo)". I simply and respectfully disagree that ZT bears that reading."*

The court concluded, finally:

*"[16] Thirdly, to have a differential approach as between Rule 353 and section 94 cases is not illogical. In Rule 353 cases the applicant has already had full recourse to the immigration appellate system. Rule 353 is in the form of an extra-statutory concession. In section 94 cases, the Secretary of State is empowered to deny the applicant access to the immigration appellate system at the outset. A more protective approach to review in that situation is understandable. For my part, I would also consider an assimilation of the tests to be justifiable but, on the authorities, I consider that we are bound to continue to apply WM and TK in Rule 353 cases."*

Accordingly, Rule 353 of the Immigration Rules and Section 94 of the 2002 Act are not to be assimilated, unless and until Parliament chooses to do so.

## **VII SOME RECENT DECISIONS: AN ASSORTMENT**

### **[23] Zambrano -v- Office National [Case C-34/09]**

The contemporary profile of immigration law litigation is undoubtedly changing. In particular, the EU "Citizens' Directive" is of increasing prominence and gives rise to interesting and difficult questions of construction. In *Zambrano*, the Grand Chamber of the ECJ ruled that the "Citizens Directive" applies only to EU citizens who move to or reside in a Member State other than that of which they are a national and their family members. In this case, the parents were third country nationals (Columbians) and their minor children were EU citizens. Article 20 of the Treaty on the Functioning of the European Union has the effect of precluding a Member State from refusing a third country national upon whom EU citizen minor children are dependent, a right of residence in the Member State concerned and from refusing to grant a work permit to the third country national, insofar as such decisions deprive children of the genuine enjoyment of the substance of the rights attaching to the status of EU citizen.

### **Elmuratov -v- Russia [Application No. 66317/07]**

The Applicant failed to establish that his extradition from Russia to Uzbekistan would be in violation of Article 3 ECHR. There was no evidence

that he belongs to any vulnerable group susceptible of being ill treated and, while he faced charges in Uzbekistan, his allegations that any criminal suspect there was at risk of ill treatment lacked substance. The Applicant did establish a violation of Article 5/1 on the ground that his initial detention was in breach of national law, being effected by the District Prosecutor's Officer rather than a court. Furthermore, there was a violation of Article 5/4, as the relevant statute had no procedure to facilitate judicial superintendence of the legality of his detention.

**R (MD, Gambia) -v- Secretary of State for the Home Department**  
**[2011] EWCA Civ 121**

The Home Secretary designated Gambia as a "safe" country (for men only) under Section 94(4) of the 2002 Act. The Court of Appeal held that the Home Secretary was entitled to conclude that while there were evident human rights infringements in Gambia, these were no so systematic or general as to compel the conclusion that designation could not properly be made as a matter of law. The central issue was not whether Gambia had a good human rights record: rather, it was whether its human rights failings would place the United Kingdom in breach of its obligations to send adult males back to that country. The Claimant's challenge to the clearly unfounded certification of the Home Secretary was successful, on the ground that it was at least open to the tribunal to conclude that he may face a prosecution for sedition arising out of his alleged activities as an opposition supporter, giving rise to treatment in prison which could infringe his rights under Article 3.

**R (Mirza) -v- Secretary of State for the Home Department**  
**[2011] EWCA. Civ 159**

This case concerned a refusal of leave to remain under the Immigration Rules, followed by a deliberately delayed removal decision. This reflected a general policy of the UKBA to separate the two decisions by a substantial period of time. The operation of this policy had the important consequence that the Appellants were unable to oppose their removal by advancing grounds based on paragraph 395C of the Immigration Rules, which (as amended) provides:

*"Leave to enter the United Kingdom with a view to settlement as the unmarried or same-sex partner of a person present and settled in the United Kingdom or being admitted on the same occasion for settlement is to be refused if the Immigration Officer is not satisfied that each of the requirements of paragraph 295A is met".*

The detailed specified requirements are the very stuff of the well established common law right to make representations. The Court of Appeal held that the UKBA policy was contrary to the policy and objectives of the 2002 Act,

absent specific justification in a given case. As a general rule, nothing extending beyond a modest gap between the two decisions would be permitted.

**R (Daley-Murdock) -v- Secretary of State for the Home Department**

[2011] EWCA. Civ 161

This case was decided by the Court of Appeal in tandem with *Mirza* (*supra*). Here, the court made a distinction with regard to *over-stayers*. It held that when refusing an over-stayer's application for leave to remain, the Home Secretary is not obliged under the 2002 Act to simultaneously make a removal decision. Once again, the Court of Appeal prayed in aid the policy and objects of the 2002 Act. It held that these would be frustrated by the imposition on the Home Secretary of an obligation to make an appealable refusal decision – under Section 82(2) – at the same time as refusing an over-stayer's application for leave to remain. Fundamentally, the legislation distinguishes between over-stayers and those lawfully present in the United Kingdom. Under the current scheme of the Immigration Rules, an over-stayer in receipt of a removal direction can pursue an in-country appeal *only where* he has made an in-country asylum or human rights claim.

**FM (Zimbabwe) -v- Secretary of State for the Home Department**

[2011] EWCA. Civ 168

This case illustrates the limitations inherent in any appeal involving a challenge to an Immigration Judge's evaluation of factual issues. The Claimant was an AIDS sufferer who contended that, if returned to Zimbabwe, she would receive inadequate medical treatment on the ground of political discrimination. The Court of Appeal declined to interfere with the judge's assessment of the evidence, but allowed the appeal on the ground that it had been overtaken by the country guidance decision in *RS (Zimbabwe)* [2010] UKUT 3363.

**R (WJ, China) -v- Secretary of State for the Home Department**

[2011] EWCA. Civ 183

Article 8 ECHR did not avail the Claimant who was found to have indulged in a prolonged, persistent and dubious history of deception in evading the United Kingdom's immigration controls. The decision also determined an important point of law. If, following further representations, the Home Secretary makes a fresh decision, this will constitute an immigration decision appealable under Section 82 of the 2002 Act, thereby generating an in-country right of appeal. In contrast, if the Home Secretary decides that the further representations do not constitute a fresh claim, there will be no appealable decision under Section 82.

Thakur -v- Secretary of State for the Home Department [2011] UKUT 00151

This is a recent decision of the Upper Tribunal in which the Appellant had not enjoyed an adequate opportunity of enrolling at another college following the withdrawal of his sponsor's licence *or* of making further representations before the impugned decision viz. a refusal of leave to remain as a Tier 4 (General) Student Migrant. The first aspect of this loss of opportunity might be viewed as the deprivation of a substantive benefit, whereas, in contrast, the second represents a classic element of common law procedural fairness. The Upper Tribunal held that these lost opportunities were in breach of the common law duty of fairness (the "**Doody**" duty) owed by the Home Secretary to him.