

# ILPA information sheet

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## Immigration Rules 1

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The Immigration Rules set out the requirements that a person must meet in order to be permitted to enter or remain in the UK. However, the Immigration Rules do not apply to some people – e.g. British citizens, and European Economic Area nationals and their family members exercising free movement rights. The Immigration Rules are available on the UK Border Agency website at: <http://www.ind.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/>

In July 2012, the Supreme Court gave two judgments concerning the Immigration Rules. This information sheet provides information about these judgments, and about the Immigration Rules more generally.

### **The basis on which the Immigration Rules are made and changed**

In *R (Munir & Anor) v Secretary of State for the Home Department* [2012] UKSC 32 and *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, the Supreme Court considered the legal basis for the making of the Immigration Rules. In *Munir & Anor* (at paragraphs 23 to 33), Lord Dyson set out the relevant history to the Immigration Rules. The first reference to ‘immigration rules’ in UK legislation was in the Immigration Appeals Act 1969. However, the source of the Immigration Rules is now the Immigration Act 1971. As is more fully explained in the judgments in *Alvi*, the Immigration Act 1971 imposes a duty upon the Home Secretary to make immigration rules and place these (and any changes) before Parliament. The Act provides that Parliament may disapprove these rules and changes within a 40 day period following their being placed before it. The 40 days does not include periods when Parliament is not sitting (other than short-term adjournments of less than five days).

As the Supreme Court makes clear in *Alvi*, the duty upon the Secretary of State is to place all immigration rules before Parliament in this way.

### **When the Immigration Rules and changes take effect, and the effect of Parliamentary disapproval**

The Immigration Rules and any changes take effect on the date, after they are made, chosen by the Secretary of State. Changes are published as “Statements of Changes in Immigration Rules” and these statements state the date or dates on which the various changes are to take effect. Changes can take effect before the end of the 40 day period in which Parliament may disapprove them. The most recent Statement of Changes was published on 5 September 2012, and made several changes which took effect the next day.

If Parliament disapproves the changes within the 40 day period, the Act requires the Home Secretary to make further changes, within 40 days of Parliament’s disapproval, to address the

concerns of Parliament. If Parliament considered that the further changes had not fully or accurately addressed its concerns, it could within another 40 days disapprove of these changes. Parliament's approval is not, therefore, required before the Immigration Rules and changes are made; and Parliament's disapproval does not make the Immigration Rules or changes unlawful, though it will require some further changes to be made.

### **What is an immigration rule?**

In *Alvi* (paragraph 94), Lord Dyson concluded:

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

Lord Dyson reached this conclusion by considering the wording of the Immigration Act 1971. In requiring immigration rules to be placed before Parliament, the Act did not set out any limitation to only the most important of these rules. The Act did not require the approval of Parliament of the rules, only that Parliament had the opportunity to disapprove them if it so wished. This suggested that Parliament had intended that all rules were to be placed before it. Previous interpretations of the lower courts had sought to distinguish between some requirements and others, in deciding what was or was not a rule. These distinctions were not satisfactory.

Accordingly, mandatory requirements (i.e. requirements that if not met mean a migrant must be refused leave to enter or remain) are all required to be placed before Parliament. *Alvi* was about whether it was lawful to refuse Mr Alvi leave to remain to continue his job as assistant physiotherapist on the basis that the job was not of the skills level required. The requirement as to skills levels which it was said Mr Alvi had not met was set out in a code of practice, which was not in the Immigration Rules and was changed from time to time without any statement of the change being placed before Parliament. This requirement was a rule. It was required to be placed before Parliament. It had not been, and was therefore unlawful. Mr Alvi's appeal against his refusal of leave to remain succeeded. Generally, therefore, all mandatory requirements should be found in the Immigration Rules. If changes to the Immigration Rules refer to requirements set out elsewhere, those requirements must be known and fixed at the time the changes are placed before Parliament.

### **Resident labour market test**

Under the Points Based System, an employer, who wishes to sponsor a migrant worker to come to or stay in the UK to work for that employer, may be required first to check that a suitable worker is not available in the resident labour market. The guidance relating to this requirement had set out what the employer was to do to test whether there was someone available from the resident labour market to do the job.

In *Alvi*, Lord Hope gave his opinion that this requirement was not a rule. Lord Dyson disagreed, as did Lord Clarke and Lord Wilson. The other Supreme Court judge in *Alvi*, Lord Walker, preferred not to express an opinion on this issue. An opinion on whether this requirement was a rule was not necessary to decide that case. Therefore, none of these opinions is binding on any court or tribunal in the future. However, the differences between the judges show that the question of what is a rule and what is not may still cause difficulties in future cases.

### **Further information and recent changes**

The “Immigration Rules 2” information sheet [<http://tinyurl.com/8wbyz6p>] provides further information about the Home Office response to, and some of the implications following, the Supreme Court judgments. The judgment in *Alvi* may have important implications for applications and appeals decided in the past. The “Immigration Rules 2” information sheet provides further information about this.