

## **SUPPLEMENTARY NOTE ON THE PROPOSED IMMIGRATION CAP BY THE JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS**

This is a supplementary note by the Joint Council for the Welfare of Immigrants on the issue of the legality of the rule changes following the judgement in *English UK v Secretary of State* CO/3854/2010 handed down last week.

1. *Pankina*<sup>1</sup> precludes the legality of decisions based on Rules which purport to supplement themselves by further 'rules' derived from an extraneous source (para 27 read with the rest of the judgment); put another way it precludes 'rules' which impose criteria affecting persons status and entitlements that have not been put before Parliament (para 33).
2. The *English UK case*<sup>2</sup> interprets the ratio in *Pankina* to the effect 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 Parliamentary scrutiny (para 59).
3. Arguably the new rule relating to 'grant allocation' imposes such a criterion because, even if applications so refused are referred to the next grant allocation period for consideration, the instant application/appeal must be refused under the Rules.
4. However, as appears from *Pankina*, there is no absolute rule against the incorporation by reference of extraneous material into a rule of piece of delegated legislation - see the *Camden case*<sup>3</sup> at para 24. But that qualification relates to an existing document so that there is 'no question of sub-delegation' and it being clear that parliament has in fact endorsed the rule together with its clear and ascertainable incorporation.
5. Further, so says Sedley LJ at para 29, what sends the constitutional objection yet deeper is the ability to *change* the incorporated material (thus resulting in a substantive change) at any given time and without corresponding Parliamentary scrutiny. Note from this paragraph that it is the *ability* to change the criterion rather than actual change which is the real vice to which Sedley LJ drives at this paragraph. The point is also underlined with his reference to external "impermanent" sources at the last line of paragraph 33.

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<sup>1</sup> *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719

<sup>2</sup> *English UK v Secretary of State* CO/3854/2010

<sup>3</sup> *R v Secretary of State for Social Services, ex p Camden LBC* [1987] 1 WLR 819

6. That would seem to underline that providing, outside the known rules, for changes to substantive criteria, unknown at the point of parliamentary scrutiny is impermissible. That would suggest that even if one knows the cap at the date the Rules are laid (as we do), the purported power to change them without scrutiny would be an unlawful way of proceeding.
  
7. However, one way out for SSHD might be to do that which Foskett J suggests in English UK, albeit clearly *obiter*, might be done i.e. at paras 70, 71 and 78 i.e. for the Rule itself to refer to extraneous changes from 'time to time' as a means of Parliament expressly authorising a particular means of amending the substantive criterion w/o further specific approval. There seems to be an internal tension in Foskett J's own judgment as to how far he is prepared to acceded to such an approach, but, in any event it is *obiter* and we think an issue would arise as to the extent to which such an approach would be consistent with the rationale in *Pankina*. Further and in any event, it is not clear that the wording of the rules as presently laid would in fact conform to the formula suggested by Foskett J.

12 July 2010