HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 27

on appeal from: [2007] EWCA Civ 1139

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

R (on the application of Bapio Action Limited and another) (Respondents) v Secretary of State for the Home Department and another (Appellant)

Appellate Committee

Lord Bingham of Cornhill
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Carswell
Lord Mance

Counsel

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(Instructed by Department of Health)

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LORD BINGHAM OF CORNHILL

1. The issue in this appeal is whether the Secretary of State for Health acted lawfully in issuing the guidance she did to employing bodies within the National Health Service in April 2006. At first instance Stanley Burnton J, who also had other issues to decide, upheld the lawfulness of the guidance: [2007] EWHC 199 (QB). The Court of Appeal (Sedley, Maurice Kay and Rimer LJJ) [2007] EWCA Civ 1139 held that it was unlawful. The Secretary of State challenges that decision in this appeal to the House. Pending the outcome of this litigation the guidance has been suspended.

Background

2. Under sections 1 – 3 of the National Health Service Act 1977, as under its successor statute, the Secretary of State for Health had an overall responsibility to provide or secure the provision of medical and related services under the auspices of the National Health Service. To ensure the provision of adequate care and treatment it is necessary that there should be appropriately qualified staff, including medical staff, in NHS hospitals. Among the medical staff employed in such hospitals, an important part is played by "junior doctors", a colloquial expression which I use to describe those who have successfully completed the first, academic, phase of medical education and are undertaking the second, postgraduate, phase by working in hospitals, treating patients and qualifying themselves to become fully-trained general practitioners or specialists. The structure of postgraduate education and training has changed from time to time over the years, but nothing in this appeal turns on the specific features of the training regime. It is not in doubt that the Secretary of State for Health has, in general, a power under the

statutes to give guidance to employers within the NHS on matters pertaining to the employment of staff, nor that such guidance, although not strictly binding, will ordinarily be followed by such employers.

3. Those working as junior doctors in the NHS have always, naturally enough, included nationals of the UK and the other member states of the European Economic Area. But there have not, historically, been enough of these to meet the demand of the NHS for junior doctors. So it has been necessary to recruit junior doctors from elsewhere. These have become known as international medical graduates (or IMGs). They are doctors who are not nationals of the UK or another EEA state and who, by reason of their immigration status, require leave to enter or remain in the UK and require permission to take up employment. The most fruitful source of IMGs has proved to be the countries of the Indian subcontinent, and the claimant in these proceedings is a company established by the British Association of Physicians of Indian Origin to represent the interests of doctors from the subcontinent in this country, of whom there are many. One such was the second claimant, Dr Imran Yousaf, an IMG from Pakistan, who was adversely affected by the changes described below and who, perhaps as a result, took his own life in January 2007.

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) that

> "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.

5. Since the NHS was heavily dependent on them to fill the ranks of junior doctors, IMGs enjoyed the benefit, for many years, of a very benign immigration regime. With effect from 1 April 1985 the regime became even more benign for those seeking entry to pursue postgraduate training. The Immigration Rules were then amended to introduce what came to be known as "Permit-Free Training" ("PFT"). IMGs who met the requirements of PFT and were appropriately qualified could enter and remain and take up a training post in this country without a work permit. The initial period of entry was 12 months, but this could be extended for further periods of 12 months up to a maximum aggregate period of four years. It was, however, a feature of the scheme that the entrant should leave and return home when the training was complete or the four-year period had expired. If an IMG wished to take up an employment otherwise than for the purpose of postgraduate training, he had to obtain a work permit to do so.

6. With effect from 1 April 2003 the Immigration Rules were amended to expand a programme introduced in January 2002 and known as the "Highly Skilled Migrant Programme" ("HSMP"). The object of the amendment was to facilitate the entry into the country of highly-skilled non-nationals who would be an asset to our economy. Unlike the PFT scheme just described, the HSMP applied to all skilled occupations and was not confined to the medical profession, although the selection criteria were such that most IMGs would meet them. The principal requirements for entry under the HSMP, as laid down in paragraph 135A of the Immigration Rules at the relevant time (the Rules have since been amended), were that the applicant produced confirmation by the Home Office that he met the criteria specified by the Secretary of

State for entry under the programme, that he intended to make his main home in the UK, that he was able to maintain himself and any dependants adequately without recourse to public funds and that he held a valid UK entry clearance for entry as a highly skilled migrant. Where the conditions were met the applicant might be granted leave to enter for 12 months (now two years), renewable for up to a further three years and then further renewable if the conditions continued to be satisfied. After five years, if the conditions were satisfied, the entrant would be eligible for indefinite leave to remain under paragraph 135G. Unlike PFT this scheme did not require those admitted to return home after a specified period; it catered for those who might choose to stay here indefinitely.

7. In earlier days, as explained above, the NHS had been heavily dependent on IMGs to make good the shortfall among UK/EEA nationals seeking employment as junior doctors in the NHS. But by about 2005 the situation had altered 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 this country. Not only was there no longer a need to recruit IMGs to fill the ranks of junior doctors in the NHS; the recruitment of such IMGs would deny employment as junior doctors to potentially large numbers of home-grown medical graduates whom the state had expensively educated and needed to train if they were to render the service for which they had been educated. The danger was particularly acute because, as stated by Ms Mellor (the Secretary of State's witness in these proceedings), in para 157 of her statement:

> "There was a risk of IMGs displacing a significant number of United Kingdom doctors. Many IMGs in the United Kingdom are highly skilled and have several years' experience in their chosen field. Accordingly, they are highly attractive to NHS trusts seeking to provide services at junior doctor levels."

It is the steps taken to address this new problem which lie at the heart of this appeal.

The April 2006 changes

8. The object of the Department of Health ("the Department") was, very broadly, to debar IMGs from employment as junior doctors so as to keep these posts open for graduates who were British or EEA nationals. The first step towards achieving that object was to secure an amendment

of the Immigration Rules relating to PFT. The effect of the change was that henceforward only a graduate of a UK medical school could benefit from PFT, and then only for undertaking the first stage of postgraduate training, and for a period not extendable beyond three years. Thus while the amendments did not altogether abolish PFT, they did very significantly restrict its availability. The amendments were made with minimal prior publicity, in order to prevent prospective applicants for PFT anticipating the restriction and so defeating its purpose.

9. The Department appreciated that these changes to the Immigration Rules did not prevent IMGs obtaining leave to enter the UK and permission to work here through an employment route other than PFT under the Rules, such as the HSMP or the work permit provisions. There were concerns that the HSMP might prove an alternative route for IMGs to obtain appointments as junior doctors. So the Department proposed that the HSMP be restricted in the same way as the PFT scheme, so as to exclude IMGs at postgraduate training level from the HSMP. An amendment of the Immigration Rules to this effect could not, however, be agreed with the Home Office, with whom the responsibility lay for amending the Rules. So the Department decided to take action on its own. It did so by issuing, on 13 April 2006, the guidance attacked in these proceedings.

10. To speak of the guidance being "issued" is to suggest a degree of official formality which was notably lacking. It appears that the guidance was published on the NHS Employers' website in terms approved by the Department, but no official draft, record or statement of the guidance has been placed before the House, which has instead been referred to an e-mail beginning "Dear All" sent by an official of the Immigration and Nationality Directorate of the Home Office in response to confusion caused by some earlier communication. It is for others to judge whether this is a satisfactory way of publishing important governmental decisions with a direct effect on people's lives. The parties are, however, agreed on the effect of the advice, directed to NHS employers, which was that

> "… only those [IMGs] whose limited leave extends beyond the period of the post on offer should be considered in the same way as UK/EEA nationals. Those whose limited leave will expire before the end of the post on offer should only be offered the post if there are no suitable candidates in the resident labour market (… there is an exception to this, in that those granted limited leave as a refugee can be considered in the same way as UK/EEA nationals)."

The rationale underlying the guidance is very clearly explained by Ms Mellor in para 162 of her statement:

> "The [Department's] solution to its main concern (ie that IMGs would by-pass the restriction of PFT by using the HSMP) and its linked more specific concern (ie that those IMGs who did use the HSMP might not be able to complete their training positions) was to require that IMGs who had certain categories of limited leave to enter or remain in the United Kingdom (apart from those recognised as refugees) be treated as if they required a work permit to enter training positions in the NHS if the duration of their leave did not cover the duration of the training position for which they were applying. This meant that, in order for such a position to be offered to a relevant IMG, the employer would have to demonstrate that the resident market labour test was met. It was considered that managing IMG entry to training positions by the application of the resident labour market test would avoid the problems that I have described above, including the problems which gave rise to the decision to restrict PFT."

She makes plain (para 151) that a deliberate decision was taken to make the guidance more restrictive than the Rules; it was not intended (para 164) to reflect the provisions of the Rules, but to go further.

The argument

11. The claimants' challenge to the guidance rests essentially on these propositions:

(1) The issue of the guidance on behalf of the Secretary of State was a public law act reviewable as such.

(2) The content of the guidance fell within the scope of sections 1 and 3 of the 1971 Act.

(3) The content of the guidance was accordingly to be addressed, if at all, in Immigration Rules and statements made by the Home Secretary under the procedure prescribed in section 3 of the 1971 Act and not otherwise.

(4) The mandatory requirements of the 1971 Act could not be circumvented by the intervention of a minister other than the Home Secretary.

(5) The issue of the guidance was therefore unlawful.

I did not understand counsel for the appellant Secretary of State (Mr Jonathan Swift) to take issue with proposition (1). Nor, if the claimants were right on proposition (2), did I understand Mr Swift to contend that propositions (3), (4) and (5) did not follow. But he did very strongly submit that proposition (2) was not correct, and that the succeeding propositions fell with it.

12. The crux of the argument on proposition (2) was in essence very simple. The Secretary of State submitted that the guidance was given to NHS employers to influence their conduct in the employment field. It related to employment. It did not purport to alter, nor did it in fact alter, the immigration status of anyone. Counsel for the claimants (Mr Rabinder Singh QC) rejected this approach, as elevating form over substance. The effect, and the intended effect, of the guidance was, he submitted, clear: it was to subject those IMGs who had entered, or who would enter, under the HSMP to a new requirement, unexpressed in the Rules, that they should be employable as junior doctors only if they satisfied the resident labour market test (qualified by the period of their unexpired leave to remain). Satisfaction of the resident labour market test had always been a requirement of obtaining a work permit, but neither PFT nor the HSMP had included such a requirement. Access to the former route had been effectively blocked by the amendment to the Rules. Effective access to the latter for many IMGs would be impeded by inability to meet the new test and consequent inability to obtain employment and so support themselves.

13. Stanley Burnton J rejected the claimants' challenge in para 63 of his judgment. The guidance did not affect private hospitals, he pointed out, so an IMG who qualified under the HSMP could obtain employment there. If the guidance affected immigration law or practice it would restrict the leave that might be obtained by an IMG who was offered a post in a private medical establishment, but it did not.

14. Sedley LJ (para 50 of his judgment) took a different view. The guidance directly and intentionally affected immigration law and practice by imposing on the possibility of employment in the public sector a restriction beyond those contained in the Rules. It made no difference (para 52) that the guidance did not affect private hospitals: the partial nature of the restriction emphasised that the state was using its power as a policy-maker, not an employer. Maurice Kay LJ agreed (para 61): the purpose of the guidance was to regulate the conditions attaching to the immigration status of an identified group. Rimer LJ agreed with both judgments (para 66).

15. I am satisfied that the arguments of the claimants and the reasons of the Court of Appeal are correct. The Department's object, as stated by its witness (para 10 above) "was to require that IMGs who had certain categories of limited leave to enter or remain in the United Kingdom (apart from those recognised as refugees) be treated as if they required a work permit to enter training positions in the NHS if the duration of their leave did not cover the duration of the training position for which they were applying." In other words, a new term, unwritten and formally unauthorised, was being silently introduced into their permissions. There was a further, less obvious but no less real, disadvantage to IMGs seeking to rely on the HSMP. A cardinal feature of that programme, as noted above, was the expectation of renewal if the conditions continued to be met. Thus the initial, or renewed, period of leave was not to be regarded as finite for the economically active. There is, however, no suggestion in the guidance that account would be taken of the prospect of renewal. Thus HSMP entrants would be subject to the resident labour market test even though, if appointed, they could ordinarily have expected their period of leave to be extended under the programme as formerly operated. These changes were not made in the way which the 1971 Act requires.

16. I would dismiss this appeal with costs.

LORD SCOTT OF FOSCOTE

My Lords,

17. I have had the great advantage before writing this opinion of reading in draft the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Mance. In paras 1 to 10 of his opinion Lord Bingham has set out the factual and statutory background to the issue that is before the House for decision. It is unnecessary for me to repeat, and I gratefully adopt his account. The issue, as Lord Bingham has said, is whether the Secretary of State for Health acted lawfully in issuing, on 13 April 2006, the guidance she did to NHS employers, in particular NHS training hospitals. The guidance was to the effect that, when NHS employers were looking for junior doctors to fill post-graduate training positions, applicants who were not nationals of the UK or any other European Economic Area member state, and whose leave to remain in the UK, granted pursuant to the Immigration Act 1971, would not extend beyond the duration of the position on offer, should not be

offered the position unless there were no suitable candidates who were UK or EEA nationals.

18. In considering the justification for the contention that it was unlawful for the Secretary of State to have issued this guidance it is necessary in my opinion to start by noticing the nature of the statutory duties and the breadth of the statutory powers of the Secretary of State in relation to the National Health Service. Her duties and powers are to be found in the main in the National Health Service Act 1977, replaced as from 1 March 2007 by the National Health Service Act 2006 the provisions of which are, so far as relevant to this appeal, to the same effect. Section 1 imposes a duty on the Secretary of State to provide in England a national health service that (subject to any statutory exceptions) is free of charge. Section 3 imposes a duty on the Secretary of State to provide hospital facilities "to such extent as he considers necessary to meet all reasonable requirements". Section 2 empowers the Secretary of State to "do any other thing … which is calculated to facilitate, or is conducive or incidental to, the discharge of …" these statutory duties, and section 8 empowers the Secretary of State to give directions to any NHS institutional employer about any of its functions. These are very important duties and very broadly expressed powers.

19. It is not suggested in the present case that the giving of the guidance of 13 April 2006 was outside the width of the statutory powers conferred on the Secretary of State. Nor is it suggested that the guidance was given otherwise than for the purpose of trying to ensure the continued effective provision of the hospital and medical health services that are needed for people living in England. Nor is it suggested that the reasons why it was thought desirable that the guidance should be given for that purpose were not reasons of substance. In short, the attack on the guidance has not been directed at all to the desirability in the interests of an efficient National Health Service that the guidance should have been given. The attack has been directed instead to the depressing effect of the guidance on the expectations of those medical graduates who are not UK or EEA nationals but who, previously to the guidance, would have been able to compete on an equal footing with UK and EEA nationals for post-graduate training positions at NHS hospitals in England. The respondents point out that a number of non-UK or EEA medical graduates have been permitted entry into the UK under rules made pursuant to the Immigration Act 1971 without any limitation having been imposed on their entitlement to seek post-graduate training positions at NHS hospitals. They contend that the Secretary of State's 13 April 2006 guidance constitutes an interference with the legitimate

expectations of these non-UK or EEA medical graduates and, in particular, those given leave to enter the UK pursuant to the Highly Skilled Migrant Programme ("the HSMP") and that the guidance is accordingly unlawful.

20. In considering this contention it is necessary, although the Secretary of State's reasons for giving the guidance have not been challenged, to keep in mind what those reasons were. They are explained by Deborah Mellor in her witness statement of 21 September 2006 submitted on behalf of the Secretary of State. An important part of the training of doctors consists of the post-graduate training of graduates from medical school, "junior doctors" as they are commonly called. The post-graduate training involves the junior doctors working in hospitals and receiving training as part of their employment by NHS trusts. After completing this post-graduate medical training the erstwhile junior doctor will be fully qualified.

21. Junior doctors who are not nationals of the UK or of any other EEA member state require, as do all other non-nationals, leave to enter or remain in the UK and permission to work here. It had been for some time not difficult for foreign junior doctors to obtain the requisite leave. Home grown junior doctors were in short supply and the needs of the NHS required their numbers to be supplemented by junior doctors from abroad who came to the UK for post-graduate training purposes and took up training posts at UK hospitals. In order to facilitate the entry into the UK of these foreign junior doctors, Immigration Rules were amended to allow them entry for post-graduate training purposes without their having to obtain a work permit. This was the so-called "permit-free training", or PFT, scheme. The total duration of any PFT period could not exceed certain specified limits and, as a general rule, the doctor had to leave the UK on the expiry of his or her training programme.

22. In the autumn of 2005, however, the Department of Health reviewed its position on the recruitment by the NHS of international medical graduates ("IMGs"). There had been considerable increases in the number of medical graduates emerging from UK medical schools who were UK nationals. There was no longer perceived to be an NHS need to recruit IMGs. Indeed the recruitment of IMGs to fill training positions at NHS hospitals was perceived to have become undesirable to the extent that it was preventing home-grown medical graduates from obtaining post-graduate training positions and thereby being able to complete their medical training in the UK. Bearing in mind that the

IMGs, or a great majority of them, would be leaving the UK after the completion of their post-graduate medical training, it was feared that a shortage of fully qualified doctors in practice in the UK might be the result. So changes in the Immigration Rules with effect from 3 April 2006 were introduced. Under the amended Rules only foreign nationals who were graduates from UK medical schools could benefit from PFT. Transitional provisions catered for IMGs already in training positions.

23. In 2002, however, the HSMP scheme had been introduced. This was an immigration scheme operated by the Home Office under Immigration Rules made pursuant to the 1971 Act. The HSMP scheme was open to all categories of skilled workers, including medical graduates and fully qualified doctors. It was, and is, geared towards skilled individuals who wanted to settle in the UK. The requirements of a migrant desirous of entering the UK under the HSMP scheme are the production of a Home Office document confirming that the relevant criteria for HSMP entry are met, the intention to make the UK the migrant's main home, the ability of the migrant to maintain and accommodate himself without recourse to public funds and, in addition, the holding of a valid UK entry clearance. A person fulfilling these requirements may be admitted to the UK for a period not exceeding two years but the leave may then be extended to three years and thereafter the migrant can apply for indefinite leave to remain. Migrants entering the UK under the HSMP do not require a work permit. They are expected to look for and obtain employment in any category for which they are qualified and to support themselves. Medical graduates entering the UK under the HSMP and hopeful of obtaining post-graduate vocational training would naturally apply for training positions at UK NHS hospitals.

24. The changes in the Immigration Rules that withdrew the PFT scheme under which foreign junior doctors could enter the UK and obtain post-graduate training positions at NHS hospitals did not prevent IMGs from obtaining leave to enter the UK and permission to work here through alternative employment routes available under the Immigration Rules, that is to say, the HSMP provisions or the ordinary work permit provisions. The Home Office was not willing to make changes in the Immigration Rules relating to the HSMP scheme or relating to the ability of IMGs to obtain work permits. The Secretary of State for Health was concerned that the Department of Health's policy that priority for post-graduate training positions at NHS hospitals should be given to UK nationals and EEA nationals might be side-stepped by IMGs entering the UK under the HSMP scheme, then applying for post-graduate training positions at NHS hospitals and thereby undermining

the Department's policy. A damaging effect on the NHS, brought about by IMGs using the HSMP route for making applications to and being accepted by NHS employers for post-graduate training positions to the detriment of the prospects of home-grown applicants, was feared. Hence the guidance of 13 April 2006 that IMGs should not be appointed unless no suitable UK or EEA national were available.

25. It is clear that an intended effect of the 13 April 2006 guidance would be to reduce the prospects of IMGs, junior doctors who had entered or proposed to enter the UK, whether under the HSMP scheme or under the ordinary rules, obtaining post-graduate training positions at NHS hospitals. But the guidance has no legal effect whatever on the immigration status of these junior doctors. They remain entitled to be in the UK. They remain entitled to apply for training positions at any hospital, NHS or private. If a training position is offered to any of them, whether by an NHS hospital or a private one, no immigration offence is committed; if the offer is accepted, no immigration offence is committed. The guidance has no legal effect, although it is to be expected that NHS hospitals would try to follow it.

26. The "legitimate expectations", on which the respondents rely, can reasonably be described, in my opinion , as an expectation that the employment policy of the Department of Health, so far as junior doctors from outside the UK and EEA and post-graduate training positions at NHS hospitals are concerned, would remain unaltered. I am not clear, however, on what basis this expectation, whether or not described as "legitimate", should be treated as fettering the ability of the Secretary of State for Health to adjust Departmental policy so as to afford priority in offers of post-graduate training positions first to suitable UK and EEA junior doctors if in her judgment the discharge of her statutory duties under the 1977 Act, now the 2006 Act, required that adjustment. The reasons, as explained by Deborah Mellor in her witness statement of 21 September 2006, for the adjustment in policy that the guidance represents seem to me very powerful. As I have said, the soundness and good sense of the reasons has not been challenged. So, I repeat, on what legal basis can the guidance be challenged?

27. "Legitimate expectations" is sometimes put forward as a complaint that some procedural step, such as consultation with some person or body, should have taken place before the challenged decision could properly have been made. I do not understand that to be the complaint here. At least it has not been advanced before your Lordships as the basis of the complaint. The complaint, as I understand it, is based

on expectations of substantive, as opposed to procedural, benefit, namely, that the guidance interfered with expectations, engendered in medical migrants when given permission to enter the UK, without any condition attached to their ability to seek employment, that they would be able to compete on an equal footing with home grown medical graduates for post-graduate training positions at NHS hospitals. But why should unconditional leave to enter the UK granted by the Home Secretary, whether under the HSMP scheme or under any other rules made pursuant to the Immigration Act, fetter the breadth of the statutory powers of the Secretary of State for Health given to her for the purpose of discharging her statutory duty regarding the preservation and promotion of the efficiency of the NHS in general and, in particular, of NHS hospitals? The answer given by my noble and learned friends Lord Bingham of Cornhill and Lord Mance appears to me to depend on the constitutional principle that the Crown is indivisible, that Ministers are merely "emanations" of the Crown, that leave to medical graduates to enter the UK under the HSMP scheme and the guidance of 13 April 2006 given to the NHS employers must be treated as coming from the same source, and that the latter should not be permitted to qualify or detract from an unqualified entitlement available under the former.

28. My Lords, the constitutional theory of the indivisibility of the Crown is in my opinion no basis upon which an important issue as to the lawfulness of guidance given by a Minister to institutions for which she has statutory responsibility ought to be decided. In *Town Investments Ltd v Department of the Environment* [1978] AC 359, 380-381 Lord Diplock said that

> "to continue nowadays to speak of 'the Crown' as doing legislative or executive acts of government, which, in reality as distinct from legal fiction, are decided on and done by human beings other than the Queen herself, involves risk of confusion".

And Lord Simon of Glaisdale, at p 400, after referring to "the Crown" as "a corporation aggregate headed by the Queen" commented that "the legal concept … does not correspond to the political reality". Nor does it. The statutory duties, responsibilities and powers under the National Health Service Acts fall on the Secretary of State for Health and her departmental officials. It is they who make the judgmental decisions necessary to be made and do the things necessary to be done if the statutory duties imposed by the National Health Service Acts are to be properly discharged. Similarly, the statutory duties, responsibilities and powers under the Immigration Act 1971 fall on the Home Secretary and his departmental officials. I can see no good or sensible reason why

what is done by one department in the proper discharge of its statutory duties should be taken to be a limitation on what can be done by another department in the otherwise proper and unexceptionable discharge of its own quite separate statutory duties and the exercise of its own quite separate statutory powers. In chapter 5, "The Crown and the Changing Nature of Government", in Sunkin and Payne's "The Nature of the Crown" (1999), the author, Mark Freedland, argues that the concept of a unitary Crown "is an imposed rule, in effect a legal fiction, rather than a real state of affairs" (p 114), that "rules, conventions and understandings of this kind obscure a reality in which executive government is conducted on a departmentalised basis" (p 115) and that the unitary Crown concept is a legal fiction which may lead to unsatisfactory regulation of executive government. My Lords there seems to me, if I may respectfully say so, much good sense in these remarks. Issues about "legitimate expectations" that are said to have been interfered with by some executive act or decision and the lawlessness of which is challenged in judicial review proceedings should surely be resolved on a basis of reality and not on the basis of an archaic constitutional theory that has become legal fiction.

29. The imperative underlying a judicial review challenge on "legitimate expectations" grounds to an executive act or decision is, or should be, that of fairness. The thought that the decision-maker should not be allowed to frustrate expectations that have been engendered by assurances that the decision-maker has, whether expressly or impliedly, previously given seems to me the underlying theme. But there are two limiting factors that, in my opinion, need to be taken into account in a case such as the present. First, the assurances that are relied on should be assurances that have been given by the decision-maker. Sullivan J in *R v Secretary of State for the Home Department, Ex p Mapere* [2001] Imm AR 89, paras 34, 36 agreed that for a legitimate expectation to arise it had to be founded on "some promise or policy statement or practice made by the relevant decision-maker" and that

> "it would be wrong in principle for courts to rule that a decision-maker's discretion should be limited by an assurance given by some other person".

To the same effect, in *De Smith's Judicial Review* 6th ed (2007), the authors say (at para 12-032) that

> "The representation by a different person or authority will therefore not found the expectation. Thus representations by the police will not create a legitimate expectation about the actions of the prison service".

I respectfully agree. Representations made by the officials in the Home Office, whether expressly or impliedly, in accepting medical graduates from outside the UK or EEA into the HSMP scheme, or otherwise giving doctors permission to enter and work in the UK without any limiting conditions, cannot, in my opinion, be prayed in aid so as to fetter the Secretary of State for Health's statutory discretion regarding the policy to be applied by NHS hospitals when deciding who to accept for post-graduate training positions.

30. That brings me to the second limiting factor. Before the 13 April 2006 guidance was issued foreign medical graduates with leave to enter the UK were able to compete for training positions at hospitals in England on an equal footing with UK and EEA nationals. This was in accordance with the pre-13 April 2006 policy of the Department of Health. To that extent, therefore, expectations held by foreign medical graduates that they would continue to be able to compete on an equal footing with home-grown medical graduates can be said to have been induced by the department's pre-13 April 2006 policy. But can these expectations be elevated to a level that deprives the departmental policy regarding employment of doctors at NHS hospitals of the flexibility that it needs in order to adjust to changing circumstances? It is not, in my opinion, open to the Department of Health to fetter its ability to adjust its policy from time to time so as to continue to discharge its statutory duty to ensure the proper functioning of NHS hospitals. In my opinion, the respondents' case in this appeal, while it has demonstrated expectations on the part of international junior doctors regarding their employment prospects for post-graduate training at NHS hospitals that may justify being described as "reasonable", does not justify elevating those expectations to the point at which they can succeed in challenging the sensible and, to my mind, well justified guidance given to NHS employers on 13 April 2006. Whether or not the expectations that departmental policy regarding the obtaining of post-graduate training positions at NHS hospitals would remain unaltered regardless of changing circumstances should be regarded as reasonable, they cannot, in my opinion, be described as "legitimate" for judicial review purposes.

31. The Secretary of State for Health was entitled, in my opinion, for the reasons described by Deborah Mellor in her witness statement, to adjust the departmental policy regarding employment of junior doctors in post-graduate training positions at NHS hospitals so as to give priority to the employment of those who were UK or EEA nationals, and to give the 13 April 2006 guidance accordingly. It is well arguable

indeed that, having regard to those reasons, she was bound to give that guidance. I would, therefore, allow this appeal.

LORD RODGER OF EARLSFERRY

My Lords,

32. I have had the advantage of reading your Lordships' speeches in draft. For the reasons to be given by my noble and learned friend, Lord Mance, I too would dismiss the appeal.

33. In England the executive power of the Crown is, in practice, exercised by a single body of ministers, making up Her Majesty's Government. With the increased range of responsibilities of central government today, there are, of course, more ministries dealing with domestic affairs than once there were, but they all exist to carry out the policies of the Government. As this case illustrates, policies adopted in one field often have repercussions in other fields. Indeed, responsibility for government policy in particular fields is frequently transferred from one ministry to another in the hope of achieving the elusive goal of greater overall coherence. In these circumstances Schedule 1 to the Interpretation Act 1978, which declares that the term "Secretary of State" in a statute "means one of Her Majesty's Principal Secretaries of State", expresses a principle of constitutional law of considerable practical importance: all Secretaries of State carry on Her Majesty's government and can, when required, exercise any of the powers conferred by statute on the Secretary of State. The same applies, in broad terms, to the exercise of the prerogative powers of the Crown.

34. I am accordingly satisfied that it would be wrong, not only as a matter of constitutional theory, but as a matter of substance, to put the powers, duties and responsibilities of the Secretary of State for the Home Department into a separate box from those of the Secretary of State for Health. Both are formulating and implementing the policies of a single entity, Her Majesty's Government.

35. Until April 2006 the Government had encouraged IMGs with HSMP status to come to this country in the expectation that they would get work in the National Health Service. The aim was that these skilled migrants would help staff the Health Service. In fact, for some years, it must have been clear to the Government that, due to a change which it had itself initiated soon after taking office, from about 2005 there would

be an increased supply of home-grown medical graduates. In order to try to provide jobs in the National Health Service for these home-grown doctors, in April 2006 the Government issued advice to NHS trusts in England. (Similar advice was issued for Scotland, Wales and Northern Ireland.) The advice was intended to free up places by making it impossible in practice for IMGs with HSMP status, including those already in this country, to obtain appropriate NHS posts. In my view, that was unfair to the IMGs with HSMP status in this country because the Government thereby dashed the legitimate expectations which it had fostered and on which they had acted. The advice was accordingly unlawful.

36. Obviously, the Government could have achieved its objective if it had amended the Immigration Rules. For various reasons, it chose not to do so. But, if it had chosen to try to amend the Rules, it would have required to pay the political price of subjecting the proposed change, and its highly damaging effects on the IMGs with HSMP status in this country, to the scrutiny of Parliament.

LORD CARSWELL

My Lords,

37. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Bingham of Cornhill. I gratefully adopt his statement of the facts and do not propose to repeat them. I shall also use the same abbreviations as he has. Lord Bingham held (para 15) that a new term, unwritten and formally unauthorised, was being silently introduced into the permissions of the IMGs to enter or remain in the United Kingdom. He further held that IMGs on the HSMP were deprived by the effect of the guidance of their ordinary expectation that their period of leave to remain would be extended, as it had been under the programme as formerly operated. I agree with both reasons and shall add only a few observations.

38. It is not in dispute that the Secretary of State and the Department of Health ("the Department") had as their object to keep medical training posts in the United Kingdom for junior doctors educated and resident there. The supply of such junior doctors available to take training posts had been materially increased, and the Department

understandably enough wished to retain them in the United Kingdom, where their expensive medical education could be put to good use in the NHS. In order to achieve this object the Department had to restrict the numbers of IMGs coming to the United Kingdom and taking training posts. After obtaining an amendment to the Immigration Rules restricting the availability of permit-free training, it was still faced with the possibility that the HSMP might prove an alternative for IMGs to obtain training appointments. In order to close this gap the Department sought a further amendment of the Immigration Rules, to exclude IMGs at postgraduate training level from the HSMP. The Home Office did not agree to secure such an amendment, and the Department decided to achieve its object by the issue of the guidance whose validity is challenged in the present litigation.

39. It is apparent accordingly that the officers of the Department appreciated very well that the effect of the guidance would be to restrict immigration to a greater extent than had been done hitherto by the Immigration Rules. That was their intention, as is confirmed by the terms of para 162 of the statement made by Ms Mellor (quoted in para 10 of Lord Bingham's opinion). The Department's ultimate object was no doubt to make more training posts available for UK-educated doctors, in itself a legitimate employment object. But its chosen method for achieving this object was to impose a restriction which operated in effect to alter the permitted limits of leave for non-nationals to enter and remain in the country. This could only lawfully be done by an amendment to the Immigration Rules, which would have had to be laid before Parliament and would have been subject to negative resolution. This was not done, and it must follow that the guidance is invalid.

40. The Secretary of State, acting through the officials of the Department, intended to achieve a restriction of immigration as a means of securing more training posts for UK-educated medical graduates. That that was her intention and would be the effect if the guidance were brought into operation is quite apparent. The restriction is an essential step in achieving the employment objectives of the Department, but it cannot be done without an amendment to the Immigration Rules. This straightforward finding is sufficient to determine the appeal and accordingly the guidance containing the restriction must be declared to be unlawful.

41. I would dismiss the appeal.

LORD MANCE

My Lords,

42. I have had the benefit of reading in draft the opinion of my noble and learned friend, Lord Bingham of Cornhill. I gratefully adopt his account of the background and facts in paras 1 to 10.

43. As Lord Bingham notes (paras 9-10), the Department of Health's guidance was designed to address the position of international medical graduates ("IMGs") with leave to enter under the Highly Skilled Migrant Programme ("HSMP"). The highly informal e-mail message, which now evidences the guidance, began with an express reference to those with HSMP status. There are however three different categories of IMGs who were potentially affected by the guidance: (i) IMGs within the United Kingdom having HSMP status at the date of the guidance; (ii) IMGs within the United Kingdom under the permit free training ("PFT") scheme at the date of the guidance; and (iii) IMGs overseas who might wish in the future to come to the United Kingdom to complete their medical training.

44. With effect from 3 April 2006 the Immigration Rules were changed to restrict PFT, in a manner which potentially affected IMGs within categories (ii) and (iii). In short, permits were in future only to be issued to IMGs for posts that could not be filled by United Kingdom or European Economic Area doctors (the resident labour market – "RLM" - test). Certain transitional provisions were however included by way of informal concession in the Immigration Directorate's instructions. First, any existing leave to enter or remain held by an IMG for PFT was to continue unchanged to expiry; second, if the existing leave was for PFT at Specialist Registrar level, the IMG could switch into work permit employment without meeting the RLM test. Third, any IMG offered a training placement prior to 7 March 2006 due to commence on or before 4 August 2006 whose existing leave did not allow him to complete that new position could obtain a permit without meeting the RLM test. Any other IMG without, or seeking an extension of, existing leave had to satisfy the RLM test.

45. In these circumstances, the Department of Health decided that steps needed to be taken in relation to those eligible under the HSMP scheme, particularly those falling within categories (ii) and (iii). In her witness statement dated 21 September 2006 Ms Deborah Mellor of the Department of Health explains that the concern was that:

> "the HSMP would become the entry route of choice for IMGs if PFT were to be restricted. ….. [M]ost IMGs within the UK would be eligible for the HSMP and …. the HSMP would be attractive to IMGs from outside the UK given the then current high level of IMG interest in working and training in the UK. If the number of HSMP doctors grew significantly then HSMP doctors would be increasingly successful in displacing United Kingdom graduates in competition for entry to training positions and this would leave insufficient training positions available to accommodate the increasing number of United Kingdom medical graduates with all the costs and consequences for UK graduate unemployment and emigration."

46. The first respondent, BAPIO Action Ltd, a company established by the British Association of Physicians of Indian Origin, a "voluntary organisation which represents the interests of doctors from the Indian subcontinent now working in the UK": para 1 of the first witness statement of its president, Dr Ramesh Mehta, dated 6 June 2006. Dr Mehta's statement estimated the number of IMGs working in NHS hospitals at that date as about 30,000, the number of IMGs in training as about 15,000, and the number of IMGs in the United Kingdom but unemployed and looking for their first job as about 5,000 (para 5). These figures do not distinguish between IMGs within categories (i) and (ii). The respondents make that point in their written case (para 29). They go on to observe that "the differences between them are however highly significant in this context" – a point to which I return in para 62 below.

47. The effect on IMGs within categories (i) and (ii) of the changes to the Immigration Rules and of the guidance (until suspended upon the commencement of these proceedings) is indicated by Dr Mehta's second statement dated 22 November 2006. He records that "Many IMGs on the HSMP were not considered for posts as a result of the DH guidance" (para 8); and that five out of six IMGs responding to a survey sent to 1000 IMGs said that the combination of the Rule changes and the guidance meant that they would be unable to complete their training, because their present PFT leave would be insufficient (para 3). The present proceedings were thus brought in the interests of those in

categories (i) and (ii) above. The guidance, on the other hand, was directed at categories (ii) and (iii), but its terms covered all three categories and did so without any transitional provisions for IMGs in category (i). Lord Bingham's reasoning and conclusions extend to persons within all three categories: see paras 12 and 15, where he refers to "IMGs who had entered, or who would enter, under the HSMP" and to " a further, less obvious but no less real, disadvantage to IMGs seeking to rely on the HSMP". I return to these distinctions in paras 60-62 below.

48. In para 11 of his opinion, Lord Bingham formulates five propositions which he identifies as constituting the essential basis of the respondents' challenge to the Secretary of State for Health's guidance. The difficulty lies to my mind in propositions (2) and (3). In particular, what characteristics can be said to bring guidance so "within the scope" of sections 1 and 3 of the Immigration Act 1971 as to mean that it can only be introduced, if at all, by amending the Immigration Rules or by the issue of statements by the Home Secretary under section 3 of the 1971 Act? And is the position the same for all three categories of IMGs identified above, ie even for IMGs without existing HSMP status (category (ii)) or without any immigration status at all (category (iii))?

49. The respondents have adopted a variety of phrases to identify the nature of their objection to the guidance. Not surprisingly, these focus on the position of IMGs in categories (i) and (ii), often without distinguishing between them. The respondents described the guidance, in their judicial review claim form, as "unreasonable, discriminatory, unfair and an abuse of power" and "highly prejudicial in its effect"; before Stanley Burnton J, as a "misrepresentat[ion of] the effect" of, and "an illegitimate attempt to amend", the Immigration Rules; and in their notice of appeal, as "directly related to, indeed predicated on, the immigration status of [IMGs with HSMP status]" and as having the effect of "depriv[ing] IMGs applying for jobs on the NHS of a benefit to which their immigration status entitled them". The Court of Appeal, in upholding the respondents' objection described the guidance as "directly and intentionally affect[ing] immigration law and practice by imposing on the possibility of employment in the public sector a restriction beyond those contained in the Rules" (para 50, per Sedley LJ) and "a document, the nature and purpose of which was to regulate the conditions attaching to the immigration status of an identified group" (para 61, per Maurice Kay LJ). In oral submissions to the House, Mr Rabinder Singh QC said that "the defining feature" of the case was the "express link in the guidance to immigration status" – in particular, the guidance applied to IMGs because they had no right of abode in the

United Kingdom; it also applied to IMGs with HSMP status the resident labour market test which work permit holders had to satisfy. The guidance, he submitted, "curtailed and limited the scope of and the legal effects following from the permissions those doctors had". For whatever reasons, neither illegitimate discrimination nor gross unreasonableness has been pursued as an objection to the guidance. The variety of other ways in which the case can be and has been put makes it necessary to analyse the guidance with care in order to determine whether and, if so, to what extent its issue by the Secretary of State for Health was inconsistent with the Immigration Act and Rules.

50. The Immigration Act 1971 regulates the position of persons who do not have the right of abode in the United Kingdom. Section 1(2) provides that:

> "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, stay in and departure from the United Kingdom as is imposed by this Act; ……"

Under section 1(4) the Secretary of State may lay down rules as to practice which

> "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 …."

Section 3(1)(c) further provides that, if a person is given limited leave to enter,

> "it may be given subject to … (i) a condition restricting his employment or occupation in the United Kingdom";

and section 3(3) adds that limited leave

> "may be varied, …. by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave shall cease to apply".

51. These sections make clear that immigration status, including any conditions to which it is made subject, attaches to the person to whom it

is granted. It is a criminal offence for such a person to overstay or to fail to observe a condition attaching to his leave, including a restriction on the employment he or she may undertake: Immigration Act 1971, section 249(1)(b). More recently, and subject to certain defences, it has also been made an offence for an employer to employ a person who has no subsisting leave to enter or remain or whose leave is subject to a condition precluding him or her from taking up the employment: Asylum and Immigration Act 1996, section 8, as amended.

52. The Secretary of State for Health's guidance does not effect any alteration in law to the immigration status of IMGs with HSMP under the Immigration Act or Rules. Such IMGs remain in law free to seek and accept employment with NHS trusts without committing any offence. NHS trusts remain in law free to offer such IMGs employment without committing any offence. Implementation of the guidance would mean that such IMGs were much less likely in practice to be offered employment. But that would be a consequence not of any change in their immigration status in law, but because of the employment policy introduced for NHS employers by the guidance. I am therefore unable to agree with Lord Bingham's analysis in para 15 of his opinion that "a new term, unwritten and formally unauthorised, was being silently introduced into their permissions". I am equally unable to agree that it is accurate to describe the guidance as "directly and intentionally affect[ing] immigration law and practice ……" (per Sedley LJ, para 50) or as regulating by its "nature and purpose … the conditions attaching to the immigration status of an identified group" (para 61, per Maurice Kay LJ).

53. The Secretary of State in issuing the guidance was not exercising or purporting to exercise any power under the Immigration Act or Rules; and it was not the purpose of the guidance either to amend the Immigration Rules or even to restrict the number of IMGs seeking HSMP status or its renewal, though it was appreciated that this would be the likely effect. The purpose was, rather, a core employment purpose central to the Secretary of State for Health's role, namely ensuring that the future need for healthcare professionals in the NHS, as modelled by her Department's projections, would be met: see paras 20-21, 107-127 and 150-162 of Ms Deborah Mellor's statement. The increase in training places for United Kingdom doctors meant that the supply of doctors to the NHS could be met from that source. IMGs were nonetheless attractive to NHS trusts at junior doctor levels, where they would displace United Kingdom doctors in training positions. United Kingdom doctors would then either leave the profession or go abroad. Further, statistics (Appendices 1 and 2 to Ms Mellor's statement) showed that the

"attrition" rate amongst IMGs was very high (although again not distinguishing between IMGs in categories (i) and (ii)): only about 25% of IMG senior house officers and 20% of IMG registrars were still in the NHS by the time they were expected to complete those respective grades, and only about 7% of IMGs were still in the NHS 10 years later. It was likely that there would be insufficient United Kingdom doctors to compensate for these losses.

54. In these circumstances, the question is: what is it about the Secretary of State for Health's guidance that is said to be illegitimate? It was informal and unsatisfactory in the way in which it was given. But it was given by the Secretary of State as part of her core role of over-seeing NHS employers and trusts and for a vital employment purpose. The Secretary of State originally hoped and wished to achieve similar protection for the NHS by the different route of amending the Immigration Rules and practice. But that in my opinion is neither here nor there. Her aim was always to protect and preserve the future work-force of the NHS. Restricting immigration would have been one way to achieve that employment aim. But if she had, otherwise, the power to achieve that employment aim by virtue of her supervisory responsibility for the NHS (and it is not suggested that she did not), the co-existence of power in the Crown to achieve similar effects in relation to NHS employment patterns by the different route of restricting immigration is as such irrelevant. Leaving aside the question whether it was right to embrace all three categories identified in the guidance and to do so without any transitional provisions, the employment route which she ultimately adopted can be said to have been more accurately targeted than a blanket amendment of the criteria for eligibility for, or of the conditions attaching to, HSMP status.

55. Ultimately, Mr Singh's submissions depend, as he accepts, on the fact that the employment guidance was targeted at persons with particular (HSMP) immigration status, together (for what it is worth) with the supporting factor that the criteria used for employment are criteria which in practice apply when deciding whether to grant a work permit to persons not having HSMP status. He accepts that it would have been legitimate for the Secretary of State to issue guidance limiting employment on other bases, for example by requiring particular academic qualifications. Indeed, it is not clear what ground of objection anyone could have had on Mr Singh's case if the Secretary of State had decided that *priority* should be given to persons with HSMP status. The critical question is whether it was inconsistent with the scheme of the Immigration Act and Rules and the practice regarding the HSMP to introduce guidance which significantly and detrimentally affected the

employment prospects of those with, or potentially able to obtain, HSMP status.

56. Mr Singh acknowledged that he could not point to any case on all fours with the present. But he relied on two as pointing the way: *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513 and *R (S) v Secretary of State for the Home Department* [2006] INLR 575. The latter case does not appear to me to assist. The respondents, Afghan nationals, had successfully established that their removal back to their home state would violate their rights under the European Convention on Human Rights. The statutory scheme of immigration control postulated that someone in such a position would be entitled to leave to enter. The Secretary of State, to avoid appearing to refuse such leave, had instead said that it was "inappropriate to grant any leave" and that the respondents would be "placed on temporary admission or temporary release", a status reserved by paras 16 and 21 of Schedule 2 to the Immigration Act 1971 for only two categories of persons, into neither of which the respondents fitted (p 594). The case presents no real parallel with the present.

57. The former *Fire Brigades Union* case is of greater potential relevance. The Criminal Justice Act 1988 provided for a statutory compensation scheme for the victims of violent crime, to replace the existing non-statutory scheme and to be brought into effect "on such day as the Secretary of State may … appoint" (section 171). Instead of appointing any day, the Secretary of State in 1993 announced that the existing non-statutory scheme would be replaced by a further non-statutory scheme, whereby awards would be made ex gratia according to a tariff fixed according to particular categories of injury.

58. By a majority of three to two, the House held that the Secretary of State had acted unlawfully. Lord Browne-Wilkinson noted at p 553 that "an executive decision which affects the legitimate expectations of the applicant (even though it does not infringe his legal rights) is subject to judicial review", citing *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 408-410, per Lord Diplock, and that this was relevant both to the standing of a victim of crime to take proceedings for judicial review and to the legality of the Minister's decision. He went on to say that, by introducing the tariff scheme, the Minister had given up his statutory duty to consider from time to time whether to bring the statutory scheme into operation and "debar[red] himself from exercising the statutory power for the purposes and on the basis that Parliament intended" (p 554). Lord Lloyd of Berwick said that it was clear that the tariff scheme was not an interim measure and

regarded the Minister as having illegitimately renounced, surrendered, abdicated or relinquished his power to implement the statutory scheme, in a way which was either an abuse or an excess of power (pp 571e-g and 572a-d). Lord Nicholls of Birkenhead said that "any exercise of the prerogative power in an inconsistent manner, or for an inconsistent purpose, would be an abuse of power and subject to the remedies afforded by judicial review" (p 576). On the facts, he concluded at p 578 that the tariff scheme was "not intended as a temporary solution" and its introduction meant that "there is no expectation of ever bringing the statutory scheme into operation", and that the Secretary of State had effectively "disabled himself from properly discharging his statutory duty in the way Parliament intended", that is his statutory "duty to consider, in good faith, whether he should exercise the power" to bring the statutory scheme into operation (p 575).

59. The emphasis in the *Fire Brigade Unions* case on legitimate expectation and abuse of power is in my opinion helpful in the resolution of the present case. Although no victim of crime had a right to have the statutory scheme introduced, the legitimate expectation existed in that case that the Secretary of State would perform his statutory duty, arising from the express provision that the 1988 Act was to be brought into force on such day as he appointed, to keep open and under review the introduction of the statutory scheme. There is in the present case no equivalent express provision in the Immigration Act or Rules from which any duty on the part of the Crown may be derived to keep open any particular employment. But the grant of HSMP status to IMGs within category (i) undoubtedly gave them a legitimate expectation that they would be able to seek and obtain employment in the fields of their skill; and that may in public law itself preclude the Crown from acting inconsistently with the expectation so created. That is underlined by an examination of the requirements to be met by someone seeking leave to enter and stay in the United Kingdom as a highly skilled migrant. These are set out in rules 135A-H of the Immigration Rules. An applicant seeking leave to enter must "intend … to make the United Kingdom his main home", and be "able to maintain and accommodate himself and any dependants adequately without recourse to public funds" (rule 135A), and may then be admitted for a period not exceeding 12 months (since April 2006, two years) (rule 135B). A person admitted on this basis may seek a three year extension of stay, provided s/he continues to meet those requirements, and shows that s/he "has already taken during his period of leave all reasonable steps to become lawfully economically active in the United Kingdom in employment, self-employment or a combination of both" (rule 135D). Indefinite leave to remain may be granted, on application, to a person currently with leave as a highly skilled migrant, provided, inter alia, that he has had a continuous period

of at least four (since April 2006, five) years' leave to enter or remain in the United Kingdom in that capacity and, for the period of leave as a highly skilled migrant, has met the requirements of rule 135A.

60. For IMGs already in the United Kingdom with HSMP status (category (i)), the guidance would thus have undermined their legitimate expectations in a very fundamental way. They would have come here intending to make the United Kingdom their main home. Their decision to come would necessarily have taken account of the prospect of employment in the NHS. Prior to the guidance, the normal practice was for leave to stay with HSMP status to be renewed without difficulty, provided the requirements for renewal were met. Even if the attrition rate for IMGs with HSMP status was in practice high (something itself not clear from the statistics given in para 53 above), IMGs with that status would have expected to be able if they wished to stay here and be employed in the NHS until the time came when their leave could be made indefinite. The introduction of a resident labour market test for those whose limited leave expired before the end of the post on offer would radically undermine this expectation. That could have been done by amending the immigration scheme, which would at least have involved a measure of Parliamentary scrutiny. But, by issuing the guidance, the Secretary of State for Health as one emanation of the Crown was exercising her prerogative to give informal guidance inconsistently with the legitimate expectations generated by the Immigration Rules and practice adopted by another emanation of the Crown, the Home Secretary. In my opinion, the inconsistency and its effects were so profound as to render such guidance invalid.

61. I move to the position regarding IMGs within categories (ii) and (iii). I take first category (iii), IMGs not within the United Kingdom at the time of the guidance and whose interests BAPIO does not appear strictly even to have been formed to protect. I cannot see what objection there could have been had the guidance been limited to IMGs within category (iii). The guidance was in its nature, as I have explained, employment guidance. Those without right of abode and without leave to enter and stay in the United Kingdom cannot be said to have any sort of protected immigration status in the United Kingdom; IMGs in that position had no legitimate expectation that the Immigration Act, Rules or practice would remain unchanged, and still less that any particular employment would be or would remain open to them in the United Kingdom in the future. On the contrary, the guidance, once issued, was a restriction on employment prospects which any IMG applying for HSMP status would have to take into account when seeking to establish that s/he would be "able to maintain and accommodate himself and any dependants adequately without recourse to public funds" (Immigration

rule 135A). BAPIO itself has recognised the force of these points. In Dr Mehta's second statement (para 10), he records that:

> "It was and is common ground that something needed to be done to regulate the flow of IMGs into the United Kingdom. BAPIO's primary concern with this issue was to address the hardships suffered by those who came over to take the PLAB [Professional and Linguistic Assessment Board test], only to find extreme difficulty in finding training posts thereafter".

Had the guidance been so limited, I would have had no difficulty in upholding it. As it is, the guidance drew no distinction between the various categories of IMGs.

62. The position in relation to IMGs within category (ii), that is IMGs within the United Kingdom under the permit free training (PFT) scheme at the date of the guidance, is problematic. The only immigration status that they had was affected not by the guidance but by the changes to the Immigration Rules. If after such changes any such IMGs decided to apply for HSMP status, they too would have to take into account the restriction on employment prospects when seeking to establish that they would be "able to maintain and accommodate himself and any dependants adequately without recourse to public funds" (rule 135A). The extent to which, apart from such rule changes, they would ever have thought of applying for HSMP status, or would have regarded the possibility of obtaining such status as a long-stop, is far from clear. There are significant differences in the state of mind required to obtain PFT and HSMP status. An IMG with PFT status is required to leave the United Kingdom at the end of his or her training. An IMG in order to obtain HSMP status has to "intend … to make the United Kingdom his main home". Para 29 of the respondents' case (to which I have referred in para 46 above) highlights this distinction between categories (i) and (ii), and goes on to say that

> "Hence the analysis of the longevity of IMGs in the NHS may be a valid reason for changing the Immigration Rules to exclude overseas qualified IMGs from PFT, but not for the exclusion of IMGs on the HSMP from training posts".

There is no suggestion in this passage that all or any IMGs would, if validly excluded from PFT by a rule change, have a legitimate expectation of being able to obtain HSMP status; rather the contrary. Elsewhere in their case (eg paras 39 and 43) as well as in Mr Singh's oral submissions, the respondents also concentrated their arguments on

the position of those with HSMP status, ie within category (i). I am not convinced that IMGs with PFT can be said generically and without more to have any legitimate expectation that they would, if PFT was withdrawn, be able to obtain HSMP status.

63. The guidance applied nonetheless to IMGs within all three categories without distinction or qualification. Whatever could legitimately have been done by way of more limited guidance, or by issuing general guidance subject to transitional provisions protecting those within category (i) who did have a legitimate expectation, the actual guidance issued did not do. In these circumstances, it is not in my opinion possible or appropriate for the court to try to rewrite or qualify the guidance or to seek to uphold it in part. It follows that I agree that the appeal should be dismissed, but that I do so by a different route to that taken by my noble and learned friend, Lord Bingham of Cornhill, in his opinion.