# ILPA information sheet



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# Immigration Rules 2

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This information sheet provides information about the implications of the Supreme Court judgments 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, and the Home Office response to these judgments. The September 2012 "Immigration Rules 1" information sheet provides more information about these judgments.

## General

In recent years, the Home Office has made many and frequent changes to the Immigration Rules. Many of these have been intended to reflect a changed approach to immigration control. As Lord Walker explained in *Alvi* (paragraph 111), in this area and others Governments have tended to favour predictability over flexibility. The requirements imposed for someone to be permitted to come to or stay in the UK have become more numerous and complex. The aim has been to reduce the degree of discretion that a decision-maker at the UK Border Agency may exercise in deciding a person's application or claim. The result is a more rigid system.

An example of the increased rigidity, is the way in which requirements for many migrants to show they can financially support themselves in the UK have changed from a general requirement to show this (which might be done by various means) to, in many cases, a requirement to have had a minimum amount of money in an account over the period of three months immediately before their application. The previous approach left the UK Border Agency decision-maker with discretion to consider whether all the evidence presented by an applicant showed the migrant could support himself or herself. The new approach leaves no discretion to the decision-maker. Either sufficient money has been in the account throughout the three months, or it has not. If not, the requirement is not met. (This is only an example, and the financial requirements differ depending on the type of application a migrant is making.)

In *Alvi*, the Supreme Court expressed concerns at this approach and its effect. Lord Wilson (paragraph 128) described it as "*an astonishingly prescriptive system*". Lord Dyson (paragraph 96) described it as "*hugely cumbersome*" and "*rightly... the subject of frequent criticism and... in urgent need of attention.*" Recent changes relating to family migration (see the "Family Migration – Changes to Immigration Rules 1" information sheet [http://tinyurl.com/blz7zg6]) have added to these concerns.

## Home Office response to the judgments

Since the changes relating to family migration (HC 194), there have been three further Statements of Changes (HC 514, Cm 8423 and HC 565), much of which has tried to put requirements in the Immigration Rules that previously the Home Office had tried to impose through guidance and other

documents. One of these statements (Cm 8423) is 288 pages in length. It has moved much that was previously set out in policy guidance and other documents into the Immigration Rules, which are now very much longer and more complex. ILPA has written to the Home Office highlighting several errors that have been included in the Immigration Rules by these recent changes. As ILPA has explained to the Home Office, moving statements in guidance into the Immigration Rules has caused several problems. Many of the statements in guidance which have been moved were poorly drafted. Previously, lack of clarity in the guidance could be corrected in practice by the UK Border Agency decision-maker. Now that these statements are included in the Immigration Rules, there is no room for a flexible approach. In the meantime, migrants, lawyers, tribunals and courts are faced with the near impossible task of understanding the effect of these changes.

The UK Border Agency has published a new policy – 'Alvi judgment – how to handle cases' ("the Alvi guidance"). This can be found in the Modernised Guidance section of the Law and Policy area of the UK Border Agency website:

http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/cross-cut/alvi-judgement/alvi.pdf?view=Binary

**Earlier refusals and the Alvi guidance**

In many cases in the past, statements in guidance (and elsewhere) specified particular types of evidence to be provided with an application otherwise it would be refused. These requirements were not lawful because they had not been placed before Parliament. The Alvi guidance sets out that where there is an outstanding appeal or judicial review claim:

- If the refusal was solely on the grounds that the specified evidence was not provided, the UK Border Agency should withdraw the refusal and grant leave. This will apply in other cases where the refusal is based on a requirement that was not included in the Immigration Rules.
- In cases where the UK Border Agency withdraws a refusal to reconsider an application for further leave to remain, if the application was made before the person's previous leave had expired the UK Border Agency must now treat the person as continuing to have leave to remain (from the time the application was made) until it makes a new decision on the application.
- In some cases, a requirement in the Immigration Rules made no sense without the further statement in guidance. In such cases, neither the requirement in the guidance nor the requirement in the Immigration Rules can be applied. The Alvi guidance states: "*If it is impossible to apply the rule because the requirements were only in the guidance* [the UK Border Agency decision-maker] *must concede the appeal or allow the JR.*"

The Alvi guidance sets out that UK Border Agency decision-makers should take a similar approach to requests for refusals to be reconsidered only if the applicant is still within the time for bringing an appeal against the decision (or bringing a judicial review claim if there was no right of appeal against the refusal). The Alvi guidance also makes clear that the UK Border Agency will resist appeals or judicial review claims brought out of time. These time limits are short, especially time limits for appeals. However, where there is good reason to do so, appeals and claims may be brought out of time. If the applicant is out of time to appeal or bring a judicial review claim, the Alvi guidance states: "*Where the refusal to reconsider has an exceptionally harsh consequence for the person,* [the UK Border Agency decision-maker] *must consider whether it is appropriate to grant leave outside the rules.*" Otherwise, the Alvi guidance states that refusals (made on the basis of requirements now shown to be unlawful) are nonetheless lawful unless and until they are overturned on appeal or by judicial review. This is plainly wrong. An appeal or judicial review decision cannot make the refusal unlawful, it merely declares whether the refusal is or is not lawful. From all of this, it must be expected that the UK Border Agency will not be doing all that it could to ensure those who have been wrongly refused have their applications and claims reconsidered. Those who may be affected should take legal advice.