HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 25

on appeal from:[2008]EWCA Civ 308

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Odelola (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent)

Appellate Committee

Lord Hope of Craighead
Lord Hoffmann
Lord Scott of Foscote
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

Counsel

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Respondent:
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LORD HOPE OF CRAIGHEAD

My Lords,

1. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Brown of Eaton-under-Heywood and Lord Neuberger of Abbotsbury. I agree with them, and for the reasons they give I would dismiss the appeal.

2. Although this does not affect the outcome of the appeal, I wish like my noble and learned friend Lord Scott of Foscote to associate myself with what Lord Brown says in the last paragraph of his opinion. It is perfectly clear that the appellant would have succeeded in her application as the rules stood in January 2006 when she submitted it together with the prescribed fee. It is equally clear that, had she known what the rules were to say by the time the application came to be considered several months later, she would have seen that it was pointless to apply and she would not have parted with her money. I have no doubt that counsel for the Secretary of State was right not to give an undertaking that it would be returned to her, as the rules do not provide for this. There is something to be said for dealing with mishaps of this kind on a case by case basis. This case, however, is one where none of the responsibility for the wasted expenditure lies with the appellant. It lies entirely with the Secretary of State and her officials. Fair dealing, which is the standard which any civilised country should aspire to, calls out for the fee to be repaid.

LORD HOFFMANN

My Lords,

3. This case turns on the construction of the Statement of Changes in Immigration Rules 2006 (HC 1016), which came into force on 3 April 2006. Until then, a foreigner with any medical qualification was entitled to apply for leave to remain in the United Kingdom as a postgraduate doctor. The new rule confined the entitlement to those with medical qualifications from UK institutions. Did the new rule apply to all cases in which leave still had to be granted? Or only to doctors who had not yet applied? The distinction was vital to the appellant Dr Odelola, whose qualification was gained in Nigeria. She had applied on 17 January 2006 but when the new rule came into force her application had not yet been determined.

4. 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. The language of the rule is not in itself much help. It states the new rule but does not say anything expressly one way or the other about whether it is to apply to existing applications or not.

5. There was a good deal of argument about whether the rules attract a presumption (either under the Interpretation Act 1978 or the common law) that they are not intended retrospectively to take away vested rights. But, as Lord Rodger of Earlsferry pointed out in *Wilson v First County Trust Ltd* [2004] 1 AC 816 at p. 880, such arguments are usually circular. If a vested right means a right which will not be construed as taken away except by express language, then an appeal to the presumption only transfers the argument to the question of whether you have a vested right.

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 how the Crown proposes to exercises 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. So there is no conceptual reason

why they should not create rights which subsequent rules should not, in the absence of express language, be construed as removing. The question is whether, on a fair reading, that is what they do.

7. In my opinion, if one looks at the function of the rules, they should not be so construed. They are, as I have said, a statement by the Secretary of State as to how she will exercise powers of control over immigration. So the most natural reading is that (in the absence of any statement to the contrary) they will apply to the decisions she makes until such time as she promulgates different rules, after which she will decide according to the new rules. That was the understanding of the Divisional Court in *R v IAT ex p Nathwani* [1979-80] Imm AR 9. If new rules are intended to apply only to applications made after they come into force, they expressly say so, as they did in paragraph 4 of the Immigration Rules 1994 (HC 395).

8. I therefore think that the Court of Appeal decision was right and I would dismiss the appeal.

LORD SCOTT OF FOSCOTE

My Lords,

9. I have had the advantage of reading in draft the opinion on this appeal of my noble and learned friend Lord Brown of Eaton-under-Heywood and find myself compelled by the reasons he has given to agree that this appeal must be dismissed.

10. I want, particularly, to associate myself strongly with Lord Brown's remarks (para 40) about the fee of £335 that the appellant was obliged to pay in order to make her application for leave to remain in this country as a post-graduate doctor (para 21) of Lord Brown's opinion. The amount of the fee is calculated, your Lordships were given to understand, as representing in part a contribution to the departmental costs of processing an application and in part a payment in recognition of the benefits an applicant would obtain from a successful application. The appellant, of course, made her application on the basis of the Secretary of State's rules in force at the time she made it, 17 January 2006. On the basis of those rules she had, it is accepted, a justified

expectation that her application would be successful. But the rules were changed as from 3 April 2006. Her application had not by then been dealt with. Under these new rules her application was bound to fail.

11. So what benefit did the appellant receive for her £335? The answer is 'None'. She paid her money on what turned out to be a false and misleading prospectus. The least that the Secretary of State can be expected to do is to return her fee. But I agree that her appeal fails.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

12. The UK, like every other sovereign state, has the right to control access to its borders. Immigration control in the UK is the responsibility of the Home Secretary. The Immigration Act 1971 recognises that it is for the Secretary of State to decide and lay down rules as to the practice to be followed in controlling immigration (rules which may be changed whenever the Secretary of State thinks necessary), and it provides for these rules and any changes in them to be laid before Parliament. Changes in the rules are always stated to take effect from a given date. Sometimes they will contain transitional provisions, sometimes not. The present appeal arises from a rule change which contained no transitional provisions. The narrow but important issue it raises is whether, in such a case, an application for leave to enter or remain is to be decided according to the version of the rules in force at the date of decision or according to whatever earlier version was in force at the time when the leave application was made.

13. The importance of the issue is obvious: rule changes are frequently made and generally there will be a large number of outstanding applications pending. But the narrowness of the issue also needs to be stressed. It is not the appellant's case that rule changes cannot apply to pending applications, only that if they are to do so, the rules themselves must expressly so specify; if the rules are silent as to this, submits the appellant, the default position is that applications must be decided according to the rules in force when they were made.

14. In so submitting, Mr Drabble QC seeks to rely upon "well-established principles of statutory construction, as contained in both the Interpretation Act 1978 (the 1978 Act), and the common law. Those principles, which are intended to protect accrued rights, and so provide individuals with a measure of certainty upon which to order their affairs, are: (i) Section 16(1)(c) of the 1978 Act, and (ii) the common law presumption against retrospectivity" (paragraph 2 of his printed case). That is the argument.

15. Section 16(1) of the 1978 Act provides:

> "16(1) . . . where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, . . . (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment."

Section 23 of the 1978 Act applies the Act to "subordinate legislation" just as to Acts of Parliament and, by section 21, provides that:

> "'Subordinate legislation' means Orders in Council, orders, rules, regulations, schemes, warrants, bylaws and other instruments made or to be made under any Act."

A change in the immigration rules, submits Mr Drabble, constitutes subordinate legislation repealing an earlier such enactment.

16. Before turning to the facts of the case it is convenient next to set out the sections of the 1971 Act which continue to this day to make provision for the immigration rules. Section 1(4) refers to the rules as "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" and makes some general provision as to their content.

17. Section 3(2) 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, . . .
>
> 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 40 days beginning with the date of laying . . . , 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 40 days beginning with the date of the resolution . . ."

Section 33(1) of the 1971 Act provides that, for the purposes of the Act, except in so far as the context otherwise requires, "immigration rules" means "the rules for the time being laid down as mentioned in section 3(2) above".

18. The 1971 Act also, in section 19, made provision for appeals to adjudicators if a decision "was not in accordance with the law or with any immigration rules applicable to the case". Now, however, appeals are dealt with by section 86(3) of the Nationality, Immigration and Asylum Act 2002 which so far as material provides that the tribunal "must allow the appeal insofar as it thinks that (a) a decision against which the appeal is brought . . . was not in accordance with the law (including immigration rules)".

19. The facts of this case can be shortly stated. The appellant is a citizen of Nigeria. She is a medical doctor, having graduated with distinction from the University of Ibadan in July 1988. She underwent specialist training in surgery in Nigeria and is a Fellow of the West African College of Surgeons. Until leaving Nigeria in September 2005 she was a consultant surgeon and senior lecturer at the College of Medicine, University of Lagos, and Lagos University Teaching Hospital.

20. On 5 September 2005 the appellant came to the UK as a visitor for a two months clinical attachment. She had entry clearance valid from 25 July 2005 to 25 January 2006. She intended to apply, when she had completed the necessary clinical attachments, for a variation of her leave so as to obtain leave to remain as a postgraduate doctor. The rules then in force—Statement of Changes in Immigration Rules HC299 which came into force on 19 July 2005—provided that a person with an overseas medical degree would (subject to certain other requirements including registration with the General Medical Council) be eligible for such leave.

21. After undertaking a further clinical attachment, it was confirmed to the appellant that the basic surgical training she had received was, in the view of the UK's Postgraduate Medical Education and Training Board, "acceptable" and on 17 January 2006 she made her application for leave to remain as a postgraduate doctor. She completed the prescribed form and enclosed the prescribed fee, in her case £335.

22. On 30 March 2006 the respondent laid before Parliament Statement of Changes in Immigration Rules HC1016 which was stated to take effect on 3 April 2006. HC1016 contained no transitional provisions. One of the changes made was that a person was only to be eligible for leave to remain as a postgraduate doctor if they had obtained "a recognised UK degree in medicine" from either "a UK publicly funded institution" or "a UK bona fide private education institution which maintains satisfactory records of enrolment and attendance". Since the appellant's medical degree was obtained in Nigeria, she could not satisfy the amended version of the rules and so, by the respondent's decision of 26 April 2006, was refused leave to remain.

23. The appellant's appeal against this decision failed, first before Immigration Judge Campbell on 12 June 2006, next, on reconsideration by a panel of the Asylum and Immigration Tribunal chaired by the Deputy President, Mr Ockelton, on 5 February 2007, and finally before the Court of Appeal (Buxton, Longmore and Richards LLJ) ([2008] EWCA Civ 308) on 10 April 2008. Leave to appeal was given by your Lordships' House on 27 October 2008.

24. The appellant's initial appeal to Immigration Judge Campbell was dismissed on the basis that:

> "In HS [2005] UK AIT 00169, the tribunal held that in the absence of a specific transitional or other saving provision, an application is to be assessed under the immigration rules as at the date of decision and not the date of application."

On reconsideration of the appeal by the tribunal, it was recognised that HS was not a starred decision and carried no particular authority. In addition, the tribunal took note of a passage in Macdonald's Immigration Law and Practice (Butterworths, 2005) 6th edition, para 1.50:

> "Where changes are made to the immigration rules, it is sometimes difficult to establish whether the old or new rules apply. The transitional provisions in the current rules, HC395, provide that applications extant prior to their coming into force will be decided under the previous rules. We suggest that the same logic should apply with regard to amendments, so that applications made before the amendments take effect should be dealt with under the unamended rules. Any other rule penalises the applicant for Home Office delays."

(HC 395 had been laid before Parliament on 23 May 1994. Paragraph 4 read:

> "These rules come into effect on 1 October 1994 and will apply to all decisions taken on or after that date save that any application made before 1 October 1994 for entry clearance, leave to enter or remain or variation of leave to enter or remain shall be decided under the provisions of HC 251, as amended, as if these Rules had not been made.")

25. The tribunal recorded that the question raised was "being raised very frequently" before them, perhaps because of the view expressed in Macdonald, or perhaps simply because changes in the immigration rules were now so frequent (there having been 31 such changes between 31 May 2003 and 11 December 2006). In dismissing the appeal, the tribunal referred to the decision of the Divisional Court (Lord Widgery

CJ, Eveleigh LJ and Stephen Brown J) in *R v Immigration Appeal Tribunal, Ex p Nathwani* [1979-80] Imm AR 9, as it happens the only authority directly in point, where Stephen Brown J, giving the first judgment, said this, at p 13:

> "It seems to me that, bearing in mind that the rules are not statutes or statutory instruments which give rights to any person, there can be no question here of retrospectivity applying certainly to the time of the application as distinct from the time of the Secretary of State's consideration of the application and his decision. This is a matter, in my judgment, which is so abundantly clear that no arguable point of law can arise upon it."

26. The tribunal then considered whether it was still appropriate, nearly 30 years on, to take the same view of the rules. In holding that it was, the tribunal pointed out that section 3(2) of the 1971 Act has never been amended and concluded, at para 14:

> "Although they can have no effect if the legislature disapproves of them, the immigration rules are essentially executive, not legislative. Section 3(2) of the 1971 Act sets down the procedure for making what are essentially statements of policy; it does not change those statements from policy into legislation. As executive rules or policy they are in our view not amenable to interpretation as though they were statutes or statutory instruments. The Secretary of State is entitled and bound to make and operate the United Kingdom's immigration policy and he is entitled to make decisions about particular cases by reference to the policy in operation at the time the decision is made."

27. In the Court of Appeal Buxton LJ's leading judgment collected together the many dicta down the years which, in a variety of contexts, have addressed the precise status of the immigration rules—*Nathwani* alone, as I have said, being directly in point. It would seem to me unnecessary and unhelpful to repeat that exercise here. To ask whether the rules are strictly rules of law is ultimately a barren exercise. Obviously, as Buxton LJ recognised, when they apply the rules have legal force and decisions are appealable if not taken in accordance with

them. But that does not answer the question as to which rules apply to any given decision.

28. The essential reasoning of the Court of Appeal is to be found in paragraphs 21 and 22 of Buxton LJ's judgment as follows:

> "21. Dr Odelola's case was, and had to be, that by making her application on 17 January 2006 she acquired not an expectation but a right that that application would be adjudicated upon according to the rules that obtained on that date. That being a right in law, it was not defeasible upon a change in the rules between the date of application and the date of adjudication. But there is nothing in the immigration rules that creates a right in those terms. As her argument demonstrated, the right that Dr Odelola asserted had to be constructed from rules of the general law, separate from the immigration rules. And that general law, expressed through the 1978 Act, would only in any event avail Dr Odelola if the right created when she made her application was a right to have her case decided according to the rules as they existed at the date of the application, rather than a right to have her case decided according to the rules for the time being: because preservation of the latter right by the operation of section 16(1)(c) would still lead to her case being decided on the basis of HC 1016.
>
> 22. Accordingly, even if section 16(1)(c) could be applied to this case, it can only achieve the effect that Dr Odelola seeks if we assume in her favour the very thing that she has to establish, that the making of an application created a right thereafter to have her case determined according to the rules as they stood on that day."

That reasoning was echoed by Longmore LJ at paras 25 and 26:

> "25. . . . The new version [of the rules] says that they take effect on 3 April and so they must. As rule 4 of HC395 shows, transitional provisions can be included if thought to be desirable. In this case they were not included.

> 26. If that meant that Dr Odelola had been deprived of a vested right this might be a troubling conclusion. But Dr Odelola had no vested right to indefinite leave to remain as at the date she made her application for that leave. Her right was to have her application considered according to the rules on their proper construction—no less but no more. So one is just thrown back to the question of construction."

Richards LJ agreed with both judgments.

29. In short, the Court of Appeal's approach was this. The presumption against retrospectivity, whether it is to be found in section 16(1)(c) of the 1978 Act or in the common law, applies only in the case of vested rights. To say that the presumption applies in the case of the immigration rules is to beg the very question at issue. Given, as the appellant accepted, that there was no question of her being able to invoke the principle of legitimate expectation and that the rules could be changed at any time in such a way as to deprive a current applicant of any entitlement to the leave being sought, it could not sensibly be said that, prior to a change in the rules, any right or privilege had already accrued or been acquired.

30. Mr Drabble strongly criticises this reasoning. It is not the appellant's argument which is circular, he submits, but rather the Court of Appeal's approach to it which is misconceived. Whenever the presumption against retrospectivity is raised, ex-hypothesi the right which is being asserted is one capable of being taken away by subsequent amendment of the provisions on which the right is based. If it were not capable of repeal, there would be no need to consider the presumption. It is in that context that the presumption, which is a rule of interpretation only, operates to preserve the right in question. To use the possibility of repeal itself as a reason for saying that the presumption does not apply would mean that the presumption would be defeated in precisely those cases in which it might be relevant, and so render it of no effect.

31. To my mind the whole debate has been bedevilled by a failure to recognise the difficulties inherent in the presumption itself, difficulties explored in the House, principally by Lord Rodger of Earlsferry, in *Wilson v First County Trust Ltd (No. 2)* [2004] 1 AC 816. As Lord Rodger pointed out at para 196:

> "The presumption is against legislation impairing rights that are described as 'vested'. The courts have tried, without conspicuous success, to define what is meant by 'vested rights' for this purpose. . . . It is not easy to reconcile all the decisions. This lends weight to the criticism that the reasoning in them is essentially circular: the courts have tended to attach the somewhat woolly label 'vested' to those rights which they conclude should be protected from the effect of the new legislation. If that is indeed so, then it is perhaps only to be expected since, as Lord Mustill observed in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 525A, the basis of any presumption in this area of the law 'is no more than simple fairness, which ought to be the basis of every general rule'."

32. In *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 525F, Lord Mustill said:

> "Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say."

Lord Mustill then observed that the approach which he proposed "involves a single indivisible question, to be answered largely as a matter of impression".

33. In deciding what simple fairness demands in the present context it is important to recognise first and foremost that, so far from asking here what *Parliament* intended, the question is what the *Secretary of State* intended. The rules are her rules and, although she must lay them before Parliament, if Parliament disapproves of them they are not thereby abrogated: the Secretary of State merely has to devise such fresh rules as appear to her to be required in the circumstances.

34. Secondly, as Mr Ockelton put it in the tribunal's decision here, "the immigration rules are essentially executive, not legislative"; the rules "are essentially statements of policy". Longmore LJ said much the same thing in the Court of Appeal (para 27): "the rules are statements of executive policy at any particular time. … Policy statements change as policy changes." This to my mind is the core consideration in the case. This, and the fact that, save in those few specific cases (such as HC395 in 1994) when express transitional provisions were included in the rule changes, decisions invariably have been taken according to the up to date rules.

35. The immigration rules are statements of administrative policy: an indication of how at any particular time the Secretary of State will exercise her discretion with regard to the grant of leave to enter or remain. Section 33(5) of the 1971 Act provides that: "This Act shall not be taken to supersede or impair any power exercisable by Her Majesty in relation to aliens by virtue of Her prerogative." The Secretary of State's immigration rules, as and when promulgated, indicate how it is proposed to exercise the prerogative power of immigration control.

36. Mr Drabble submits that the analogy to be drawn here is with social security law and in this regard he seeks to pray in aid the Court of Appeal's decision in *Chief Adjudication Officer v Maguire* [1999] 1 WLR 1778. The claimant there was seeking special hardship allowance, a benefit payable to those suffering, as he was, a prescribed disease. Before he made his claim, but still within the period during which he was permitted to make it, the Statute providing the benefit was repealed. The Court held that the claimant was nonetheless entitled to the benefit. Having analysed a number of the authorities I said this:

> "A mere hope or expectation of acquiring a right is insufficient. An entitlement, however, even if inchoate or contingent, suffices. The fact that further steps may still be necessary to prove that the entitlement existed before

> repeal, or to prove its true extent, does not preclude it being regarded as a right. . . .[W]hether or not there is an acquired right depends upon whether at the date of repeal the claimant has an entitlement (at least contingent) to money or other certain benefit receivable by him, provided only that he takes all appropriate steps by way of notices and/or claims thereafter." (pp1787H – 1788F)

37. So far from assisting Mr Drabble's argument, *Maguire* seems to me to point up the critical distinction between, on the one hand, legislation conferring "money or other certain benefit" and, on the other hand, a mere statement of policy as to how presently it is proposed to exercise an administrative discretion when eventually it comes to be exercised, a policy which may change at any moment. In the former case (*Maguire*) the right vests even *before* the necessary claim is advanced; in the latter case no right accrues even *after* the application is made. Indeed the argument based on *Maguire* surely proves too much: if the situations were truly analogous, the appellant here would not have needed even to make her application for leave to remain.

38. In my opinion the truer analogy is with planning law and practice which requires that all applications are determined in accordance with whatever policies are in force at the time the decisions are taken.

39. Standing back, therefore, from the detail and addressing, as Lord Mustill proposed in *L'Office Cherifien* [1994] 1 AC 486, 525H "a single indivisible question, to be answered largely as a matter of impression", I have no doubt that the changes in the immigration rules, unless they specify to the contrary, take effect whenever they say they take effect with regard to all leave applications, those pending no less than those yet to be made.

40. That said, one particular feature of the scheme strikes me, as I understand it strikes all your Lordships, as conspicuously unfair: the irrecoverability of the substantial charge made upon an application for leave which, as here, becomes doomed to fail by virtue of a subsequent change in the rules. There can surely be no doubt that the Secretary of State has power in these circumstances to return the charge. That, indeed, would seem to me the only fair and rational course open to her. So far as the appeal itself is concerned, however, in my judgment it cannot succeed and must be dismissed.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

41. The issue on this appeal is whether the application made by the appellant, Dr Odelola, for leave to remain in the UK as a postgraduate doctor should have been considered under the immigration rules as they were as at the date of her application, 17 January 2006, or as they were as at the date of the Secretary of State's decision, 26 April 2006.

42. The current immigration rules originate in rules ("the 1994 Rules") contained in a Statement laid before Parliament on 23 May 1994 (HC 395), which have been varied by a number of subsequent Statements of Changes, also laid before Parliament. The Statement of Changes in Immigration Rules 2005 (HC 299) ("the 2005 Statement"), which came into force on 19 July 2005, amended the rules so that, inter alia, a person with a medical qualification was (subject to satisfying other requirements immaterial for present purposes) eligible to apply for an extension to stay in the UK as a postgraduate doctor. However, the Statement of Changes in Immigration Rules 2006 (HC 1016) ("the 2006 Statement"), which came into force on 3 April 2006, altered this provision so that it only applied to a person with a medical qualification from a UK institution.

43. As the appellant is a Nigerian citizen, who graduated as a medical doctor (with distinction) from the University of Ibadan in 1988, the difference between the 2005 Statement and the 2006 Statement is crucial. The factual background, the procedural history, the relevant statutory provisions, and the relevant parts of the immigration rules and of the 2005 and 2006 Statements are more fully set out in the opinion of my noble and learned friend, Lord Brown of Eaton-under-Heywood, which I have had the privilege of seeing in draft.

44. The appellant's case is that, because the rules as amended by the 2005 Statement were in force when she made her application, it should have been considered on the footing of the rules as amended by that Statement, and not as amended by the subsequent 2006 Statement. The Secretary of State, however, applied the rules as they existed as at the date of her decision, and that approach was upheld by the Asylum and Immigration Tribunal (HR/ 00295/ 2006) and by the Court of Appeal ([2008] EWCA Civ 308). That approach is challenged on the ground

that the 2006 Statement is silent on the question of whether it is to apply to applications which had already been made when it came into force, and, in those circumstances, the presumption against retrospectivity means that it did not extend to the appellant's application. The presumption is said to apply on two alternative grounds. The first is section 16(1)(c) of the Interpretation Act 1978, and the second the common law presumption against retrospectivity.

45. Section 16(1)(c) of the 1978 Act applies to "an Act" and "an enactment". However, through section 23(1), it also applies to "subordinate legislation", which extends, by virtue of section 21(1), to "orders, rules, regulations …. and other instruments made … under any Act". In my opinion, although referred to in the Immigration Act 1971, and potentially subject to control by the legislature under that Act, the immigration rules were not "made … under [an] Act". In the 1971 Act, section 1(4) refers to immigration rules being laid down by the Secretary of State, and section 3(2) sets out the procedure for laying before Parliament statements of those rules and of any changes thereto. However, neither section purports to be the source of the power to make such rules. The definition of "immigration rules" in section 33(1) of the 1971 Act takes matters no further: it refers back to section 3(2), and makes it clear that any reference to the rules is to the rules "for the time being".

46. As Ms Laing QC, for the Secretary of State, points out, the view that the rules are not made under any enactment is consistent with the statutory history. From the Aliens Act 1905 up to and including the Commonwealth Immigrants Act 1968, the immigration statutes contained no reference to any rules. The first time the immigration rules were mentioned in any statute was in the Immigration Appeals Act 1969, whose section 24(1) was not dissimilar for present purposes from section 1(4) of the 1971 Act. However, it is clear that such rules had existed long before that Act. That tends to support the view that the rules are non-statutory in origin. The view is also consistent with legislation subsequent to 1971. In particular, the Nationality, Immigration and Asylum Act 2002, which introduced new provisions for appeals (applicable in this case), adopts the same definition of immigration rules as the 1971 Act.

47. In these circumstances, the Secretary of State's decision in this case cannot, in my view, be impugned on the ground that it was based on an interpretation of the immigration rules which conflicted with

section 16(1)(c) of the 1978 Act. Despite its wide words, section 21(1) of that Act does not apply to the immigration rules.

48. I turn then to what, at least in my view, is a stronger basis for the appellant's argument, namely the common law presumption against retrospectivity. Your Lordships were not referred to any case in which it was held that such a presumption exists in relation to rules issued by the executive, or indeed to any provision other than one in a statute. There is, however, much authority to support the proposition that the presumption exists in common law in relation to vested rights under statutes – see the discussion in *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816, paras 193-197 and 199-202 per Lord Rodger of Earlsferry. There is also what Lord Rodger called "a further presumption", which he also described as "a more limited version of the more general presumption", namely "that legislation does not apply to actions which are pending at the time when it comes into force unless the language of the legislation compels the conclusion" – *Wilson* [2004] 1 AC 816, para 198.

49. In agreement with Mr Drabble QC, for the appellant, I find it hard to see why the common law presumption against retrospectivity should be limited to statutes. It seems to me that, given that it is a principle developed by the courts, there is no reason why it should not be applied to any set of rules which give rise to legal rights or obligations. A familiar example of the application of the presumption is in relation to vested limitation defences, where a statutory limitation period is subsequently extended by an amendment – see e.g *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553. In my opinion, the presumption should equally apply in a case where a limitation period arises under a non-statutory set of rules, provided that they have legal effect. The notion that the presumption should apply relatively widely is supported by the fact that it has been said to be based on fairness – see *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 525, cited with approval in *Wilson* [2004] 1 AC 816, paras 196 and 201.

50. Given that the presumption is therefore capable of applying relatively widely, the next question is whether it could apply to the provisions such as the immigration rules. The rules contain a mixture of substantive and procedural provisions, and guidance to the legislation and practice, and they have to be laid before Parliament. However, they are not legislation. Much has been made of the fact that the rules are *sui generis*, as can be seen from the extracts from earlier judgments on the

immigration rules collected by Buxton LJ below – [2008] EWCA Civ 308, para 12. But I do not see how that helps on the question of whether the presumption applies.

51. As I see it, the crucial point for present purposes is that the immigration rules are intended to have legal effect, and to give legal rights. Part V of the 2002 Act contains the current provisions governing immigration appeals. Under section 84(1), an appeal against an immigration decision can be brought on various grounds, including that it was "(a) … not in accordance with immigration rules", and that it was "(e) … otherwise not in accordance with the law". By section 86(3) of the 2002 Act, the Tribunal "must allow the appeal" if the decision "(a) … was not in accordance with the law (including immigration rules)"…." .

52. Accordingly, the appellant had a right to have her application determined by the Secretary of State in accordance with the immigration rules. (Indeed, even in the absence of sections 84 and 86 of the 2002 Act, that was probably the case: if such rules are publicly promulgated by the Secretary of State, then there must be a powerful argument for saying that, as a matter of law, at least in the absence of good reason to the contrary, she must abide by those rules when making immigration decisions). In my opinion, this means that the common law presumption against retrospectivity can apply to amendments to the immigration rules. Consider the position if the rules had provided that, where an application was not heard within a period of six months of its being made, it could only be refused on grounds of national security; and the rules were then amended so that the period was extended to one year. In my view, in such a case, there would be a presumption that the change was not meant to extend to an application made more than six months before the period was extended by amendment.

53. Given that the presumption against retrospectivity can apply to changes to the immigration rules, the next issue is whether it can be relied on in this case. I consider that the presumption, at least in its traditional sense, cannot be relied on, as this is not a case where there was a vested right at the time of the relevant amendment. At the time the 2006 Statement came into effect, the appellant did not have a right to have her application determined by reference to the rules as amended by the 2005 Statement. No doubt, she had that hope or even that expectation, but she did not have that legal right. Accordingly, if the amendments made by the 2006 Statement applied to her application, there would be no interference with any vested right. That is in contrast

with the position of the hypothetical applicant mentioned in the previous paragraph, whose application was not determined within a period of six months: if an amendment was then made extending the period to a year, he could properly claim to have a vested right to have his application granted unless it was contrary to national security. By the time the extension was introduced, the six months had expired without his application being granted, so the right under the rules to have his application refused only on national security grounds was, as it were, tucked under his belt.

54. I accept that the difference between the two cases is subtle, but, in my view it is clear and principled. In the example, a right given under the rules had actually come into existence by the time of the amendment (albeit that, subject to public law and human rights arguments, it could subsequently be removed by amendment). On the other hand, in this case, no such right had ever come into existence. I also accept that the issue of whether or not there is an accrued or vested right is not easy, and indeed it can be said that arguments either way on the issue have elements of circularity, as pointed out in *Wilson* [2004] 1 AC 816, para 196. Nonetheless, the distinction between the appellant's position and that of the hypothetical applicant appears to me to be clear in logic and principle, and, in connection with the application of the presumption, it is supported by the passages in the judgment of Dickson J in *Gustavson Drilling (1964) Ltd v Minister of National Revenue* [1977] 1 SCR 271, 279-280 and 282-283, cited and discussed in *Wilson* [2004] 1 AC 816, paras 191-194.

55. However, despite my conclusion that no vested right is involved here, it seems to me that, when considering whether the amendments made by the 2006 Statement extend to an existing application, it is appropriate to take into account the potential unfairness if it does so. After all, the issue in this case is ultimately one of interpretation, and when deciding such an issue, the general fairness of one interpretation over another is, at least potentially, a relevant factor. Indeed, the presumption against retrospectivity is itself a rule of construction, or, perhaps more accurately, a factor to be taken onto account when interpreting a statute or rule. It is not some sort of substantive, or even procedural, legal right. That is well illustrated by the fact that, in this case, the appellant realistically disclaims any reliance on the doctrine of legitimate expectation. Further, as already mentioned, the presumption itself is based on fairness.

56. In addition, the point made in *Wilson* [2004] 1 AC 816, para 198, quoted at the end of para 48 above, provides some support for the notion that, even though no vested right is involved here, some principle not dissimilar from the presumption may still be invoked. The appellant's application in this case is similar to an "action … which [is] pending" at the time the amendments made by the 2006 Statement came "into force". It is true that, in that paragraph, Lord Rodger was, as I read it, directing attention to a case where there was a vested right (as indicated by his view that the case was "a more limited version of the general presumption that legislation is not intended to affect vested rights"). However, he also said that the presumption can arise in such circumstances in relation "to all legislation, not just to legislation with retroactive effect".

57. The notion that the unfairness of a change in the rules applying to existing applications can be taken into account when deciding if they do so apply, even if no vested right is involved is also supported by a passage, cited with approval in *Wilson* [2004] 1 AC 816, para 200, from the judgment of Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712, 724. He said that it was "not simply a question of classifying an enactment as retrospective or not retrospective", but that "it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended". The fact that the weight to be given to the presumption varies in this way assists the conclusion that one can take into account the fairness of the result when considering whether an amendment applies to existing applications, even where no vested right is involved.

58. Turning to this particular case, it does appear to me that there is some unfairness if the 2006 Statement applies to existing applications, such as that of the appellant. That is partly because, as my noble and learned friend Lord Scott of Foscote puts it, such an applicant would have "made her application on the basis of the Secretary of State's rules in force at the time", albeit that there was always the possibility that the rules might be changed. It is also because, as the appellant did, she would have had to pay a fee, calculated by reference to the benefits she would obtain if her application succeeded. As my noble and learned friend, Lord Hope of Craighead says, there is no provision for the return of this proportion of the fee, and it is not "fair dealing" for it to be retained. And, as mentioned, fairness is ultimately the basis for the presumption against retrospectivity.

59. Having said that, I consider that the unfairness of the 2006 Statement applying to existing applications such as that of the appellant is relatively slight. There is no question of the appellant having a vested right or a legitimate expectation. The immigration rules would have been expected to be amended from time to time, as needs and perceptions change: they had been frequently amended (some 40 times) between 1994 and 2006. If the amendments made by the 2006 Statement extend to existing applications, applicants in the position of the appellant would suffer disappointment, but it cannot be put higher than that, as is underlined by the fact that legitimate expectation cannot be invoked. And they would have wasted around £300, a significant sum, but not a large amount. So unfairness is a factor which the appellant can invoke, but it does not have great force.

60. I turn, then, to the central issue, namely whether the amendments made by the 2006 Statement extend to an application made, but not determined, before the Statement came into force. In common with all your Lordships, I have reached the conclusion that they do. First, the natural meaning of the 2006 Statement, read on its own, is that its provisions will extend to all applications, whenever made, from 3 April 2006. That is because, on its frontsheet, the Statement is recorded as "[l]aid before parliament on 30 March 2006", and, on the first page, immediately before its 16 paragraphs of amendments, there is the sentence that "[t]hese changes shall take effect on 3 April 2006". And all the rule changes in those 16 paragraphs are expressed in terms which most naturally suggest that they will apply forthwith. Thus, the crucial provision in this case, para 4, substitutes a new para 73 in the 1994 rules, which sets out "[t]he requirements to be met by a person seeking extension of stay as a postgraduate doctor…. are…".

61. Secondly, the 1994 Rules include para 4, which provides that they come into force on 1 October 1994, "and will apply to all decisions taken on or after that date save that any application made before 1 October 1994 … shall be decided under the provisions of [the previous immigration rules, namely the Immigration Rules 1990, HC 251], as if these Rules had not been made". In my judgment, this paragraph makes it pretty clear that if a Statement is not intended to extend to existing applications, that will be spelt out. A reader of the 2006 Statement, which makes amendments to the 1994 Rules, would see that, where, as in the case of the 1994 Rules themselves, it was intended that a Statement should not extend to existing applications, that was stated. The fact that para 4 of the 1994 Rules also refers to those rules applying from 1 October 1994 provides further support for this view. Its effect is that the 1994 Rules, as amended by any subsequent Statements, extend

to any application made after 1 October 1994. That means that the rules as amended by the 2006 Statement would extend to any application made after 1 October 1994, including the instant application, although, of course, if a subsequent Statement provided otherwise, or if an application was determined before a particular amendment came into effect, that amendment would not extend to that application.

62. Taken together, the wording of the 2006 Statement and the effect and wording of para 4 of the 1994 Rules establish to my satisfaction that the 2006 Statement does extend to existing applications, notwithstanding the unfairness of that result in relation to some such applications. The natural meaning of the language of the 2006 Statement, when read together with para 4 of the 1994 Rules, is, in my judgment, too strong to be rebutted by the comparatively slight, albeit real, unfairness which results in some cases (including that of the appellant) if the 2006 Statement does extend to current applications.

63. In these circumstances, I, too, would dismiss this appeal.