

**Agency Rulemaking, Rule-type, and
Immigration Administration**

By

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Agency Rulemaking, Rule-type, and Immigration Administration

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In the massive space intervening between framework legislation and ground level decision-making, administrative agencies make rules to administer policy. When agencies make rules, they are often confronted with a number of design issues: which type of rules provide the best means of implementing policy? What is the most appropriate way of organising decision-making? An agency could select general standards that require officials to exercise judgement (discretion-laden or flexible rules) or detailed rules that unambiguously specify precise decisional criteria (bright line or rigid rules)—or it could choose any intermediate position which blends together different rule-types. Rulemaking may also take different forms: formal, secondary or informal, tertiary rules.

Such choices comprise an important aspect of an agency's rulemaking policy. The rule-type chosen will also be affected by, and have significant repercussions for, an agency's organisational structure; a critical issue for those who design administrative institutions is to determine which types of rules to use. Furthermore, rulemaking provides a starting point for exploring administrative justice: the greater the consonance (or dissonance) between a particular rule-type and the nature of the regulated social world, then the better (or worse) individuals and the public will be served by administration.

The "rules and discretion" debate is, of course, central to administrative law.¹ A particularly influential normative theory has been provided by KC Davis. While accepting the need for discretion, Davis was highly sceptical of discretion and consistently warned of its dangers. He argued that perhaps 90 per cent of injustice flowed from discretion; the remedy was to confine, structure, and check discretion to protect individuals.² Since Davis wrote, it cannot be said that administrative discretion has been eliminated; nor has it always been viewed as a source of potential injustice.³ In the meantime, though, there have been significant developments in the nature of governmental administration, such as the change from street level to system level bureaucracy. Increasingly, discretionary decision-making has been replaced by automated IT based systems in which human

* Thanks go to Mike Feintuck, Simon Halliday, and the external reviewer for comments; the usual disclaimer applies.

¹ C. Harlow and R. Rawlings, *Law and Administration*, 3rd edn (Cambridge: CUP, 2009), ch.5.

² K. C. Davis, *Discretionary Justice* (Urbana: University of Illinois Press, 1971), p.25.

³ R. Baldwin and K. Hawkins, "Discretionary Justice: Davis Reconsidered" [1984] P.L. 570.

judgement has been significantly reduced if not altogether eliminated.⁴ Given his proclivity for rules, Davis might well have approved of this development. Nonetheless, digital rigidity can just as equally result in hardship for individuals as excessive discretion. What is required is a more nuanced appreciation of the appropriate role of rules and discretion according to the particular administrative context.

This article analyses the selection of rule-type in the administration of immigration policy. This context provides a fertile area of study precisely because of the different rule-types used. The article proceeds by examining the different values underpinning the rulemaking enterprise and the various forces—political, organisational, and legal—which inform rulemaking. It also offers an appraisal of two particular sets of immigration rules—those governing the points based scheme and family life applications—and analyses the relationship between rule-type and the control of administration. Underlying these specific inquiries are two interrelated themes. The first concerns the nature of the trade-offs between competing values and wider forces which influence the selection of rule-type. The second theme concerns the constitutional legitimacy of rulemaking. Primary responsibility for rulemaking rests with the agency, yet in identifying constitutional limits to rulemaking, the courts come to influence the choice of rule-type. Through this analysis, the article contends that neither Davis’s blanket scepticism of discretion nor the wholesale adoption of rigid robotic rules provides an appropriate normative perspective on rulemaking: the appropriateness of which types of rules to use depends largely upon the context involved.

Immigration rulemaking

To start with: some basic features of immigration rulemaking. First, although the Immigration Rules have an unusual constitutional status, they are a manifestation of the government’s political power to regulate immigration.⁵ The crucial tool here is that of authority, government’s ability to command and prohibit.⁶ The rules articulate the Government’s immigration policy and are integral to its administration. Indeed, it was only when the state was able to formulate rules governing the entry and residence of foreign nationals that the administration of immigration policy became possible. The rules assign legal entitlements by laying down the criteria governing entry into and residence within the United Kingdom of persons required to have leave to enter. The rules must be laid before Parliament, but in practice changes to the Rules are rarely debated let alone disapproved.⁷

Secondly, the Rules must be administered. This requires a large scale bureaucratic organisation, the United Kingdom Border Agency (“UKBA”), which makes

⁴ M. Bovens and S. Zouridis, “From Street-Level to System-Level Bureaucracies: How Information and Communication Technology is Transforming Administrative Discretion and Constitutional Control” (2002) 62 *Public Administration Review* 174. cf. M. Lipsky, *Street-Level Bureaucracy* (New York, 1980).

⁵ In *Odelola v Secretary of State for the Home Department* [2009] UKHL 25; [2009] 1 W.L.R. 1230 at [35], the rules were described as “statements of administrative policy” whereas in *R. (on the application of Abbassi) v Secretary of State for the Home Department* [2012] UKSC 32; [2012] 1 W.L.R. 2192 at [23]–[40] there were classified as subordinate legislation.

⁶ C. C. Hood and H. Z. Margetts, *The Tools of Government in the Digital Age* (London, 2007), p.50.

⁷ Immigration Act 1971 s.3(2). The agency may consult when making Immigration Rules (especially on major changes to the rules), but is not obliged to do so: *R. (on the application of BAPIO Action) v Secretary of State for the Home Department* [2007] EWCA Civ 1139.

millions of decisions each year concerning individuals' eligibility under the rules. From an organisational perspective, the rules themselves serve various functions in terms of programming operational routines, that is, they specify the detailed administrative behaviours to be activated in response to an external stimulus.⁸ Applications are submitted, considered under the Immigration Rules, and then either granted or refused; some negative decisions can be appealed. An agency's internal programme will enable it to transfer inputs (facts) into outputs (decisions) which should result in outcomes (policy implementation) by specifying decisional criteria. This programming function of rules provides higher level agency officials with an efficient means of coordinating and controlling subordinate officials.⁹

Thirdly, like many administrative rules, the Rules are complex and detailed. As social management tools, the Rules are designable and their intricate nature reflects the complexities of immigration policy. But while they are central to immigration policy, the Rules are not everything. Once viewed as an undesirable delegation of informal rulemaking power, the Immigration Rules are now recognised as formal secondary rules and are supplemented by tertiary level policies.¹⁰

Fourthly, there are different trends in immigration rulemaking. Until fairly recently, the Immigration Rules were largely based upon qualitative and judgemental decisional criteria, such as assessing an applicant's intention to leave the United Kingdom at the end of her stay.¹¹ Recently, the agency has consciously introduced new-style points-based rules which embody rigid, quantitative decisional criteria. These trends have been overlaid by human rights standards, in particular the right to family life under art.8 of the European Convention on Human Rights ("ECHR").

Selecting rules

Which types of rules?

To appreciate the choice between different rule-types and the underlying values, it is useful to compare the different rules governing the eligibility criterion that immigration applicants be able to support themselves during their stay. It is well established that immigrants should be able to finance themselves and not turn to the taxpayer for support. But how is the agency to specify this requirement?

One way—rule-type one—is to require that applicants maintain and accommodate themselves adequately without recourse to public funds.¹² Such a rule gives the decision maker discretion to consider whether the evidence shows that the applicant could support herself given living costs in the United Kingdom, the proposed length of stay, and friends or relatives who may assist the applicant.

⁸ J. G. March and H. A. Simon, *Organizations*, 2nd edn (Oxford: Blackwell Publishers, 1993), pp.162–172; A. Dunsire, *Implementation in a Bureaucracy* (New York: St Martin's Press, 1978), pp.40–43.

⁹ A. Downs, *Inside Bureaucracy* (Boston: Little, Brown and Company, 1967), pp.59–60, 144–145.

¹⁰ S. Juss, "Rulemaking and the Immigration Rules" (1992) 13 Statute L.R. 150. Some policies can be found on the agency's website, some come out through leakage, and some not at all. See R. McKee, "Home Office Policies" (2006) 20 J.I.A.N.L. 289. On secondary/tertiary rules, see R. Baldwin, *Rules and Government* (Oxford: Clarendon, 1995), p.4; D. Galligan, *Due Process and Fair Procedures* (Oxford: Clarendon, 1996), pp.483–484.

¹¹ See A. Dummett and A. Nicol, *Subjects, Citizens, Aliens and Others* (London: Weidenfeld and Nicolson, 1990), pp.3–4; S. Juss, *Discretion and Deviation in the Administration of Immigration Control* (London: Sweet & Maxwell, 1997).

¹² See, e.g. UKBA, Immigration Rules (2012), r.41(vi) (visitors).

A different way—rule-type two—is to lay down a mandatory requirement that the applicant provide specified evidence that she possesses specified funds (e.g. £3,100 for overseas applicants; £900 for in-country applicants) for a specified period of time (e.g. 90 days).¹³ Such a rule does not require any judgement concerning the adequacy of funds, but simply an assessment of whether the right boxes have been ticked.

Both rules reflect a different legal approach toward policy implementation. A type one rule creates a broad legal framework in which officials make judgements through individualised decision-making; its meaning is only settled when applied in practice. By contrast, with a type two rule, the policy judgements have already been taken and the rule automatically determines individual cases before they arise.¹⁴ These different approaches have important implications as regards the allocation of administrative authority between rulemakers and subordinate officials. Whereas a type one rule confers authority upon subordinate officials to make their own choices, a type two rule eliminates caseworker discretion thereby increasing hierarchical control by rulemakers.¹⁵ The rule-types also correspond with different procedures (face-to-face interview versus assessment of documentary evidence alone).

Which rule-type works best? Consider rule-type one. The open-textured nature of the rule enables decision makers to consider the particularities of each application and allows for sensitive exercises of judgement, but this inevitably diminishes the rule's precision and predictability. This can in turn generate unfounded applications: opportunistic applicants may seek to exploit the rule's ambiguity while legitimate but unmeritorious applicants may have their false hopes raised. Furthermore, as the rule has to be applied by a large number of officials, it can generate inconsistent outcomes. Some officials may adopt a stringent approach while others may be more lenient, thereby raising the prospect of arbitrary or incorrect decision-making. An appeals process provides a means of challenging such decisions, but adds costs, time, and complexity.

By contrast, rule-type two, a bright line rule, cannot be criticised for imprecision. By specifying a simple and readily intelligible requirement, the rule is predictable and transparent. Applicants can self-assess their eligibility, thereby reducing speculative and erroneous applications. The rule is easy and efficient to administer and should produce uniform outcomes. As there is little, if any, scope for interpretation, there is no need for an appeal process, though administrative review may be necessary. The drawback is the rule's rigidity and inflexibility. When individual circumstances arise which are not catered for by a bright line rule (near misses), the decision maker cannot exercise discretion and error costs can arise.¹⁶ Such under—and over—inclusiveness can undermine the rule's ability to achieve its purpose.

¹³ UKBA, Immigration Rules, r.245CA(e); Appendix C paras 1–3.

¹⁴ C. R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford: OUP, 1996), pp.21–22.

¹⁵ A. Dunsire, *Control in a Bureaucracy* (New York: St Martin's Press, 1978), pp.122–127.

¹⁶ For instance, applicants who fall short of the required amount of funds even by a trivial amount, such as £1, for a short period of time, such as one day, will not qualify irrespective of any extenuating circumstances. See *NA v Secretary of State for the Home Department (Tier 1 Post-Study Work-funds)* [2009] UKAIT 25 at [47] and [103].

Values and rule design

This comparison illustrates some well-established points concerning the design of rules. The rulemaking enterprise is influenced and constrained by a number of values.¹⁷ Rules should be open and knowable; this enhances their transparency and predictability and enables people to plan their lives around them. They should ensure uniformity between those similarly situated. The costs of making and administering rules should be kept to a minimum. Rules should not allow officials to act on a personal whim, but they should contain sufficient flexibility to cater for individual circumstances. Rules should also be congruent, that is, capable of achieving their intended purpose.

All these values are desirable, but the achievement of one value will often be at the expense of another.¹⁸ Different rule-types generate their own set of costs and benefits. The optimum balance between competing values cannot be specified a priori and will vary from one context, even one rule, to another. The appropriateness of rule-type then requires a contextualised inquiry into a specific context to determine the appropriate rule-type and may be highly contingent upon the policy, organisational, and legal forces at play in the particular administrative process. To investigate further, it is necessary to examine the impact of those forces on immigration rulemaking.

Rulemaking contexts

Policy influences

Policy factors clearly determine the substantive content of rules, but they also affect rule-type in various ways. In the immigration context, the principal policy pressure upon government is to maintain public confidence in the immigration system.¹⁹ Ministers seek to do this in part by announcing tough, rigorous rules. This political pressure is acute for various reasons: the policy context; the increasingly unmanageable and large scale nature of the immigration system; and the media attention devoted to the porous nature of immigration controls. Under pressure to answer to these demands, the typical ministerial response is to announce strict, rigid rules which toughen up the system and thereby seek to restore public confidence.

A classic example is the agency's failure in 2006 to deport over 1,000 foreign national prisoners. The various causes of this—rising numbers of foreign national prisoners, ignored warnings, fragmentation across government, ineffective communication, budgetary freezes, and competing pressures on caseworkers—resulted in a major operational failure.²⁰ The episode illustrates how systemic organisational failure in enforcing the rules causes political fallout and

¹⁷ See J. Jowell, "The Legal Control of Administrative Discretion" [1973] P.L. 178, 184–190; C. Diver, "The Optimal Precision of Administrative Rules" (1983) 93 Yale L.J. 65, 66–71; J. Black, *Rules and Regulators* (Oxford: Clarendon Press, 1997), pp.6–19.

¹⁸ C. E. Schneider, "Discretion and Rules: A Lawyer's View" in K. Hawkins (ed), *The Uses of Discretion* (Oxford: Clarendon Press, 1992), p.47.

¹⁹ Home Office, *Controlling our Borders* (2005), Cm.6472 p.5. Restoring public confidence has been a recurrent theme, see speeches by G. Brown, March 31, 2010 and T. May, November 5, 2010.

²⁰ House of Commons Home Affairs Select Committee ("HAC"), *Immigration Control* (2006), HC Paper No.775 at [516]–[535].

backlash, which in turn leads to more restrictive rules. The previous rules—under which, in considering whether to deport, the public interest had to be balanced against any compassionate circumstances—went beyond the requirements of the Human Rights Act 1998.²¹ New rules created a very strong presumption in favour of deportation, only to be outweighed in exceptional cases²² and were followed by legislation which established a scheme of automatic deportation.²³

A similar trend can be seen in relation to the general grounds for refusal.²⁴ Previous rules had enabled caseworkers to exercise discretion when issuing sanctions, such as re-entry bans, against those who had breached immigration law (e.g. by overstaying or working illegally). Subsequent rules set out a clear period during which a previous immigration offender would have any future applications refused; for instance, an applicant who has used deception to enter will be automatically banned for ten years.²⁵ The ministerial rationale was that blanket rules send out a clear message that breaches of immigration law will not be tolerated.²⁶ For ministers who want to pursue tough immigration policies, rigid rules are the instrument of choice.

The desire for rigidity is, however, not always motivated by punitive considerations. For instance, the points based scheme has been the principal response to the need to formulate clear standards to demonstrate to the public that economic migrants bring important benefits in the country's economic interests; transparent, rigid rules have been used to gain public legitimacy for the policy of economic migration. The Coalition Government's policy of limiting non-EU economic migration provides a further twist in the policy forces impacting upon rule-type.²⁷ To implement this policy, the agency has introduced an annual limit on the number of skilled workers through a system of monthly allocations of sponsorship certificates; numerical limits mean quantitative, rigid rules.²⁸ Rule-type can also be influenced by the need to protect vulnerable migrants. Consider, for instance, the desire to safeguard potential victims of forced marriage. To tackle the practice, the qualifying age for a marriage visa was raised from 18 to 21, but such a rule inevitably includes those not being forced into marriage.²⁹

Intense as these political forces can be, the agency sometimes needs a low visibility way of dealing with hard cases. Extra-statutory discretion allows positive decisions to be made outside the rules in individual cases and for concessionary policies which supplement the Rules.³⁰ Concessionary policies outside the rules enable the agency to soften their strict application, to experiment with a policy before formally introducing it, and to handle unexpected situations, yet this

²¹ Home Office, *Immigration Rules* (1994), HC Paper No.337), r.364; *Hansard*, HC Vol.446, cols 77–81ws, (May 23, 2006); *CM v Secretary of State for the Home Department* [2005] UKIAT 00103 at [36].

²² Home Office, *Statement of Changes to Immigration Rules* (London: The Stationery Office, 2006), HC Paper No.1337, r.364.

²³ UK Borders Act 2007 ss.32–39.

²⁴ UKBA, *Immigration Rules*, r.320.

²⁵ Home Office, *Statement of Changes to Immigration Rules* (London: The Stationery Office, 2008), HC Paper No.321, r.320(7B).

²⁶ *Hansard*, HC Vol.475, col.1351 (May 13, 2008).

²⁷ UKBA, *Limits on Non-EU Economic Migration* (2010).

²⁸ Home Office, *Statement of Changes to Immigration Rules* (London: The Stationery Office, 2011) HC Paper No.863.

²⁹ Home Office, *Statement of Changes to Immigration Rules* (London: The Stationery Office, 2008) HC Paper No.1113, r.277.

³⁰ Immigration Act 1971 s.33(5).

undermines transparency.³¹ Likewise, individualised ministerial discretion enables consideration of exceptional cases, but opens up the risk of lobbying and political favours. Furthermore, departing from the rules can amount to rewriting policy through individual cases and undermine the desirability of applying known rules. Ministers have, though, stressed that discretion outside the rules should only be exercised where there are clear compassionate circumstances.³²

The organisational context

An agency's organisational structure will also exert significant influence upon the choice of rule-type. To examine such forces, it is necessary to specify the nature of the agency's structure. The UKBA epitomises a general organisational model: the machine bureaucracy, that is, an organisation that has to cope with a large, repetitive, and routine workload and has a clearly defined hierarchy.³³ Given the nature of the work, machine bureaucracies place particular weight upon the standardisation of operational and decisional processes as their prime coordinating mechanism. Rules programme the standard operating procedures enabling decision-makers to undertake the routine and repetitive decisions and to cope with the workflow. Further defining characteristics of machine bureaucracies often include a ubiquitous control mentality over the operating core and an incessant search for efficient processing.

Such organisations generate a deep seated ambivalence.³⁴ From one perspective, given their ability to mobilise administrative power on an unprecedented scale, machine bureaucracies are technically superior to other forms of organisation. From another perspective, such organisations generate dysfunctional behaviours: the mistreatment of clients and legalism—rules designed as means to achieve important public functions may end up being applied mechanistically without regard to their purpose.³⁵ This displacement of ends in favour of means can result in the rigid and formulaic adherence to rules at the expense of the individuals concerned and the desired policy goals; officials may end up applying rules without understanding them.³⁶ Nonetheless, the machine bureaucracy provides the only conceivable way of managing the workflows of large scale administrative systems.

A variant of this organisational model, the immigration bureaucracy is characterised by a proliferation of rules and regulations which standardise its decision processes. At the heart of the agency's operations is case working: making decisions on applications to travel to or stay in the country. Its operating core comprises a large number of decision makers: Immigration Officers and Home

³¹ See *R. (on the application of Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744; [2005] Imm. A.R. 608 (a concessionary policy to grant asylum to certain applicants had not been publicised or applied by agency officials); *R. (on the application of Tozhlukaya) v Secretary of State for the Home Department* [2006] EWCA Civ 379; [2006] Imm. A.R. 417 (a concessionary policy announced to Parliament did not form part of the relevant instructions for caseworkers, an outcome "contrary to basic principles of good administration" (Richards L.J. at [89])).

³² HAC, *Managing Migration: Points-Based System* (London: The Stationery Office, 2009) HC Paper No.217, Ev.72–73.

³³ M. Weber, *Economy and Society* (Berkeley: University of California Press, 1978), pp.956–1003; H. Mintzberg, *The Structuring of Organizations* (London: Prentice-Hall, 1979), pp.314–347.

³⁴ M. Crozier, *The Bureaucratic Phenomenon* (1964), p.176.

³⁵ J. Jowell, "The Legal Control of Administrative Discretion" (1973) P.L. 178, 192–194; R. A. Kagan, *Regulatory Justice* (New York, Russell Sage Foundation, 1978), pp.92–93.

³⁶ R. K. Merton, "Bureaucratic Structure and Personality" in *Social Theory and Social Structure* (1968), p.249; P. M. Blau and M. W. Meyer, *Bureaucracy in Modern Society*, 3rd edn (New York: Random House, 1987), pp.141–142.

Office caseworkers in the United Kingdom and Entry Clearance Officers located at visa posts around the world. The volume of decision-making is immense. In 2009, the agency made some 2.45 million visa decisions in addition to 297,780 after entry decisions and 24,285 initial asylum decisions.³⁷

Given the volume of case working and the agency's unfortunate history of backlogs and delays, there are intense organisational pressures to manage the workflow efficiently.³⁸ One response has been to redesign and streamline agency processes. For instance, the overseas entry clearance network has been redesigned from having 150 posts operating independently to a "hub and spoke" model under which there are 315 application centres (the spokes) and 70 larger regional decision centres (the hubs) to improve efficiency.³⁹

Another response has been to standardise decisional process further by moving toward rigid rules. In general terms, programming need not connote complete rigidity, but the more routine and repetitive an administrative process the greater the programming.⁴⁰ Consider the agency's simplification project. For the agency, the complexity of the Rules generates problems: obscure rules that are difficult to comprehend; inefficient and delayed decision-making; poor decisions and increased likelihood of legal challenge. Simplification aims to maximise transparency, efficiency, clarity and predictability, public confidence, compliance, and to minimise discretion.⁴¹

To these pressures, can be added the need for better customer service and higher decisional quality, but the intrinsic conflicts within machine bureaucracies present difficult managerial challenges. The realities of organisational life can mean that the pressure to process a high volume caseload quickly according to performance targets,⁴² inevitably comes into tension with the need for decisional quality.⁴³ Consider the high volume of complaints. Such complaints generate a considerable amount of work for the agency, overloading its complaint handling systems, resulting in delays and backlogs and prompting criticism that such processes are themselves of poor quality.⁴⁴ It might be expected that additional resources should be allocated to raise decisional quality, but the agency's instinctual response is to reduce the scope for complaints in the first place and to exert tighter oversight of its caseworkers through standardised rules. This may meet workflow pressures, but also induce other decisional errors. Finally, the agency's self-interests should not be overlooked: automating decisions through rigid rules enables it to avoid

³⁷ Home Office, *Control of Immigration: Statistics 2009* (2010).

³⁸ These pressures are likely to heighten. For instance, following HM Treasury, *Spending Review 2010* (2010), Cm.7942 at [2.66], the agency's budget is to be cut by up to 20% by 2014–2015.

³⁹ See UKBA, "Overseas network changes", UKBA Website at <http://www.ukba.homeoffice.gov.uk/aboutus/organisation/overseas-network> [Accessed October 31, 2012].

⁴⁰ March and Simon, *Organizations* (1993), pp.163–164.

⁴¹ UKBA, *Simplifying Immigration Law* (London: The Stationery Office, 2009), Cm.7730. There are obvious parallels with tax and social security, see N. Harris, "Complexity, Law and Social Security in the United Kingdom" (2006) 8 *European Journal of Social Security* 145.

⁴² National Audit Office ("NAO"), *Visa Entry to the United Kingdom* (2004), HC Paper No.367. The agency aims to complete 90 per cent of non-settlement visa applications within 3 weeks.

⁴³ Parliamentary Ombudsman, "*Fast and Fair?*" *A Report by the Parliamentary Ombudsman on the UKBA* (2010), HC Paper No.329; Independent Chief Inspector of the UKBA ("ICIUKBA"), *Asylum: Getting the Balance Right?* (2010).

⁴⁴ For criticism of the agency's complaint handling systems, see UKBA Complaints Audit Committee, *Annual Report 2007/08* (2008); HAC, *Managing Migration* (2009), HC Paper No.217 at [269]–[290]; ICIUKBA, *Lessons to Learn* (2010). See also UKBA, *Customer Strategy 2009–2012* (UKBA, 2009).

blame for the faulty exercise of discretion (unless inappropriate rules attract more blame).⁴⁵

Judicial responses

As rigid rules eliminate the scope for individualised judgement, they can produce unfair outcomes. The question then arises as to whether the courts will restrain the drive toward standardisation. As they are accustomed to governing through standards and principles, courts tend to be sceptical of rigid rules. Yet, rule-type raises obvious tensions given the judicial reluctance to intrude into policy issues. In general, courts adopt a deferential posture.⁴⁶ Consider *MB (Somalia)* in which the court recognised that it was permissible for the agency to adopt rigid rules even if they produced an irrational outcome. Although it was difficult to distinguish between a widower over 65 years of age who would qualify for entry as a dependant relative and a divorcee of the same age who would not, the rule was not unlawful.⁴⁷ As Laws LJ noted, the Rules will inevitably contain some bright line distinctions; if they did not, they would move closer to a catalogue of individual cases, inoperable in practice and hostile to the public interest in clear and open administration.⁴⁸

Yet, the courts have increasingly sought to preserve appropriate discretion within the rules by, for instance, castigating instances of rule-bound inflexibility.⁴⁹ They have also overruled attempts by the agency to remove caseworker discretion through stealth tactics such as guidance and rule interpretation. Take *Ishtiaq* for instance.⁵⁰ Here, the agency had issued guidance to effect that victims of domestic violence seeking indefinite leave to remain could prove their case only by reference to specified types of evidence whereas the relevant Immigration Rule gave caseworkers discretion to decide what evidence would suffice in individual cases. For the Court of Appeal, the agency's rationales for its restrictive interpretation—safeguarding the immigration system against abuse and promoting efficient and consistent rule application—could not justify removing caseworkers' fact-finding discretion as it would defeat the rule's purpose. Likewise, in *Ahmed Mahad* the Supreme Court held that the agency's interpretation of various Immigration Rules so as to preclude third party support of individuals applying to settle permanently with their UK sponsor was unlawful.⁵¹ Again, the agency's interpretive justifications—the difficulty and administrative costs of testing the reliability and genuineness of third party promises—were rejected in favour of requiring caseworkers to assess the reliability of such promises in each application.

⁴⁵ C. Hood, *The Blame Game* (2011), pp.93–97.

⁴⁶ *Mahad (Ethiopia) v Secretary of State for the Home Department* [2008] EWCA Civ 1082; [2009] Imm. A.R. 254 at [65] (Laws L.J.). Successful challenges to the legality of the Immigration Rules are rare; for an exception, see *R. v Secretary of State for the Home Department Ex p. Begum* [1986] Imm A.R. 385.

⁴⁷ UKBA, Immigration Rules (2012), r.317(i); *MB (Somalia) v Entry Clearance Officer* [2008] EWCA Civ 102; [2008] Imm. A.R. 490.

⁴⁸ *MB (Somalia) v Entry Clearance Officer* [2008] EWCA Civ 102; [2008] Imm. A.R. 490 at [60].

⁴⁹ See, e.g. *R. (on the application of Forrester) v Secretary of State for the Home Department* [2008] EWHC 2307 (Admin) at [16]: “a classic example of a thoroughly unreasonable, disproportionate, inflexible application of a policy, without the slightest regard for the facts of the case”.

⁵⁰ UKBA, Immigration Rules (2012), r.289A; *Ishtiaq v Secretary of State for the Home Department* [2007] EWCA Civ 386; [2007] Imm. A.R. 712.

⁵¹ UKBA, Immigration Rules (2012), r.281 (spouses); r.297 (children); r.317 (other dependent relatives); *Mahad v Secretary of State for the Home Department* [2009] UKSC 16; [2010] 1 W.L.R. 48.

Furthermore, the flat rule that marriage visa applicants be 21 years old has been held to interfere disproportionately with the right to family life.⁵² This does not imply judicial approval of vague rules.⁵³ What it does mean is that the courts will seek to preserve necessary discretion to maintain an appropriate balance between rigidity and flexibility.

Two case studies

Appreciating the different values and forces which impact upon rule-design is necessary, but not sufficient. What is also required is an analysis as to how trade-offs are struck in practice, why particular values come to predominate over others, and how different institutional actors resolve these tensions. This section evaluates the rules governing family life applications and the points based scheme.

Family life applications

While immigration decision-making must comply with all convention rights, the right to family is of particular importance.⁵⁴ Article 8 ECHR is often invoked by those individuals who do not qualify to remain under the Immigration Rules, but who challenge their removal. The importance of the matter is underscored by a number of factors: the number of failed asylum seekers and other categories of person illegally resident in the United Kingdom; agency delays in initial decision-making; and the fact that individuals cannot be expected to put their family life on hold. The central issue is the appropriate rule-type to be used.

Both policy and organisational factors loom large here. The risk for the agency is that art.8 will be used by applicants to evade immigration control. Administrative costs are potentially high because of the volume of applications and appeals. This has prompted various agency responses. First, to ensure compliance with the human rights standards such as art.8 and to guide its staff, the agency adopted various extra-statutory policies.⁵⁵ Secondly, it has sought to confine the application of art.8 to minimise successful applications through administrative changes and legal challenges. For instance, the agency adopted a no queue-jumping policy; those wanting to remain on art.8 grounds should return home and apply (e.g. for entry as a spouse).⁵⁶ As regards litigation tactics, the agency initially convinced both the Tribunal and the Court of Appeal respectively to adopt *Wednesbury*-style deference to its assessment of immigration control and then a test that only truly exceptional cases would succeed.⁵⁷ The underlying premise was that in nearly all cases the Immigration Rules would represent the appropriate balance between public interest

⁵² *R. (on the application of Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; Home Office, *Statement of Changes to Immigration Rules* (2011), HC Paper No.1622.

⁵³ See, e.g. *R. (on the application of Limbu) v Secretary of State for the Home Department* [2008] EWHC Admin 2261.

⁵⁴ UKBA, *Immigration Rules* (2012), r.2.

⁵⁵ For instance, the agency's marriage policy (DP 3/96) stated that enforcement action should not generally be taken against someone with a genuine and subsisting marriage where the couple had lived together continuously for at least 2 years. Under the 7 year child concession (DP 5/96), enforcement action should not normally be taken against parents of a child with 7 years' residence. In 2007 and 2008, the policies were withdrawn.

⁵⁶ See *R. v Secretary of State for the Home Department Ex p. Mahmood* [2000] EWCA Civ 315; [2001] 1 W.L.R. 840.

⁵⁷ *M v Secretary of State for the Home Department* [2004] UKIAT 24; [2004] Imm A.R. 211; *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105; [2006] Q.B. 1.

and private rights; given their approval by Parliament, due deference by the judiciary was necessary.

However, in *Huang* the House of Lords, rejecting all previous discussion of due deference, articulated a judgemental weighing-of-interests test: where an applicant's family life cannot reasonably be enjoyed elsewhere, then, taking into account all relevant circumstances, would refusal be sufficiently serious to breach the applicant's family life?⁵⁸ Decision makers must exercise careful and informed judgement when balancing all the factors for and against removal:

“the search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires.”⁵⁹

It is not difficult to comprehend why the courts have insisted upon a discretion laden test in art.8 cases. The fact-sensitivity and evaluative nature of the decision task precludes bright line rules. The sheer diversity and complexity of human situations to be covered requires decision makers to exercise discretion rather than just follow rigid rules. Second, the high error costs allied with the importance of family life demands flexible decisional criteria. A bright-line rule dependent upon fragile rule-categories would be inadequate in practice and devalue the dignity of applicants.

Huang also illustrates the significance of judicially imposed constitutional constraints over the selection of rule-type. For the House of Lords, the particular importance of the rights at stake mandated the need for careful evaluation of the circumstances of each individual claim. Moreover, the court refused to accept that the Immigration Rules automatically strike the proper balance between individual rights and immigration control because they:

“are not the product of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented.”⁶⁰

Given the lack of Parliamentary representation of applicants, a discretionary test enables affected individuals to participate directly in the process of determining the rule's meaning. The appeals process provides the readily available institutional means for securing individual participation. By adopting for a flexible test, the House of Lords was acting to compensate for the lack of representation of applicants in the Parliamentary process and to buttress the constitutional legitimacy of the decisional process.

Subsequent cases illustrate these trends toward individualisation and participation in decision-making. For instance, the courts have insisted that decision makers consider not just the human rights of the applicant, but those of each individual affected, such as other family members.⁶¹ Whether removal interferes with the family lives of others settled in the United Kingdom lawfully is to be judged not by whether there are insurmountable obstacles, but whether it is reasonable to

⁵⁸ *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 176 at [14]–[20]. See also *R. (on the application of Razgar) v Secretary of State for the Home Department (No.2)* [2004] UKHL 27; [2004] 2 A.C. 368.

⁵⁹ *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] 1 A.C. 1159 at [12] (Lord Bingham).

⁶⁰ *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 176 at [17].

⁶¹ *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39; [2009] 1 A.C. 115.

expect other family members to relocate.⁶² Furthermore, in *Chikwamba* the blanket nature of the no queue-jumping policy was held to be unlawful.⁶³ While the policy's purpose—detering people from coming to the United Kingdom without entry clearance—was permissible, its blanket application was not. Only comparatively rarely would it be lawful to require someone with family in the United Kingdom to return home and apply for entry clearance, particularly when children were involved. As Lord Scott commented, policies that involve people should not become:

“rigid inflexible rules. The bureaucracy of which Kafka wrote cannot be allowed to take root in this country and the courts must see that it does not.”⁶⁴

Of course, this backlash against rigidity comes at a cost. One consequence is a loss of predictability. Yet this is not necessarily problematic. Applicants challenging removal under art.8 have usually entered illegally or sought asylum unsuccessfully and in the meantime developed a family life. They are not in a position in which they need to know in advance whether they will qualify. On the contrary, it is more plausible to assume that applicants would not want decision makers to be hamstrung by rigid rules.

Concerns about inconsistency are more intricate. Does the subjective nature of the *Huang* test increase the scope for impermissible disparate outcomes? If so, then what can be done? As the test is highly dependent on individual judgement, its application will be prone to human error; inconsistent outcomes are a good indicator that some decisions are wrong. As Lord Bingham has noted:

“in a complex and overloaded system perfect equality of treatment between applicants similarly placed will be impossible to achieve, but startling differences of treatment between such applicants, or anything suggestive of randomness or caprice in decision making, must necessarily give grounds for concern.”⁶⁵

One difficulty is that while inconsistency is an inherent complication of large scale decisional processes, it is often hard to pin down. Even establishing the degree of (in)consistency is problematic as each case turns on its own individual merits and much of the evidence of inconsistency is necessarily anecdotal. Determining whether differential outcomes across a large decisional system are either intrinsic or arbitrary is itself a question of judgement.⁶⁶ Nonetheless, it seems plausible to assume that 700 Immigration Judges determining thousands of art.8 appeals will produce discrepant outcomes. If the cognate area of asylum adjudication is anything to go by, then inconsistency will be a legitimate concern.⁶⁷

The answer has been for the courts and the Upper Tribunal to issue guidance on the factors to be taken account of when balancing family life with immigration

⁶² *VW (Uganda) and AB (Somalia) v Secretary of State for the Home Department* [2009] EWCA Civ 5 at [19] (Sedley L.J.).

⁶³ *C (Zimbabwe) v Secretary of State for the Home Department* [2008] UKHL 40; [2008] 1 W.L.R. 1420.

⁶⁴ *C (Zimbabwe) v Secretary of State for the Home Department* [2008] UKHL 40; [2008] 1 W.L.R. 1420 at [4] (Lord Scott). See UKBA, *Article 8 ECHR* (2010).

⁶⁵ *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] 1 A.C. 1159 at [10] (Lord Bingham).

⁶⁶ And, as always with immigration, politics plays a pervasive role. See, e.g. D. Barrett and J. Ensor, “Immigration court lottery and the foreign criminals allowed to stay” *Sunday Telegraph*, June 17, 2012.

⁶⁷ J. Ramji-Nogales, A. I. Schoenholtz and P. G. Schrag, *Refugee Roulette* (2009).

control.⁶⁸ Such factors include: agency delay; the nature of past non-compliance with the Immigration Rules; strong family connections in the home country; whether there is a close and genuine bond between the applicant and the spouse (and the spouse's immigration status) and whether that spouse can reasonably follow the applicant to the country of removal.⁶⁹ Further considerations include: whether there are any United Kingdom-born children; the need for weighty reasons to justify separating a parent from a lawfully settled minor; and the specific legitimate aim being pursued (preventing crime—the aim in criminal deportations—carries more weight than maintaining effective immigration control—the aim in ordinary removal cases).⁷⁰ Guidance allows factors to be recognised at a general level while allowing decision makers to assess their relative weight in specific cases.

However, in July 2012, the Home Secretary introduced new rules to reform the approach in art.8 cases.⁷¹ According to the agency, the effect of *Huang* has been for the courts to make their own decisions on an individual basis, which has led to unpredictable and inconsistent decisions in which the courts do not defer to either the Government or Parliament's view of the appropriate balance to be struck. The purpose of the new rules is, then, to introduce a rules-based approach for determining proportionality in which the assessment is to be undertaken not on a case-by-case basis outside the main rules, but according to the requirements laid down by the new rules. The agency's approach is that, under the new rules, a failure in an individual case to fulfil these requirements will mean that—absent exceptional circumstances—removal will be proportionate. The advantage is discretion is limited and consistent and transparent decision-making is promoted. For instance, only in exceptional circumstances will family life (including the best interests of a child) outweigh the public interest in deportation of a foreign offender with a custodial sentence of four years. Other detailed rules impose requirements as regards the position of children and those seeking leave to remain through long residence.

These rules represent a clear attempt to give a policy steer to the courts and tribunals. They seek to confine *Huang* by defining proportionality through the rules and by re-introducing “exceptionality” as the criterion of success and the “insurmountable obstacles” test. The agency's purpose is to attempt to “shift” the judicial role from reviewing the proportionality of individual administrative decisions to reviewing the proportionality of the Rules, which should now—according to the agency—be accorded deference because of their approval by Parliament. The risks are obvious: hard line rules are blunt instruments which

⁶⁸ See generally R. Carnwath, “Tribunal Justice—A New Start” (2009) P.L. 48, 56–64; R. Thomas, *Administrative Justice and Asylum Appeals* (Oxford: Hart, 2011), ch.7.

⁶⁹ *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] 1 A.C. 1159 at [12]–[16] (Lord Bingham); *MB (Pakistan) v Secretary of State for the Home Department* [2010] UKUT 282 (IAC); *LM v Secretary of State for the Home Department* [2010] UKUT 279 (IAC).

⁷⁰ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10 at [29] (Richards L.J.).

⁷¹ Home Office, *Statement of Changes to Immigration Rules* (London: The Stationery office, 2012), HC Paper No.194; UKBA, *Statement of Intent: Family Migration* (2012). To counter the view expressed in *Huang* that the immigration rules are not the product of active Parliamentary debate, the new rules were debated—*Hansard*, HC Vol.546, cols 760–823, (June 19, 2012)—but for concerns, see HL Secondary Legislation Scrutiny Committee, *Sixth Report* (London: The Stationery Office, 2013), HL 26.

seek to reflect the proportionality assessment under art.8, but may in some cases leave the rules in breach of it.

The points based scheme

Since 2008, the agency has implemented the points based scheme which covers entry for work and study purposes. The scheme is organised into five different tiers: Tier One—highly skilled migrants; Tier Two—skilled migrants, Tier Three—low skilled migrants (currently suspended), Tier Four—students, and Tier Five—youth mobility and temporary workers. Applicants qualify for entry only if they score sufficient points, which are assigned in accordance with mechanical criteria depending upon the particular category involved. For instance, highly skilled migrant applicants applying under Tier One must score a total of 95 points, which is to include a minimum of 75 points for attributes; 10 points for English language; and 10 points for available maintenance (funds), the rule-type two adumbrated above.⁷² Under attributes, points are awarded under particular categories—age, qualifications, previous earnings, and United Kingdom experience. Different points can be scored according to variables under each of these categories; for instance, under qualifications, a PhD will score 50 points, a master’s degree 35 points, and bachelor’s degree 30 points. Similarly, points to be scored from previous earnings overseas vary according to the amount earned, the number of points increasing in line with previous earnings. Applicants will qualify if, through whatever permissible combination, they score the required points. The scheme specifies which particular documentation must be presented to validate the points claimed.

In terms of rule-type, the scheme reflects a conscious and deliberate shift in the agency’s rulemaking policy.⁷³ Under the previous system, the agency had been heavily criticised for subjective decisions. Under the points based scheme, precise specification has become exalted in the interests of efficiency, transparency, objectivity, consistency, and usability.

Given the scale of economic migration and the volume of applications, the need to minimise administrative costs ranks highly in rule design. In 2009, the agency received 527,040 points based visa applications and 167,495 in-country variation of leave applications.⁷⁴ But while precise, rigid rules may be administratively more efficient to apply, they are not necessarily motivated solely by considerations of bureaucratic convenience. Previously, applicants had to apply for a work permit and also entry clearance or leave to remain—two separate decisions based on different criteria (someone granted a work permit could nonetheless be refused entry clearance or leave to enter). Under the points based decision, there is a single decision. Applicants can self-assess their eligibility via an online calculator. Awarding points according to objective and transparent criteria provides a structured and predictable decision-making process. Furthermore, transparent criteria serve the political end of reassuring public opinion that successful applicants contribute valuable skills.

⁷² UKBA, Immigration Rules (2012) r.245AA–245G; UKBA, *Tier 1 (General) of the Points Based System* (2010).

⁷³ Home Office, *A Points-Based System* (2006), Cm.6741 at [7].

⁷⁴ Home Office, *Control of Immigration: Statistics United Kingdom 2009* (2010).

Benefits must be weighed against costs. In general terms, greater predictability and transparency can only be attained at the cost of a rule's congruency; objective decisional criteria mean over-generalisation. For instance, points are awarded to Tier One applicants with specified formal qualifications, yet this can exclude suitable and experienced applicants without such qualifications. Awarding points under such criteria can give undue priority to easily quantifiable attributes at the expense of an individual's ability or experience in a job.⁷⁵ Conversely, concerns have been raised about false positive decisions: applicants who fulfil the formal criteria are granted entry even though they might otherwise be refused; without discretion, caseworkers cannot assess the genuineness of applicants' future intentions.⁷⁶ Similarly, the maintenance requirement will disqualify those who only narrowly miss its criterion, but who would never call on public funds.⁷⁷ The antithetical situation is just as possible; the ordinary vicissitudes of life may mean that those who possess the specified funds when applying may subsequently need to rely on public funds.

The issue here is the robustness of the rule-categories used (e.g. qualifications and maintenance); whether they correspond with clear cut break-points in the arrangement of the social world to be categorised or cut across them.⁷⁸ If cases can routinely be assigned to the extremes, then the categories are robust and errors costs will be minimal. But if they cluster predominantly around the dividing lines, then the categories will be fragile and error costs will increase. Intuitively, it might seem reasonable to assume that the errors are not so extensive as to undermine the whole scheme. Qualifications and past earnings are good proxies for employment skills.⁷⁹ But without hard empirical data, it is difficult to determine the extent of such errors.

If the rule-categories are weak, then their modification seems necessary. However, this can rarely be achieved without imperilling other values or changing rule-type. The typical response to a claimant who has just failed to fulfil mandatory requirements is to argue that any decision-making system must allow for the sensible exercise of discretion, but this would undermine the tick box nature of the system and increase administrative costs. Similarly, the Home Affairs Committee has recommended that the agency draw up a list of high level training or professional experience, by sector, to be applied as a substitute for academic qualifications.⁸⁰ However, this has been ignored by the agency—perhaps because of the additional costs or because professional experience cannot easily be pinned down without reverting to judgemental administration.⁸¹

The general complaint against bright line rules—that they incapacitate officials from contextualising their application in individual cases—needs to be accompanied

⁷⁵ HAC, *Managing Migration* (2009) at [91]–[95] and [111].

⁷⁶ HAC, *Student Visas* (2011), HC Paper No.773 at [80]. To tackle abuse of the student route, the agency has introduced targeted interviews to enable ECOs to assess whether an applicant is a genuine student: UKBA, *Statement of Changes in Immigration Rules* (2012), HC Paper No.514.

⁷⁷ See, e.g. S. Johnson, "Immigration to Review Deportation over £78 Savings Shortfall", *The Telegraph*, April 20, 2009.

⁷⁸ C. Hood, *Administrative Analysis* (1986), pp.38–42.

⁷⁹ According to Migration Advisory Committee, *Identifying skilled occupations where migration can sensibly help to fill labour shortages* (2008), p.15, earnings are an excellent proxy for skills: a rational employer would not pay an employee more than the value of their productive output; equally, an employee would not accept less, if he could secure a higher wage elsewhere.

⁸⁰ HAC, *Managing Migration* (2009) at [112].

⁸¹ UKBA, *Government Reply to Thirteenth Report* (2009), Cm.7767, pp.3–4.

by the recognition that such rules are themselves contextualised, that is, informed by administrative experience, consultation within and outside government, and other sources of relevant social data. Moving the relevant policy judgements up the organisational hierarchy from rule-application to the rulemaking level does not necessarily invalidate them. For instance, the maintenance requirement (the type two rule example above) has been criticised as an imprecise rule of thumb which can operate inflexibly and discriminate against migrants from low income countries. Nonetheless, the requirement is not in general terms unreasonable. It is based upon an objective and independent assessment of the minimum living costs in the United Kingdom which apply irrespective of whether meeting that cost is more or less onerous on migrants from different parts of the world.⁸² By adopting hard edged rules the agency reduces the transaction costs imposed by a mass system while gaining in terms of administrative control and uniformity, yet it also inevitably renounces individualisation and nuance.

This is all reinforced by the progressive weakening of appeal rights. A key component of the points based scheme has been the substitution of appeals for administrative review.⁸³ While in-country applicants retain appeal rights, the Tribunal can only consider evidence submitted in support of the initial application.⁸⁴ The rationale is that applicants should put forward all relevant evidence at the time of the application; to allow new evidence to be submitted on appeal would merely encourage inadequate applications and lead to unnecessary and expensive appeals. From one perspective, limiting the scope for appeal and the use of rigid rules can enable the agency to get it right first time: the scope for error is eliminated because the rules themselves provide the mechanism of control.⁸⁵ But this hollow perspective simply conflates technical errors with the substantive error costs induced by the over—and under—inclusiveness of rigid rules.

This analysis is incomplete: it is also necessary to examine the implications for rule-types arising from the variability of rules. All administrative regulations need to be revised as experience of their implementation is fed back to rulemakers. The more detailed administrative rules are, the more frequently they need to be revised to reflect changes in the regulated social context. Consequently, detailed rules generate additional costs arising from the frequency of rule changes.⁸⁶ Agencies will often prefer flexibility and seek to obviate such costs by resorting to informal, tertiary rules. But this can create its own problems if tertiary rules are not subject to the same degree of scrutiny as formal secondary rules. Can agencies introduce rigid decisional criteria through informal tertiary rules?

The points based scheme has been designed to be flexible and responsive to changing economic needs. The agency has also made extensive use of tertiary level policy guidance to set out the scheme's details.⁸⁷ For instance, the requirement that an applicant hold the specified maintenance funds for three months prior to

⁸² HAC, *Managing Migration* (2009) at [96]–[103] and [113].

⁸³ Nationality, Immigration and Asylum Act 2002 s.88A.

⁸⁴ Nationality, Immigration and Asylum Act 2002 s.85A.

⁸⁵ UKBA, *Report on Removal of Full Appeal Rights Against Refusal of Entry Clearance Decisions Under the Points-Based System* (2011).

⁸⁶ I. Ehrlich and R. A. Posner, "An Economic Analysis of Legal Rulemaking (1974) 2 *Journal of Legal Studies* 267, 278.

⁸⁷ Such guidance is published on the agency's website.

application was not initially contained in the Rules, but in policy guidance.⁸⁸ The attraction of guidance lies in its flexibility and enhanced agency responsiveness; the agency can make minor changes to fine-tune the system and respond quickly to policy changes without resorting to formal rulemaking.⁸⁹ However, while Parliamentary scrutiny of the Immigration Rules may be beset with difficulties,⁹⁰ they are insignificant when compared with those presented by guidance.⁹¹ Another problem is that the frequency with which guidance can be revised reduces legal certainty.⁹²

The courts have, though, blocked the use of guidance. In *Pankina* and *Alvi*, the courts have held that the agency cannot impose mandatory eligibility criteria by means of guidance not subject to Parliamentary scrutiny.⁹³ Using policy guidance is constitutionally impermissible as it amounts to sidestepping Parliament. Acknowledging that legislative recognition and executive practice had elevated the status of the Immigration Rules akin to that of law, the court have emphasised the constitutional significance of the issue: the agency could make rules only through Parliament. The constitutional function of *Pankina* and *Alvi* is to bolster Parliamentary oversight by preventing the agency from using policy guidance to lay down substantive eligibility criteria. Following amended Rules,⁹⁴ select committees emphasised the importance of Parliamentary scrutiny.⁹⁵ Further litigation has been necessary,⁹⁶ prompting the agency to bring various details, previously specified in its guidance, within the Immigration Rules.⁹⁷ At this point, the issue of rule-type resurfaces. Following *Pankina* and *Alvi*, mandatory, rigid criteria can only be used if enacted through formal rules laid before Parliament. Policy guidance cannot be used precisely because it must be applied flexibly; policies can structure, but not fetter, discretion.⁹⁸

So, what of the points based scheme? It has a high level of customer satisfaction, but this highly prescriptive scheme has its shortcomings.⁹⁹ Refusal because of non-compliance with technical mandatory requirements can be exasperating,

⁸⁸ When the points-based scheme was introduced, the Immigration Rules Appendix C para.1A stated that “the applicant must have had the specified funds for a period of time set out in the guidance”. UKBA, *Statement of Changes in Immigration Rules* (2008), HC Paper No.1113.

⁸⁹ *Hansard*, HC Vol.514, col.41ws, (July 22, 2010).

⁹⁰ For instance, the frequency with which statements of changes are, contrary to Parliamentary convention, not laid 21 days before coming into force.

⁹¹ Such concerns are longstanding: R. E. Megarry, “Administrative Quasi-Legislation” (1944) 60 L.Q.R. 125; Joint Committee on Statutory Instruments, *First Special Report* (1978), HL 51 HC 169 at [12].

⁹² The points-based policy guidance is lengthy and has been amended frequently.

⁹³ *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719; [2011] Q.B. 376; *R. (on the application of Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 W.L.R. 2208.

⁹⁴ UKBA, *Statement of Changes in Immigration Rules* (2010), HC Paper No.382), Appendix C para.1A. This was accompanied by a transitional policy, see UKBA, *Maintenance (Funds) Policy Document* (2010).

⁹⁵ HL Merits Committee, *Statement of Changes in Immigration Rules* (2011), HL 17 at [14]; HAC, *Immigration Cap* (2011), HC Paper No.361 at [109]–[110].

⁹⁶ For subsequent challenges, see *R. (English UK) v Secretary of State for the Home Department* [2010] EWHC 1726 (Admin) (a criterion concerning the minimum level of English language course should have been in the rules not policy guidance); *FA (Nigeria) v Secretary of State for the Home Department* [2010] UKUT 304 (IAC) (*Pankina* not limited to the 3-month rule); *R. (on the application of JCWI) v Secretary of State for the Home Department* [2010] EWCA 3524 (Admin) (unlawful to introduce interim migration cap through policy guidance); UKBA, *Statement of Changes in Immigration Rules* (2010), HC Paper No.698.

⁹⁷ UKBA, *Statement of Changes in Immigration Rules* (2011), HC Paper No.863; UKBA, *Statement of Changes in Immigration Rules* (2011), HC Paper No.908; UKBA, *Statement of Changes in Immigration Rules* (2012), HC Cm.8423), and UKBA, *Statement of Changes in Immigration Rules* (2012), HC Paper No.565.

⁹⁸ *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719; [2011] Q.B. 376 at [28]. The classic authority is *British Oxygen Co Ltd v Minister of Technology* [1971] A.C. 610.

⁹⁹ T. Hamson, S. Sullivan, and K. Bolling, *Points-Based System Pilot Process Evaluation* (2009); Home Office, *Users' views of the Points-Based System* (2011).

especially if it undermines the substantive aims of the policy underlying them. On the other hand, individualised investigation into whether such requirements make sense in each case would be prohibitively time consuming. The failure of applicants to fulfil evidential requirements (e.g. a minor omission in documentation) has been moderated by an internal agency instruction on evidential flexibility allowing applicants to correct such omissions, yet this has been inconsistently applied within the agency.¹⁰⁰ Furthermore, there is no guarantee that points based criteria are in practice transparent. Following *Pankina* and *Alvi*, the rules are now of considerable density and specificity, making Parliamentary scrutiny more burdensome and augmenting calls for simplification.¹⁰¹ There are strong arguments for the scheme: tick box rules enable junior officials to administer a mass scheme efficiently, but this inevitably generates hardship in borderline cases thereby weakening the scheme's overall legitimacy.

Conclusion

It is now time to return to the starting point: the balance between rules and discretion in the administration of policy. In terms of normative theory, administrative lawyers, such as Davis, have often been suspicious of official discretion. This approach certainly has a place in the broader assessment of rule-types, but there is little reason for adopting an attitude of blanket scepticism towards discretion. As the experience of family life appeals illustrates, discretion based rules are an essential component for making evaluative judgements; to confine and structure through rigid rules would induce error costs and undermine the nature of the decision-making task. Likewise, rigid rules, which can confine and structure, and also eliminate discretion, certainly find a clear rationale in terms of administrative efficiency, yet they can induce hardship for individuals and serve administrative self-interests, such as blame avoidance. To be administratively workable, rules exist to assign benefits and entitlements and have to draw a line somewhere, but there is no universal formula as to which type of rule—bright line or flexible—should be used. The selection of rule-type all depends upon a contextual analysis of the pragmatic consequences—the overall levels of errors and costs—which flow from different rule-types.

Recent developments in the immigration context reflect a wider trend within government toward more fixed rules. They also illustrate the influence of policy and organisational forces—in particular the importance of restoring public confidence and the need to process a mass of applications efficiently—in rulemaking. Rulemaking on family life operates within a much wider political context as to who has ownership (the executive or the courts?) over the interpretation of human rights standards and immigration policy. By contrast, the highly prescriptive points-based scheme is seeking systematisation of decision-making in order to manage the pressures on the immigration system.

¹⁰⁰ ICIUKBA, *A Thematic Inspection of the Points-Based System* (2011) at [5.77]–[5.90]; NAO, *Immigration: the Points Based System* (2011), HC Paper No.819 at [2.13].

¹⁰¹ *R. (on the application of Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 W.L.R. 2208 at [65]; HL Secondary Legislation Scrutiny Committee, *Ninth Report* (2012), HL 40 at [15]. For instance, the statement of changes introduced following *Alvi* adds a further 290 pages to the 488 pages already in the rules—Home Office, *Statement of Changes in Immigration Rules* (London: The Stationery Office, 2012), Cm.8423.

Yet, there is always the risk that the agency's focus will become too insular, that policy and organisational pressures will predominate, and that the agency will design rules that suit its own needs. The essential demand of constitutional legitimacy is to ensure that the rulemaking process is open to external participation. The courts have a significant role in influencing rule-type and in maintaining the legitimacy of the enterprise by ensuring the participation of those affected. Such participation may be undertaken through either individualised adjudication or democratic scrutiny and is closely connected with the selection of rule-type. In relation to family life, *Huang* laid down a flexible rule requiring case-by-case judgements to enable the participation of individuals in the decision-making process. It remains to be seen how the courts will respond to the new rules on family life. By contrast, in *Pankina* and *Alvi*, the concern was that if the agency wanted to introduce a rigid rule it had to be laid before Parliament. Nonetheless, while recognising the role of the courts and Parliament, it is important not to exaggerate their importance. The complexity of the system of immigration rules is "in urgent need of attention" and the primary responsibility rests with the government agency itself.¹⁰²

¹⁰² *R. (on the application of Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 W.L.R. 2208 at [96].