Neutral Citation Number: [2019] EWCA Civ 1760

Case No: C6/2017/3326

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**Mr Pushpinder Saini QC (sitting as a Deputy High Court Judge)**
**[2017] EWHC 2917 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2019

**Before:**

**LORD JUSTICE UNDERHILL**
**(Vice-President of the Court of Appeal (Civil Division))**
**LORD JUSTICE PETER JACKSON**
and
**LORD JUSTICE NEWEY**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **The Queen on the application of MOHAMMAD HASAN IMAM** | **Appellant** |
| **- and -** | |
| **SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Respondent** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr Michael Biggs** (instructed by **City Heights Solicitors**) for the **Appellant**
**Mr Russell Fortt** (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 8 October 2019

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

**Lord Justice Newey:**

1. On 28 June 2016, the appellant, Mr Mohammad Imam, applied for leave to remain as a Tier 2 (General) Migrant on the basis that he had been offered a job as a chef by Alishaan Indian Restaurant in Sompting, West Sussex. The application was refused by the Secretary of State, ultimately in a revised decision letter dated 27 September 2016, on the ground that Alishaan Indian Restaurant offered a take-away service and, hence, that the job did not qualify under Appendix K to the Immigration Rules ("the Rules"). At the time, the relevant part of Appendix K excluded jobs "in either a fast food outlet, a standard fare outlet, *or an establishment which provides a take-away service*". Like the Judge, I shall refer to the italicised words as "the Exclusion".

2. Mr Imam challenged the decision to refuse him leave to remain in judicial review proceedings which came before Mr Pushpinder Saini QC, sitting as a Deputy High Court Judge. The Judge dismissed the claim, but Mr Imam now appeals.

3. The appeal raises essentially two issues:

   i) Was the Exclusion, correctly construed, limited to "take-away restaurants" (as Mr Imam contends) or did it extend to other restaurants from which take-away food could be obtained (as the Secretary of State maintains)?

   ii) Was the Exclusion irrational or unreasonable and so invalid?

## The framework

4. During the relevant period, paragraph 245HD of the Rules stipulated that, to qualify for leave to remain as a Tier 2 (General) Migrant, an applicant had to meet the requirements listed in the paragraph. One of these was that the applicant had a "minimum of 50 points under paragraphs 76 to 79D of Appendix A" (see requirement (f)).

5. By virtue of paragraph 76 of Appendix A to the Rules, an applicant applying for leave to remain as a Tier 2 (General) Migrant had to score 50 points for "attributes". An applicant could score 30 such points if a Certificate of Sponsorship had been assigned to him and the "Resident Labour Market Test exemption" applied (see Table 11A in Appendix A). By paragraph 77E of Appendix A, however, no points were to be awarded for a Certificate of Sponsorship unless (relevantly):

   > "(b) the job that the Certificate of Sponsorship Checking Service entry records that the person is being sponsored to do is skilled to National Qualifications Framework level 4 or above, and appears on the shortage occupation list in Appendix K".

6. There was also reference to Appendix K in paragraph 78A of Appendix A. This stated that, in order for a Resident Labour Market Test exemption to apply for a job offer in a shortage occupation, the job must (among other things):

   > "at the time the Certificate of Sponsorship was assigned to the applicant, have appeared on the shortage occupation list in Appendix K".

7. Appendix K to the Rules included an entry (Code 5434) in respect of "Chefs". This read as follows:

> "**Only** the following job in this occupation code:
>
> Skilled chef where:
>
> - the pay is at least £29,570 per year after deductions for accommodation, meals etc; and
> - the job requires five or more years relevant experience in a role of at least equivalent status to the one they are entering; and
> - the job is not in either a fast food outlet, a standard fare outlet, *or an establishment which provides a take-away service*; and
>
> The job is in one of the following roles:
>
> - executive chef - limited to one per establishment
> - head chef - limited to one per establishment
> - sous chef - limited to one for every four kitchen staff per establishment
> - specialist chef - limited to one per speciality per establishment
>
> A fast food outlet is one where food is prepared in bulk for speed of service, rather than to individual order.
>
> A standard fare outlet is one where the menu is designed centrally for outlets in a chain / franchise, rather than by a chef or chefs in the individual restaurant. Standard fare outlets also include those where dishes and / or cooking sauces are bought in ready-made, rather than prepared from fresh / raw ingredients" (emphasis added).

8. For the most part, this entry has had effect since 2011. At that time, the shortage occupation list was published separately on the UK Border Agency website, but the list was incorporated into the Rules themselves in 2012. With effect from 6 October 2019, the entry has been amended to delete the Exclusion. Now, therefore, the relevant part of Code 5434 simply bars a job in "a fast food or standard fare outlet".

9. The Government receives advice on migration issues, including the shortage occupation list, from the Migration Advisory Committee ("the MAC"), an independent non-governmental public body made up of economists and migration experts. In February 2011, the MAC published a report in response to a request for advice on minimum skill requirements and job titles under Tier 2. With regard to chefs, the report included this at [3.67] and [3.73]:

> "We recommend £28,260 as appropriate minimum annual pay for a chef working at NQF4+. In addition the individual should have at least 5 years' experience working in a role of at least equivalent status to the one they are entering and the job should not be in a fast food or standard fare outlet….
>
> [A]s with all of the job titles discussed in this chapter, the UK Border Agency is free to consider supplementing what we recommend here with additional criteria on the basis of enforcement and operational need. Specifically, the UK Border Agency will want to note that the salary for this role is commensurate with that typically paid to the most senior chefs, and employers using the shortage occupation route to fill specialist chef roles should be rigorously monitored, with a view to striking them off the Tier 2 sponsors register if they are found to be abusing the rules of the system."

10. In September 2011, the MAC reported following a full review of the recommended shortage occupation lists. In this report, the MAC said at [5.189]:

> "When we reviewed the occupation for skill in Migration Advisory Committee (2011b) we recommended chefs earning £28,260, with five years experience, and not working in a fast food or standard fare outlet were skilled to NQF4+. We estimated that this represented around five per cent of the workforce. The UK Border Agency added to our criteria in order to try and prevent abuse. They state that a highly skilled chef must also not be working in an establishment offering a takeaway service. In addition, they must be an executive, head, sous or specialist chef and there is a limit on the numbers of each per establishment. We understand the basis for the additional requirements. We accept that there is an argument that the very best global talent should be allowed to be recruited and, pragmatically, we believe the current definition adequately identifies the very best whilst providing measures for preventing abuse. We therefore recommend no change to the current position. Skilled chefs meeting the criteria in Box 5.19 should be retained on the shortage occupation list."

11. The recent change to Code 5434 was made following a further report by the MAC. In May of this year, the MAC published a report in which it reviewed the shortage occupation list. It explained that "Stakeholder responses indicated that there were significant issues with recruiting and retaining good quality chefs, with the 'take-away clause' … being viewed as a serious block to the industry" (see [4J.47]) and that "Stakeholders commented that the criteria of requiring the chef not to work in a fast food establishment prevented them from making use of Tier 2 visas" (see [4J.53]). The MAC concluded as follows at [4J.54]:

> "We recommend the inclusion of skilled chefs within SOC code 5434 (chefs) on the SOL. The occupation ranks fairly highly (47th) in our shortage indictors and has an above

> average vacancy rate. Based on the stakeholder evidence, we recommend retaining chefs on the SOL. The MAC recommends the removal of the condition that establishments that offer a take-away service cannot use the SOL, this rules out recruitment to parts of the industry with genuine shortages as most establishments will offer some level of take-away service. We do not wish to create a further compliance burden on UK Visas and immigrations and we recommend that the number and quality of applications is monitored closely and if it appears that usage of Tier 2 (General) increases considerably we will need to revisit the recommendation."

12. The provisions in the Rules in respect of Tier 2 (General) Migrants form part of the points based system first introduced in 2008. In *Kaur v Secretary of State for the Home Department* [2015] EWCA Civ 13, [2015] Imm AR 526, Burnett LJ said this about that system (at [41]):

> "The points based system for determining whether to grant leave to enter or remain in the United Kingdom, which applies to students as well as a number of other categories of applicant, is designed to achieve predictability, administrative simplicity and certainty. It does so at the expense of discretion, that is to say it is prescriptive."

## The construction issue

13. As I have indicated, Mr Imam contends for a narrow construction of the Exclusion. It is to be understood, he argues, as referring to "a take-away restaurant", not merely a restaurant which provides any form of take-away service. To read the words as extending to any establishment offering take-away food would, it is said, be absurd, especially since the provision of some kind of take-away service is nowadays ubiquitous.

14. In his able submissions, Mr Michael Biggs, who appeared for Mr Imam, sought support in passages from the judgment of Bingham J in *R v Immigration Appeal Tribunal, Ex p Shaikh* [1981] 1 WLR 1107 and that of Simon Brown J in *R v Immigration Appeal Tribunal, Ex p Manshoora Begum* [1986] Imm AR 385. In the former case, Bingham J remarked (at 1114) that it was "incumbent on anybody seeking to give effect to these rules [i.e. the Rules] to read what they say and, so far as possible, give effect to the language used, unless of course that leads to absurdity or inconvenience so gross as to have been clearly outside anyone's contemplation". In the latter case, Simon Brown J arrived at this conclusion (at 392):

> "The construction of the rules should be approached in essentially the same way as the construction of legislation, save only less strictly, namely by giving the very fullest rein to the third principle which I have sought to state. But that is not to say, if the words are wholly unambiguous, that they can be given some other meaning, even in order to accommodate the demands of fairness and reasonableness."

Simon Brown J had stated his "third principle" in these terms:

> "The more unreasonable the result of giving the phrase its natural and ordinary meaning the readier the court will be (a) to find the phrase capable of bearing another meaning, and (b) to prefer such other meaning even if, contrasted to the meaning first suggested, this other meaning is substantially further from the literal and grammatical sense of the phrase."

15. The Judge rejected Mr Imam's construction of the Exclusion. He said:

> "36. Applying these principles, in my judgment this provision is clear and unambiguous. A restaurant which provides *any form* of take-away service is excluded. The decision-maker is not required to consider matters of fact and degree such as what proportion of business is take-away or questions as to whether the restaurant is 'only' or 'predominantly' a take-away establishment.
>
> 37. Had the draftsman intended to introduce a level of judgment on the part of the decision-maker as to the nature of the take-away service provided (and how this impacted on the grant of sponsorship points) one would expect express wording making that clear and for there also to be an indication as to how the assessment was to be made, for example by specifying that certain identified percentages of take-away turnover or business permitted the job to still be recognised."

16. I agree. A restaurant which offers both table service and take-away food is naturally described as one that "provides a take-away service". There is, as the Judge pointed out, no indication in the wording that the Exclusion was to apply only to establishments whose business was wholly or even mainly the provision of take-away food. Nor is it necessary to adopt Mr Imam's interpretation of the Exclusion to avoid absurdity. It is readily understandable that the Secretary of State would not have favoured a rule requiring her to undertake the potentially difficult exercise of assessing the significance of take-away food to any particular establishment; the points based system is, as Burnett LJ noted in the *Kaur* case, designed to achieve, among other things, "administrative simplicity". Further, however common some kind of take-away service might be now in 2019, the Exclusion was framed in 2011, when Deliveroo, for example, did not exist.

17. In the circumstances, the Secretary of State was clearly entitled to conclude that Alishaan Indian Restaurant was "provid[ing] a take-away service" within the meaning of the Exclusion.

## The validity issue

18. It is common ground that a provision in the Rules can be struck down if it is irrational or unreasonable in the *Wednesbury* sense.

19. The principles to be applied were summarised by Simon Brown J in the *Manshoora Begum* case. He explained (at 393-394):

> "This rule [i.e. the relevant provision of the Rules], unlike a statutory provision to which effect must be given however absurd, is amenable to the court's power under its review jurisdiction to condemn it, in whole or in part, as invalid for unreasonableness. This principle is well-established. In the leading case of *Kruse v Johnson* [1898] 2 QB 91, concerned with the *vires* of a county council by-law, Russell LCJ, said this:
>
> > 'I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires."
> >
> > But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern people of the country, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.'
>
> That passage well expresses not only the court's power, but also its limitation. Indeed, earlier in his judgment, Russell LCJ had said this of by-laws passed by bodies of a public representative character and entrusted by Parliament with delegated authority which it then exercisable subject to various checks and safeguards:
>
> > 'They ought to be supported if possible. They ought to be, as has been said, "benevolently" interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered…. I think Courts of Justice

> ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness.'
>
> It should also be recognised that where the relevant power is given, as here, to a Minister responsible to Parliament, the court is even less willing to intervene, *a fortiori* where, as is also the case here, the rules in question were laid before Parliament and subject to a process akin to negative resolution."

20. The last part of that quotation chimes with a passage from the judgment of Baroness Hale in *R (MM (Lebanon)) v Home Secretary* [2017] UKSC 10, [2017] 1 WLR 771. She said at [75]:

> "As Lord Reed JSC has shown (*Ali*, paras 44f), although the tribunal must make its own judgment, it should attach considerable weight to judgments made by the Secretary of State in the exercise of her constitutional responsibility for immigration policy. He cites Lord Bingham's reference in *Huang* to the need to accord appropriate weight to the judgment of a person 'with responsibility for a given subject matter and access to special sources of knowledge and advice'. As that passage indicates, there are two aspects, logically distinct: first, the constitutional responsibility of the Secretary of State for setting national policy in this area; and secondly the expertise available to her and her department in setting and implementing that policy. Both are relevant in the present case, but the degree of respect which should be accorded to them may be different. The weight to be given to the Rules or departmental guidance will depend on the extent to which matters of policy or implementation have been informed by the special expertise available to the department."

21. Another passage from Baroness Hale's judgment in *MM (Lebanon)* confirms that it can be legitimate for the Secretary of State to have regard to considerations of practicality. Baroness Hale said this at [98]:

> "It is apparent from the MAC report, and the evidence of Mr Peckover, that the reasons for adopting a stricter approach in the new rules were matters of practicality rather than wider policy, reflecting what the MAC acknowledged to be the relative uncertainty and difficulty of verification of such sources. That did not make it unreasonable or irrational for the Secretary of State to take them into account in formulating the Rules. The MAC recognised the strength of the case for taking account of other sources, but it did not in terms advise against the approach ultimately adopted by the Secretary of State. In considering the legality of that approach, for the reasons already discussed (para 59 above) it is necessary to distinguish between two aspects: first, the rationality of this aspect of the Rules or instructions under common law principles, and

> secondly the compatibility with the [Human Rights Act 1998] of similar restrictions as part of consideration outside the Rules. As to the first, while the application of these restrictions may seem harsh and even capricious in some cases, the matter was given careful consideration by both the MAC and the Secretary of State. As Aikens LJ said [2015] 1 WLR 1073, para 154, the decision was 'not taken on a whim'. In our view, it was not irrational in the common law sense for the Secretary of State to give priority in the Rules to simplicity of operation and ease of verification."

22. In the present case, Mr Richard Jackson of the Home Office's Migration Policy Unit gave evidence as to reasons for the Exclusion. He said this in a witness statement:

> "22. Criteria relating to salary and experience, while useful, were seen as insufficiently robust on their own to identify chefs working at the necessary skill level and to prevent abuse. Past experience had shown the SSHD [i.e. Secretary of State] that many employers in this sector are willing to exaggerate these in order to obtain permission to employ migrant chefs ….
>
> 24. The UK Border Agency had … , through visits to Tier 2 sponsors, regularly encountered situations where a chef had not been doing the job, working the hours, or being paid the salary stated on their CoS [i.e. Certificate of Sponsorship] ….
>
> 25. Detecting these types of abuse through post-issue compliance checks is resource-intensive and less effective than preventing it from occurring in the first place. It was therefore considered necessary to expand the MAC's suggested criteria. The additional criteria were designed to exclude the types of establishment and the types of application which objectively *were less likely* to require highly specialised chefs and which had *more typically* been associated with abuse of the system in the past.
>
> 26. The MAC's February 2011 report had, in addition to salary and experience criteria, recommended that jobs on the SOL [i.e. shortage occupation list] should exclude chefs in fast food or standard fare outlets …. The MAC did not define these terms and so it was necessary for the SSHD to provide definitions. In doing so, the decision was taken to augment the criteria recommended by MAC by also excluding chef positions in any establishments offering a take-away service.

> 27. This was a clear, objective and easily verifiable test. It was considered appropriate as take-away services were considered to be far less associated with the finest cuisine prepared by the top 5% to 8% of skilled chefs, and much more with establishments offering fast food or standard fare. The offer of a take-away service was therefore considered to be a strong and clear indicator of the quality of cuisine on offer, and by association the level of skill needed in preparing it. The SSHD considered that this exclusion of restaurants offering a take-away service was consistent with the approach recommended by the MAC."

Mr Jackson also said that the Secretary of State had considered whether there should be exceptions for "fine dining establishments" which also offered a take-away service, but concluded that it was not possible to define such chefs or establishments in an objective and readily identifiable way and that the MAC had in its September 2011 review "endorsed the criteria added by the SSHD".

23. Mr Biggs submitted that this evidence does not show the Exclusion to have had a rational basis. There is, he argued, insufficient evidence of a rational link between the Exclusion and the Secretary of State's avowed purpose of identifying chefs with the appropriate skills. The last sentence of paragraph 25 of Mr Jackson's witness statement amounts, Mr Biggs argued, to no more than assertion. The preceding paragraphs do not explain why an establishment providing a take-away service was any more vulnerable to abuse than other restaurants and neither is there evidence demonstrating that restaurants providing a take-away service, when considered as an independent category, were in less need of skilled chefs than other restaurants. In any case, the Exclusion was unreasonably broad, catching very many (if not nearly all) restaurants. In this respect, Mr Biggs referred to a witness statement in which the owner of Alishaan Indian Restaurant said that "over 95% of restaurants in the UK somehow do takeaway services either by the way of collection or delivery". Mr Biggs sought to rely, too, on the fact that the MAC recommended the removal of the Exclusion.

24. For his part, Mr Russell Fortt, who appeared for the Secretary of State, said that Mr Jackson's evidence represented the views of someone experienced in the administration of the system, that it contains no inherent illogicality and that there is no evidence to counter it. That the Exclusion might affect very many restaurants is, Mr Fortt maintained, nothing to the point since the Secretary of State did not intend more than a small minority of chefs to qualify. While, moreover, some "fine dining establishments" with a need for highly skilled chefs might provide a take-away service, the Secretary of State had specifically considered whether there should be an exception for such establishments and decided that that would not be workable. With regard to the MAC, it endorsed the Exclusion in 2011, when it was introduced. That the MAC may have recommended the removal of the Exclusion this year provides no evidence that it was irrational earlier (in particular, in either 2011 or 2016, when Mr Imam was refused leave to remain).

25. Like the Judge, I have concluded that Mr Imam's challenge to the Exclusion must fail. In the first place, there is no evidence that it was unreasonable for the Secretary of

State to consider that take-away services were "far less associated with the finest cuisine prepared by the top 5% to 8% of skilled chefs" or that the offer of a take-away service was "a strong and clear indicator of the quality of cuisine on offer, and by association the level of skill needed in preparing it" (to quote Mr Jackson). Neither is there anything to gainsay Mr Jackson's evidence to the effect that the Exclusion was apt to exclude "the types of establishment and the types of application which objectively *were less likely* to require highly specialised chefs and which had *more typically* been associated with abuse of the system in the past". True it may be, as Mr Biggs said, that Mr Jackson does not provide much by way of substantiation, but what he says is by no means inherently illogical or improbable and there is no evidence to the contrary.

26. Secondly, the Exclusion's breadth does not establish irrationality. The Secretary of State was entitled to adopt a policy under which only the "top 5% to 8% of skilled chefs" would qualify. The mere fact that very many restaurants (even, on the owner of Alishaan Indian Restaurant's estimate, 95% of them) did not do so cannot of itself, therefore, make good Mr Imam's case. Nor does the fact that the Exclusion may have extended to some "fine dining establishments" requiring very skilled chefs demonstrate irrationality when the Secretary of State had considered their position and concluded that it would not be possible to define such chefs or establishments in an objective and readily identifiable way. She was entitled to have regard to considerations of practicality (see [21] above).

27. Thirdly, I do not think that the MAC's recent report assists Mr Imam. It deals with the position now, not in either 2011 (when the Exclusion was adopted) or 2016 (when the Secretary of State refused Mr Imam leave to remain). While the MAC did not itself suggest the Exclusion, it said in its September 2011 report that it understood the basis for the additional requirements that had been included in Code 5434, that it believed the (by then) current definition adequately identified the very best whilst providing measures for preventing abuse and that it recommended "no change to the current position". As the Judge noted (at [60(vii)]), this was "an endorsement by an expert body". Over the years, with the arrival of services such as Deliveroo, the Exclusion may have come to apply more widely, but it cannot be inferred that a provision of which the MAC had approved in September 2011 had become irrationally broad or indiscriminate by 2016.

## Conclusion

28. I would dismiss the appeal.

**Lord Justice Peter Jackson:**

29. I agree. The Exclusion, whose terms were clear, has not been shown to be irrational. It is nonetheless understandable that a broad brush condition of this kind should have received correspondingly close scrutiny, if only because an exclusion that is almost universally applicable may not be universally applied. That was not an issue on this appeal, but I note that the Alishaan Restaurant was identified by the Secretary of State as offering a takeaway service by means of an internet search. Many restaurants that in fact offer a takeaway service may not be similarly identifiable.

## Lord Justice Underhill:

30. I agree with Newey LJ that this appeal should be dismissed, for the reasons which he gives.