



JR/5801/2019 (V)

**Upper Tribunal
Immigration and Asylum Chamber
Judicial Review Decision Notice**

The Queen on the application of Jamjuree Jivavichakul

Applicant

v

Entry Clearance Officer

Respondent

Before Upper Tribunal Judge Frances

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Mr S Karim, of Counsel, instructed by JS Solicitors, on behalf of the Applicant and, Mr Z Malik of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a remote hearing at Field House, London on 6 July 2020 which has been consented to by the parties.

The form of the remote hearing was video by Skype. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to are in bundle of 155 pages, the contents of which I have recorded. The order made is described at the end of these reasons.

JUDGMENT

1. The applicant challenges the respondent's decision of 3 July 2019 refusing her application for entry clearance as a Tier 1 (Entrepreneur) migrant and the

administrative review decision of 20 August 2019 maintaining the decision. Her husband is her dependant.

2. The applicant is a citizen of Thailand. She owns two Thai restaurants in Thailand and has visited the UK on several occasions. She has invested £280,000 in an India restaurant in Leicester. She plans to expand the business by adding Thai cuisine to the menu.
3. The applicant applied for entry clearance on 15 April 2019. At 6.51pm on 4 June 2019 she received an invitation to attend an interview on 6 June 2019 at 1.30pm. In her application form, the applicant requested that the interview be conducted in English. The applicant states that she was unable to prepare for the interview because when she received the invitation she was six hours away from her home and had to rush back.
4. The applicant was interviewed at 1.15pm on 6 June 2019 in Bangkok. At the end of the interview the interviewing officer noted: "Applicants English was very poor & had difficulty with the questions also seemed to know very little about the finances of the company etc".
5. The application for entry clearance was refused on 3 July 2019 on the grounds the applicant's account in interview was not credible and she was not a genuine entrepreneur. The reasons can be summarised as follows:
 - a. The Applicant's response to whether she considered other locations to Leicester was contradictory which lead to the conclusion that the applicant had not carried out the necessary research into her location;
 - b. She was unable to state what salary she would receive which lead to further doubts about her intentions;
 - c. She did not know how the funds would be invested, although she was able to estimate the costs;
 - d. Although the applicant stated she had seen the company accounts, she was unable to name the accounting company and she did not know the

company's gross or net profit for the last financial year or future turnover.

6. The applicant applied for administrative review on the grounds that she did not have time to prepare for the interview and to bring with her relevant information in relation to the business. She was investing in an existing business in Leicester and therefore research into alternative locations was not necessary. The Applicant was self-sufficient and would not be reliant on a salary from the business. It was unfair for the respondent to refuse the application on the basis that the applicant was unable to answer a few questions because she could not recall the relevant information at the time.

The Applicant's grounds and submissions

7. The grounds submit that the interview process was procedurally unfair and the respondent's conclusion that the applicant was not a genuine entrepreneur was irrational. The grounds argue that the applicant was given short notice of the interview and there was no attempt to re-phrase questions which the applicant did not understand. The applicant stated she had understood 80% of the questions and she was not given the opportunity to address the respondent's concerns (Balajigari v SSHD [2019] EWCA Civ 673). The reasons in the refusal decision did not reflect the answers given in interview. The applicant was only considering investing in a business in Leicester and she was able to give an estimated figure for her salary. The respondent relied on irrelevant matters disclosed in interview and failed to consider other material factors.
8. Mr Karim relied on his skeleton argument and submitted the decision making process was procedurally unfair because the applicant did not have a fair opportunity to respond to potentially adverse matters: R (Mustaq) v ECO [2015] UKUT 224. It was clear at the early stages of the interview that she had difficulties understanding and fairness demanded an assessment of whether the interview could continue in English. The respondent failed to consider the applicant's ability to properly express herself in English and, once it became

apparent the applicant was having clear difficulties in understanding, procedural fairness dictated that a further interview or opportunity ought to be given. The relevant clarification and necessary probing did not exist: R (Anjum) v ECO [2017] UKUT 00406 (IAC). It was unfair to rely on the interview to reach adverse conclusions. The applicant was not given a fair opportunity to answer questions in interview because of her lack of ability to understand English.

9. Mr Karim submitted the respondent's conclusion that the funds were not genuinely available to the applicant was irrational given the extensive evidence that the funds had already been transferred from the applicant to the business, that she had a 50% share in the company and she was appointed a director. The respondent's credibility concerns were out with the requirements of the Immigration Rules and inconsistent with the points awarded for access and availability of funds. The applicant had satisfied all the other requirements of the Immigration Rules and the respondent could not impose requirements outside the parameters of 245DB (f) and (h).
10. The respondent's concerns about the location of the business were irrational because the business already exists and is running. Leicester was chosen because of Leicester city football club, the restaurant is close to two universities and the train station, and the restaurant was reputable and had been nominated for awards. The respondent failed to consider the information in the business plan and placed excessive and exclusive reliance on the interview. The refusal decision did not accurately reflect the answers given in interview and the respondent failed to take into account material factors such as the applicant's other restaurants and experience, the other parties to the business and the totality of the documents.

The Respondent's grounds and submissions

11. In the acknowledgment of service, the respondent submitted the applicant was

given more than 24 hours' notice of the interview and it was open to her to request for it to be re-arranged. She was happy to be interviewed in English and made no request for an interpreter. The applicant was given an opportunity to respond to questions about her business investment and the process was not procedurally unfair. The interview transcript demonstrated the applicant did not have knowledge of her business plan. The respondent submitted it is reasonable to expect a genuine entrepreneur to have conducted extensive research into their investment and to know the company's gross and net profit for the last financial year. The refusal of entry clearance was not unfair, unlawful or irrational.

12. Mr Malik relied on his skeleton argument and submitted that the precise content of the duty to act fairly varies according to the particular decision making context in which it falls to be decided. In this case the applicant had been given ample notice of the interview and that it would be conducted in English. The respondent was not required to conduct the interview with the assistance of an interpreter and the applicant was given a fair opportunity to put forward her case. The present case was distinguishable from Balajigari. There was no evidential basis for the submission that the applicant did not understand the questions in interview. It was not her case on administrative review and she had not made a witness statement to that effect in these proceedings. There was no procedural unfairness in the decision making process.
13. In relation to ground 2, this was not an appeal on the merits. Mr Malik submitted the decision was not perverse and the weight attached to a particular factor did not render a decision irrational. The decision was clear and provided cogent reasons for refusing the application. The respondent did not have to refer to each and every piece of evidence before him/her. The answers in interview were not satisfactory and the respondent was entitled to find she was not satisfied the applicant had conducted market research into the location of the business and any suitable alternatives. The applicant was unable to state if she

would receive a salary from the business and it was rational for the respondent to doubt the applicant's intentions in this context. It was open to the respondent to conclude that the applicant's lack of knowledge of how the funds would be invested and the gross or net profit for the previous financial year was not indicative of a genuine entrepreneur.

14. There was no basis for stating that irrelevant considerations were taken into account and relevant considerations were not taken into account. The decision was one that fell within the range of reasonable responses open to the respondent.

Conclusions and reasons

Ground 1: Procedural unfairness

15. The interview process was not procedurally unfair for the following reasons. The applicant was aware from her application that she may have to attend an interview and adequate notice was given. It was apparent from the invitation that the applicant could reschedule the interview, but she did not request to change the date or time. The applicant was aware the interview would be conducted in English and she did not request an interpreter. She relied on her command of English in her application.
16. The applicant was given an opportunity to demonstrate her knowledge of the business and the interviewing officer did not recite from a prepared script. He asked further questions to clarify the applicant's answers and enabled the applicant to explain her answers. She did not state in the interview that she did not understand the questions about the finances of the company and she made no complaint about the conduct of her interview at the time or prior to her application being refused. It can be seen, in the questions and answers referred

to below, that the respondent did not adopt an inflexible approach thereby denying the applicant an opportunity to clarify her answers: R (Anjum).

17. The interviewing officer noted that the Applicant did not understand question 7. This was not relied on in the refusal letter and no adverse inference was drawn from her answer. It was not apparent at this stage that the applicant's ability to speak English was such that the interview should have been stopped and a further opportunity provided.
18. It is clear when reading the interview as a whole that the Applicant's lack of knowledge of the business plan was not due to her inability to understand the questions. She did not know the gross or net profit of the business and the figure she estimated for her salary was inconsistent with that given in the business plan. She did not know how her significant investment of £280,000 would be allocated to expand the business.
19. The interviewing officer's comment at the end of the interview indicates that the process was fair and adequate. It enabled the decision maker to assess the applicant's answers and consider any possible misunderstanding. The interviewing officer records that the applicant's English was poor and 'also' that she had little knowledge of the finances of the company. There was no evidence from the applicant that she did not understand the questions about the finances of the company. I find that the decision-making process was not procedurally unfair.

Ground 2: Irrationality

20. I find that the decision is not unlawful or irrational for the following reasons. The applicant has invested a significant amount of money into a business in the UK. It is not unreasonable to expect that a genuine entrepreneur would have carried out research into the business and its location. The applicant does not

state that she did not refer Brighton as a location. Her answer in interview was contradictory. She initially stated she had researched Brighton and later stated she did not need to research location because she was investing in a business recommended by a friend. The respondent's conclusion that this undermined her credibility was one which was reasonably open to him/her on the evidence.

21. In answer to the question: 'Will you receive a salary and if so how much?', the applicant replied "Oh we still did not set a salary yet" The interviewing officer gave the applicant an opportunity to explain and asked 'Ok but will you be receiving a salary?' The applicant replied: "We have to have a meeting and talk about the profits and for the salary I am not sure about £3000 or £4000 but I'm not sure ok." The interviewing officer sought clarification and asked, 'Would that be £3000 per month?' The application replied; "I don't know I don't know I guess but if the restaurant is not getting too much return maybe I have to review." The applicant was clearly unsure and the figure she gave was inconsistent with the business plan. It was not unreasonable for the respondent to conclude that a genuine entrepreneur would know this information (i.e. salaries for employees and directors). It was not material that the full answer to this question about salary was not set out in the refusal letter. It is apparent the applicant did not really know whether she would be receiving a salary and she guessed an amount but was not sure of its accuracy.

22. At question 20, the applicant is asked for a breakdown of how her investment (£280,000 in this case) will be spent. She replies: "Oh we will expand our food for like er Thai food so we have to maybe we use I don't know much about how many but we have to pay for the expand of the business and the marketing what er - the salary the er - supply." The interviewing officer rephrases the question and asks, 'Do you know how much each of these will cost or do you have a breakdown of each of these things will cost?' The applicant replies: "I have no idea right now maybe the cost of the salary is maybe about £16,000 by the time we meet my friend and we talk about er the ad we have to put in advertising, the

brochure and the leaflet promotion maybe 2 – 2 or £25,000 something like this I can't give you accurate." The respondent acknowledged that the applicant was able to give an estimate, but it was not unreasonable to expect the applicant to know the precise amounts or to be able to refer to the breakdown in the business plan.

23. The applicant stated that she had seen the company accounts but she was unable to state the gross or net profit for the last financial year. I accept that being unable to recall the name of the accountants was understandable, but given the significant level of the applicant's investment in the business it is inconceivable that a genuine entrepreneur would not know how much profit the business had generated in the previous year and its projected turnover for the following year.
24. Paragraph 245DB(f) of the Immigration Rules provides that the applicant must establish the following:
 - (i) She genuinely intends and is able to establish, take over or become a director of the business;
 - (ii) She genuinely intends to invest the money; and
 - (iii) The money is genuinely available to the applicant and will remain available to her until such time as it is spent for the purposes of her business.
25. Evidence that the funds had already been transferred into the business and the applicant had become a director did not preclude the respondent from finding that the funds were not genuinely available to be invested in the business. The applicant must satisfy all the requirements of the Immigration Rules. The fact that the applicant had been awarded the claimed points for access and availability of funds did not prevent such a conclusion. The issue was whether the investment was genuine and the funds would remain available to be spent for the purposes of the business. The applicant's lack of knowledge of the financial circumstances of the business gave the respondent reasons to doubt her intentions. The respondent's conclusion, that the applicant had failed to show that she genuinely intended to invest money in a business in the UK, was within

the reasonable range of responses open to him/her.

26. The respondent did not overlook other material matters. The applicant's credibility was seriously undermined by her lack of knowledge of the business plan and the financial circumstances of the business. The respondent's conclusion that the funds were not genuinely available to the applicant and she did not genuinely intend to invest the money in the business in the UK was not irrational. The respondent properly applied the relevant Immigration Rules and the decision was open to him/her on the material before him/her. There was no procedural unfairness in the decision making process.
27. Accordingly, I refuse this application. The decisions of 3 July 2019 and 20 August 2019 were not unlawful, irrational or unfair. The application is dismissed.
28. Mr Karim applied for permission to appeal on the grounds I had erred in terms of procedural unfairness and the ambit of paragraph 245DB (f) and (h).
29. I refuse permission to appeal to the Court of Appeal. There is no arguable case that I have erred in law or there is some other reason that requires consideration by the Court of Appeal.
30. The Applicant to pay the Respondent's reasonable costs of these proceedings, to be assessed if not agreed.

J Frances

Signed: _____

Upper Tribunal Judge Frances

Dated:

6 July 2020

Applicant's solicitors:

Respondent's solicitors:

Home Office Ref:

Decision(s) sent to above parties on: 06 July 2020

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).