In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR-2021-LON-000157

In the matter of an application for Judicial Review

The King on the application of

Syed Azmat Hussain

Applicant

versus

Secretary of State for the local Home Department

Respondent

FINAL ORDER

UPON hearing from Counsel for the applicant, Mr Jay Gajjar, instructed by SAJ Legal, and Counsel for the respondent, Ms Catherine Brown, instructed by the Government Legal Department at a hearing at Field House on 27 April 2023

AND UPON considering all the documents filed by both parties

AND UPON the handing down of the substantive judgment in this application for judicial review

IT IS ORDERED THAT:

1. The applicant's application for judicial review is granted in respect of both grounds of challenge.
2. The respondent's decision of 1 June 2021 is quashed.
3. The respondent is to make a fresh decision on the applicant's application for indefinite leave to remain in the United Kingdom within 3 months, absent special circumstances.

4. The respondent is to pay the applicant's costs in respect of this application for judicial review, to be the subject of detailed assessment if not agreed.

PERMISSION TO APPEAL

1. There has been no application for permission to appeal to the Court of Appeal. In any event, I refuse permission to appeal on the basis that there are no arguable errors of law in the substantive judgment.

Signed: H Norton-Taylor

Upper Tribunal Judge Norton-Taylor

Dated: 5 June 2023

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date):

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A refusal by the Upper Tribunal of permission to bring judicial review proceedings following a hearing, is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point 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 to appeal, 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 7 days** of the Tribunal's decision refusing permission to appeal to the Court of Appeal (CPR 52.9(3)(a)). Time starts to run from the decision refusing permission to appeal at the hearing, and not from the date on which this order was served.

Case No: JR-2021-LON-000157

IN THE UPPER TRIBUNAL

(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1DZ

5 June 2023

Before:

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

- -

Between:

THE KING

on the application of

SYED AZMAT HUSSAIN

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Mr J Gajjar

(instructed by Mr Z Jamali of SAJ Legal), for the applicant

Ms C Brown

(instructed by the Government Legal Department) for the respondent

Hearing date: 27 April 2023

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J U D G M E N T

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Judge Norton-Taylor:

Introduction

1. This case concerns issues relating to the fairness of the respondent's decision-making process on the applicant's application for indefinite leave to remain (ILR) in United Kingdom and the rationality of her conclusion that the applicant had engaged in dishonest conduct when applying for leave to remain as a Tier 1 Entrepreneur in February 2013 (the 2013 application).

2. The target of this application for judicial review is the respondent's decision of 1 June 2021, refusing ILR and instead granting limited leave to remain (LLTR). In short terms, the refusal of ILR was based on alleged dishonest conduct by the applicant in respect of the 2013 application.

3. There is a protracted litigation history in this case. Suffice it to say that, following the allowing of an appeal to the Court of Appeal by consent (which followed the grant of permission by Andrews LJ against the Upper

Tribunal's refusal of permission to apply for judicial review), there are now only two grounds of challenge in play:

> Ground 1: was the respondent's decision to refuse ILR tainted by procedural unfairness in that she failed to give the applicant a proper opportunity to respond to material concerns surrounding the 2013 application?
>
> Ground 2: was the respondent's refusal of ILR tainted by irrationality as regards the consideration of a variety of factors pertaining to the 2013 application?

4. A third ground of challenge was expressly rejected by Andrews LJ, she being of the view that the respondent's decision to grant LLTR instead of ILR was plainly rational.

Background

5. The applicant is a citizen of Pakistan, born in 1978. He is married to a Pakistani national and the couple have a son, born in 2012.

6. The applicant came to the United Kingdom as a student in February 2007. He obtained extensions of leave in that category, running to January 2011. He then sought and was granted leave to remain as a Tier 1 (Post-Study Work) Migrant until 14 February 2013. Meanwhile, his wife joined him from Pakistan and their son was born in this country.

7. On 14 February 2013, the applicant made his application for leave to remain as a Tier 1 Entrepreneur. Just prior to the application being made, the applicant incorporated his company, Sah Enterprises (the company), claiming that it would provide services relating to human resources and the management of such resources. He relied on £50,000 of third party funding from a family friend residing in Canada, Mr Abdul Qadir Choksi (Mr Choksi). This was by way of an interest-free loan over a 5-year period. It is accepted that the business has never in fact traded, it being said that the applicant had awaited the respondent's decision on his application.

8. On 7 March 2017, the applicant varied the 2013 application such that he then sought ILR on the basis of 10 years' continuous lawful residence in the United Kingdom, relying on paragraph 276B of the Immigration Rules (the Rules).

9. There then followed pre-action correspondence, with the applicant chasing the respondent in respect of the delay in deciding his varied application. A judicial review application was then made (JR/1606/2020), but those proceedings were withdrawn after the refusal of permission.

10. The delay in the decision-making process was, it is right to say, a result of a significant criminal investigation into fraudulent practices by certain individuals and two firms of immigration advisers, one of whom, Immigration4U, had assisted the applicant in making the 2013 application. That investigation, entitled Operation Meeker, resulted in the conviction of several individuals in 2018 and 2019 for offences including conspiracy to defraud in respect of immigration applications and cheating the public revenue. Significant sentences of imprisonment were handed down.

11. On 8 February 2021, the respondent issued what is now commonly described as a "minded to refuse letter" (the MTR), putting the applicant on notice that there were serious concerns as to his relationship with Immigration4U and the nature of the 2013 application. The specific matters raised in the MTR, together with the applicant's response, will need to be analysed in detail later in this judgment.

12. The next relevant event was the respondent's decision of 1 June 2021, refusing ILR and instead granting L LTR on the basis of "exceptional circumstances" (it appears to be common ground that these related to the applicant's family life in the United Kingdom). The refusal of ILR was based on three specific provisions of the Rules, as they then stood: paragraph 276B(ii)(c) and (iii); paragraph 322(1A); and paragraph 322(5).

13. Following pre-action protocol correspondence, this application for judicial review was made on 26 August 2021. Permission was refused on the

papers and then at a renewal hearing. The case then went up to the Court of Appeal. Following the grant of permission by Andrews LJ in an order sealed on 5 May 2022, Master Meacher ordered the appeal to be allowed by consent in an order sealed 7 July 2022. That order specified that permission to seek judicial review was to be granted only on the grounds I have already set out at the beginning of this judgment.

14. I express my gratitude to Counsel and those instructing them for the careful and timely preparation of their respective cases and the provision of a properly bookmarked trial bundle.

The relevant Rules

15. Paragraph 276B sets out the requirements for the grant of indefinite leave to remain on the grounds of long residence in this country. The purposes of this case, the following provisions are relevant:

> "276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
>
> (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.
>
> (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
>
> (a)…
>
> (b)…; and
>
> **(c) personal history, including character, conduct, associations and employment record; and**
>
> (d)…
>
> (e)…; and
>
> (f) any representations received on the person's behalf; and
>
> **(iii) the applicant does not fall for refusal under the general grounds for refusal."**
>
> [Emphasis added]

16. By virtue of paragraph 276D, if any of these requirements are not met, ILR will be refused.

17. Paragraphs 322(1A) and 322(5) of the Rules play a part in this case: they have been relied on by the respondent in the decision under challenge and, by virtue of paragraph 276B(iii), their engagement, if correct, is fatal to the applicant's challenge. By the date of the respondent's decision, both provisions had in fact been deleted and inserted back into the Rules under re-numbered provisions. However, the Statement of Changes (HC 813, laid on 22 October 2020) contained a transitional provision which had the effect of applying the pre-existing Rules to applications made before 1 December 2020, as was the case for the applicant.

18. Paragraph 322(1A) read as follows:

> "Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom **are to be** refused
> …
> (1A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application."
> [Emphasis added]

19. Paragraph 322(5) read as follows:

> "Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should **normally** be refused
> …
> (5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security."
> [Emphasis added]

20. As can be seen, paragraph 322(1A) was in mandatory terms, whilst paragraph 322(5) involved the exercise of a discretion. In respect of the

latter provision, the correct approach requires a two-stage process. First the respondent must make a finding as to whether the individual's conduct, character, or associations make it undesirable for them to remain in United Kingdom. If it does, the respondent must then decide whether leave to remain should be refused on the basis of the first finding: Balajigari and Others v SSHD [2019] EWCA Civ 673, at paragraph 33.

The decision letter

21. The decision letter is a detailed document. These proceedings have subjected it to forensic analysis and I have of course considered it with appropriate scrutiny and on a holistic basis. Here, I propose only to summarise its key features.

22. The respondent first noted the interactions between the applicant and individuals and companies linked to Operation Meeker. There is then a series of considerations of adverse matters, which, it is said, were put to the applicant in the MTR. The applicant's responses to a number of the points raised are set out. The following essential conclusions were reached:

    (a) Investment funds of £50,000. It was not credible that a family friend, Mr Choksi, would have made an interest-free loan over five years without a written contract, or without seeing a business plan. There was no documentary evidence to support the availability of the funds. There was no written agreement in respect of the loan;

    (b) The applicant's company, Sah Enterprises. There was little evidence relating to the company. It was unclear why the applicant had declined to work or otherwise operate his business, when he was lawfully able to do so. Reports filed with Companies House indicated that £50,000 had been invested, but the applicant has stated that he had not in fact invested any funds. The applicant purported to hold shares, when he did not and so it was concluded that he had made false representations to Companies House in an

attempt to make his company appear legitimate and that he failed to provide evidence to show that he was a genuine entrepreneur;

(c) Interactions with Immigration4U. The applicant had not credibly explained the nature of his interactions with the firm. He had been unclear as to whether he had reviewed his application before signing it and in respect of the assistance he had obtained from the firm. The firm was known to have improperly assisted individuals with setting up companies in order to satisfy the Rules;

(d) The applicant's company. An agreement/contract between the applicant's company and one significantly linked to Operation Meeker (Fotik Khan Trading) was considered significant. It was not credible that the applicant had agreed a contract with a particular individual whilst waiting at Immigration4U's offices. Information provided about the contract was vague. The applicant's evidence on the value of the contract or its fulfilment was not credible. The claimed contract was fabricated and had been supplied simply in order to bolster the applicant's application under the Rules;

(e) The applicant's email address. The applicant had an email address set up by an individual convicted of conspiracy to defraud, a Mr Kazi Ullah. Other individuals with whom the applicant had dealt with had also been convicted of conspiracy to defraud. The links between the applicant and the conspirators were clearly considered significant. It was not credible that the applicant had not set up his own email address;

(f) In summary, the respondent concluded that the evidence and information provided in respect of the 2013 application was "not genuine".

(g) As a consequence of the various factors previously considered, the respondent concluded that the applicant had made false

representations. The application was refused on the mandatory ground of paragraph 322(1A) of the Rules;

(h) Having weighed up the factors both for and against a grant of leave to remain, the respondent concluded that the public interest required a refusal of such leave, pursuant to paragraph 322(5) of the Rules;

(i) With reference to paragraph 276B(ii)(c), the respondent considered the adverse factors against those mitigating factors relied on by the applicant, including good work in the community and other relevant ties in the United Kingdom. It was concluded that the positive factors did not outweigh the negative factors;

(j) Finally, under the sub- heading “Summary”, the main points already described are re-stated, with the additional conclusion that discretion outside of the Rules was not to have been exercised in the applicant’s favour as regards a grant of ILR.

23. As mentioned earlier in this judgment, the respondent decided that a grant of LLTR would be appropriate and that particular aspect of the decision is no longer the subject of challenge.

Ground 1: procedural unfairness

24. The first ground of challenge in essence boils down to the complaint that the respondent failed to give the applicant a fair opportunity to address two, and only two, particular concerns raised and relied on in the decision, but not set out in the MTR. As clarified by Mr Gajjar at the hearing, and with reference to paragraph 26 of the original grounds and paragraphs 15 and 16 of his skeleton argument, the specific matters in question were:

(a) The applicant’s failure to engage in business activities (through the company) whilst he awaited the outcome of his 2013 application;

(b) That the applicant informed Companies House that he had invested £50,000 into the business, but informed the respondent that no such investment had been made, leading to the conclusion that false representations had been made to Companies House.

Relevant legal principles

25. The classic judicial statement on what procedural fairness requires is found in the well-known Opinion of Lord Mustill in ex parte Doody [1993] UKHL 8; [1994] 1 AC 531, at 560:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that: - 1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. 2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. 4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. 5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

26. The overarching guiding principle is that the requirements of procedural fairness are context-specific and will necessarily vary from case to case.

27. Although a large number of other cases have been included in the authorities bundle, in my judgment these can properly be narrowed down to three of particular relevance: Balajigari, Taj v SSHD [2021] EWCA Civ 19;

[2021] 1 WLR 1850, and Abdullah Khan v SSHD [2022] EWCA Civ 1654. The reason for this selection is that it provides proper context for the present case and, as we know from Doody, context is critical.

28. I am concerned with a case involving allegations of dishonesty. In that regard, [55]-[56] of Balajigari are clearly important:

> "55. For all of those reasons, we have come to the conclusion that where the Secretary of State is minded to refuse ILR on the basis of paragraph 322 (5) on the basis of the applicant's dishonesty, or other reprehensible conduct, he is required as a matter of procedural fairness to indicate clearly to the applicant that he has that suspicion; to give the applicant an opportunity to respond, both as regards the conduct itself and as regards any other reasons relied on as regards "undesirability" and the exercise of the second-stage assessment; and then to take that response into account before drawing the conclusion that there has been such conduct.
>
> 56. We do not consider that an interview is necessary in all cases. The Secretary of State's own rules give a discretion to him to hold such an interview. However, the duty to act fairly does not, in our view, require that discretion to be exercised in all cases. A written procedure may well suffice in most cases."

29. It is the use of the term "clearly" and the opportunity of an individual to respond to the (mis)conduct being relied on which bears significance in the present case.

30. In Khan, a case concerning discrepancies in claimed earnings, Laing LJ (with whom Warby and Lewis LJJ agreed) declined to provide general guidance in respect of whether the respondent was obliged to provide an individual with advance notice of any and all concerns upon which reliance was to be placed in a refusal decision: [4]. Instead, she undertook a forensic analysis of the evidence and correspondence between the parties (including two minded-to letters), particularly the contents of minded-to refuse letters issued in that case and the reasons eventually relied on to refuse Mr Khan's application on conduct grounds. Given the context-specific nature of the requirements of procedural fairness, that approach seems, with respect, entirely sensible and appropriate.

31. Laing LJ also addressed a submission from the respondent's Counsel to the effect that Taj had relevance. However, at [109] and [110], she concluded that Taj was probably distinguishable on the basis that it was not concerned with allegations of dishonesty. The only relevant authority was deemed to be Balajigari and what is said about how much an individual needs to be told about the case against them.

32. Finally, at [121], Laing LJ said the following:

> "121. *Balajigari*, which binds this court, establishes what procedural fairness requires in this class of case. The requirements are not odorous or complicated. If the Secretary of State considers that the discrepancy is the result of dishonesty, she should clearly tell the applicant that, and give him an opportunity to respond, both about his conduct and about any other factors which are relevant. She must then take that response into account before she can conclude that an applicant has been dishonest."

33. On the facts in Khan, Laing LJ had no doubt that the respondent had considered all relevant materials with care and had reached a rational conclusion free of any procedural unfairness.

34. Although Taj is not relevant as regards the core issue of allegations of dishonesty, it is appropriate to mention it here because both parties have cited it, notwithstanding the observations of Laing LJ in Khan.

35. Having posed the question as to whether there was an absolute duty on the respondent's part to put "evolving and potentially dispositive concerns about truthfulness" to an individual, Green LJ concluded that there was not: the requirements of procedural fairness were "fact and context sensitive": [72]-[73]. At [74], he concluded that, "the principles of procedural fairness as applied to the PBS… in issue do not compel the decision maker to communicate evolving concerns about truthfulness."

36. One cannot be sure about the content of the submissions made by the respondent's Counsel in Khan to which Laing LJ was referring at [109].

However, one might infer that these involved reliance on what Green LJ said at [74] of Taj. In any event, it is quite clear that he was concerned with procedural fairness in the context of the PBS, and not with allegations of dishonesty, that being the very point raised by Laing LJ when distinguishing Taj from Mr Khan's case.

37. In my judgment, nothing in Taj precludes a requirement for the respondent to put all relevant concerns relating to dishonesty to the individual affected, *depending on the particular circumstances of the case*. There is no absolute duty to do so, nor is it always unnecessary: the answer in any given case is context-specific.

38. I conclude that the same context-specific analysis can in principle lead to a requirement for the respondent to put new concerns about dishonesty arising from responses provided by an individual to an initial minded-to letter. In other words, procedural fairness may demand further correspondence in an "evolving concerns" case where those concerns are directly connected to misconduct. That conclusion is not in any way, as far as I can see, inconsistent with anything said in Balajigari, Khan, or the other authorities to which I have been referred. It is consistent with recognition the serious impact that allegations of dishonesty can have and the flexibility of procedural fairness to address this.

39. At this juncture, I state my conclusion on a general point somewhat tentatively put forward by Ms Brown in submissions, namely that procedural fairness may only require the "gist" of concerns to be put to an individual prior to a final decision, even where questions of honesty are in play. I reject that contention. In my judgment, providing only a "gist" of such concerns would be inconsistent with what is said in Balajigari and Khan, amongst other authorities dealing with potentially serious allegations going to conduct and character. The answer lies in the judgment of Underhill LJ in Balajigari, at paragraph 55:

> "55. For all of those reasons, we have come to the conclusion that where the Secretary of State is minded to refuse ILR on the basis of paragraph 322 (5) on the basis of the applicant's dishonesty, or other

> reprehensible conduct, he is required as a matter of procedural fairness to indicate **clearly** to the applicant that he has that suspicion; to give the applicant an opportunity to respond, both as regards the conduct itself and as regards any other reasons relied on as regards "undesirability" and the exercise of the second-stage assessment; and then to take that response into account before drawing the conclusion that there has been such conduct."
>
> [Emphasis added]

40. Laing LJ made the same point at paragraph 121 of Khan (quoted above at paragraph 32. In both judgments, use of the term "clearly" was surely very deliberate. The specificity with which potential concerns are raised with an individual prior to the decision being made must depend on the context. That is no more than consistent with the overarching principle in procedural fairness cases. There will be a spectrum, ranging from concerns unrelated to an individual's honesty requiring nothing more than a "gist", to allegations of serious misconduct, which will require sufficient particularity.

41. Before moving away from the more general legal issues, I briefly address a point raised, at least implicitly, as to the I appreciate the respondent's concern that decision-making may be elongated beyond reasonable limits if, on the facts of the case, and extended minded-to process is required. However, the approach adopted by Laing LJ in Khan demonstrates that the Upper Tribunal, High Court and, if appropriate, the Court of Appeal, will be astute to number of relevant factors, including:

    (a) The appropriate limits of the judicial review function and public law grounds of challenge;

    (b) The provisions of, and intention behind, relevant– Rules - an individual have to show in order to succeed, public interest considerations, and such like;

    (c) The importance of considering in its entirety the history of the case, the evidence provided, and the decision-making process.

The "new" concerns and the MTR

42. The MTR is, like the decision itself, a fairly detailed document. Again, as with the decision, I have considered the MTR with particular care. The central focus of this section of my judgment is on the two concerns relied on by Mr Gajjar and set out at paragraph 24, above. Needless to say, I have not considered these in artificial isolation, but in the context of the decision-making process as a whole.

43. I re-state the first allegedly "new" concern: the applicant's failure to engage in business activities (through the company) whilst he awaited the outcome of his Tier 1 Entrepreneur application.

44. Mr Gajjar submitted that the MTR did not provide the applicant with a reasonable possibility of addressing this concern and nor could he reasonably have pre-empted it being relied on by the respondent. The concerns should, it was submitted, have been the subject of a second MTR.

45. For the reasons which follow, and having regard to the legal principles outlined earlier, I conclude that the first concern relied on by Gajjar was not in fact "new", that the MTR had provided the applicant with a reasonable opportunity to address the concern, and that, in the context of the decision-making process as a whole, there was no procedural unfairness.

46. It is best to begin with the decision itself, which of course has to be considered in the round. The passages specifically dealing with the business inactivity are at internal page 8 of 18, although references to the applicant's MTR responses go back a couple of pages before this. As summarised earlier, the respondent took the view that little information on the business have been provided and there had been no credible explanation as to why the applicant had not engaged in any business activity since making the 2013 application.

47. It is, in my judgment, telling that these particular passages followed on directly from quoted questions put in the MTR, together with the applicant's responses thereto. The questions included the following:

> "Please provide an explanation to the nature of your company used to support your Tier 1 Entrepreneur application, please detail how you were involved in the day to day operational and financial running of the company?
>
> What services did your company provide? Who were your customers? Please provide evidence of business activity your company completed including invoices for work undertaken?
>
> Why is there no business activity evidenced on the company accounts submitted to Companies House?
>
> Why is your company still active if there is no business activity? What are your intentions with the company?
>
> What PAYE employment have you completed since your Tier 1 Entrepreneur application was made on 14/02/13 customer please provide evidence of employments and of weekly hours worked."

48. The applicant's responses are, as far as I can see, accurately quoted in the decision.

49. It is, I conclude, clear from the questions stated in the MTR that the respondent had material concerns in respect of the apparent absence of any business activity relating to the company, and in addition wanted more information about any employment. It is also clear that the concerns relied on in the decision were directly related to the questions in the MTR and the applicant's responses. Those concerns were not "new", but instead simply represented considerations which were clearly indicated in, and properly flowed from, the MTR process. Further, the applicant can have been under no illusion that his obvious connections to individuals and companies linked to Operation Meeker had been noted by the

respondent and formed part and parcel of the concerns raised in the MTR. That was an aspect of the context in which the MTR had to be read by the applicant and his representatives, and then responded to.

50. Whether the conclusions drawn were rational is a question to be addressed under the second ground of challenge. However, it cannot be said that the respondent relied on a material concern which had not been fairly put in the MTR and in respect of which the applicant had not had a fair opportunity to put forward relevant evidence and/or explanations.

51. In summary, this aspect of the first ground of challenge fails.

52. The second concern raised in the decision and relied on by Mr Gajjar represents a much firmer basis for complaint. As a matter of undisputed fact, the Companies House records relating to the company (specifically the Statement of Capital/Share Capital entry) showed that 50,000 shares had been issued at £1 each, albeit they were unpaid. There has been no suggestion that this arrangement is improper or unlawful in any way. As I understand it, the issuing of unpaid shares does establish limited liability on the part of shareholders (in this case, the applicant being the sole shareholder), with the benefits accruing arising therefrom. I make it clear that my consideration of this issue has taken no account of the accountant's letter, dated 26 July 2021. That constitutes post-decision evidence, with which I am not concerned.

53. That part of the decision dealing specifically with the question of shares and funds reads as follows:

> “Consideration has been given to the reports filed with Companies House which confirm your company holds shareholder funds of £50,000.00 and your MTR response which confirms you have not invested any money into your business yet as you were waiting for a decision on your application.
>
> Shareholder funds refer to the amount of equity in a company, which belongs to the shareholders. The amount of shareholder funds

> theoretically shows how much shareholders would receive if the company was to liquidate. You have filed reports with Companies House indicating you have invested £50,000.00 into your company, however, as per your letter, you have not invested any funds into your business. Your company does not currently hold £50,000.00 shareholder funds, however, you have issued a share certificate which states you hold 50,000 ordinary shares in the company. It is considered you do not currently hold 50,000 shares in your company, as your company does not hold the funds. It is therefore considered you …"

54. In theory it was open to the applicant to have set out a full explanation as to the position of the unpaid shares when originally making his application or at any time prior to the MTR. However, in my judgment this possibility does not undermine his case as it now stands. He did provide the Companies House reports and could not reasonably have been expected to provide additional information surrounding the funding of the shares prior to any queries being raised by the respondent. Thus, I reject the principal submission put forward by Ms Brown against this particular aspect of the applicant's challenge.

55. I have already referred to questions raised in the MTR as to the lack of business activity. That might have indicated to the applicant that he should have provided a detailed explanation on all aspects of his company, including details about the shares and funding. It might also have been prudent to have done this on the basis of the applicant's known involvement with Immigration4U and certain other individuals.

56. I note the question stated in the MTR on internal page 3 of 7:

> "What bank account is your company's share capital currently held in? Please provide up to date evidence of the funds."

57. This indicated a potential concern as to the position of share capital and funds. In addition, later on, the same page it was stated that, "the accounts show shareholder funds of £50,000.00." This too raised the issue of shares and funds.

58. The applicant's response to the query on the location of the company's share capital was as follows:

> "No investment funds were spent on my business as I was in limbo and was waiting for my Tier 1 Entrepreneur application….[The applicant then confirmed that £50,000 was still available]."

59. On the face of it, the statement that no investment funds had been spent was consistent with the fact of 50,000 unpaid shares having been issued.

60. I am satisfied that the MTR did not expressly raise a potential concern as to the veracity/honesty of the information provided by the applicant to Companies House, or any potential impropriety as regards the arrangement whereby the shares have been issued, but were as yet unpaid.

61. Ms Brown's alternative submission was that the MTR raised potential concerns which were sufficient to provide the applicant with a fair opportunity to address the issue of the funding of the shares. In other words, the concerns ultimately expressed in the decision itself had been at least implicitly raised in the MTR.

62. I disagree. It is certainly the case that a number of potential concerns surrounding the nature of the company, the lack of activity, the source/availability of the £50,000, and the involvement of individuals and/or companies linked to Operation Meeker, were fairly raised in the MTR and that these in turn afforded the applicant a fair opportunity to respond. However, where an issue is to be taken against an individual which bears directly on their honesty, this will need to be, to use the phrase adopted in Balajigari, "clearly indicated" in advance of the decision being made. I am satisfied that that did not happen in the present case. No sufficiently clear query was raised as to the general legitimacy/propriety of unpaid shares being issued, or why it was thought that a serious discrepancy arose in the applicant's case as between what

he had told Companies House and what he had told the respondent in his response to the MTR.

63. I conclude, therefore, that, on the very specific issue relating to the 50,000 unpaid shares and the concern as to the applicant's honesty in his dealings with Companies House, the respondent failed to give the applicant a fair opportunity to address the matter in advance of the decision. A brief second MTR should have been issued, raising the concern.

64. It follows that there has been procedural unfairness, albeit in respect of a narrow issue.

65. We now arrive at what I consider to be the crux of the first ground of challenge, namely whether the procedural unfairness already identified was such that the respondent's decision is fatally flawed, or whether relief should be refused on the basis of immateriality, as contended for by Ms Brown.

66. Subsection 15(5A) of the Tribunals, Courts and Enforcement Act 2007 requires the Upper Tribunal to apply subsection 31(2A) of the Senior Courts Act 1981, as amended when deciding whether to grant relief. Subsection 31(2A) of the 1981 Act provides:

> "(2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

67. I was not referred to any authorities in respect of the application of the statutory materiality test. However, it is my task to produce what I consider to be a legally sound judgment in this case. In pursuit of that aim,

I have directed myself to what I consider to be relevant authorities and principles on the issue at hand. By way of general background, I found the section on "Materiality" in Fordham J's *Judicial Review Handbook* (7th Edition, Hart Publishing 2020) to be of assistance.

68. In applying the statutory materiality test, I have applied the following principles, derived from the authorities cited at paragraphs 4.1-4.1.16, 4.2.5 and 4.2.10 of Fordham (noting the fact that the two latter paragraphs relate to materiality at common law and not the statutory test):

(a) The test is not as stringent as the common law requirement of "inevitability", but it nonetheless sets a "high threshold". There needs to be a "high degree" of confidence that the outcome would not have been "substantially different" but for the conduct complained of, without at the same time engaging in impermissible speculation as to what the respondent may or may not have decided absent any unlawful aspect of the decision-making process;

(b) A cautious approach should be adopted to the test, given the importance of the judicial review function and maintenance of the rule of law;

(c) A flexible approach can be adopted, depending on the nature of the alleged unlawfulness;

(d) I guard against any unconscious substitution of my own view of the merits for that of the respondent;

(e) The onus of establishing that the test has been satisfied rests with the respondent.

69. With the above in mind and having regard to the particular circumstances of this case, including the specific issue in respect of which it relates, I conclude that the procedural unfairness I have found to have occurred was not immaterial. In other words, it is not “highly unlikely” that the outcome would not have been substantially different but for the identified unfairness. My conclusion is based on the following reasons.

70. Firstly, I of course recognise the existence of a number of factors which were properly brought to the applicant’s attention in the MTR. In addition, I have concluded that one of the alleged “new” issues raised in the final decision did not involve procedural unfairness. Therefore, the respondent’s contention that any error is immaterial clearly has some traction.

71. Secondly, that being said, the issue surrounding the funding of shares was a distinct feature of the decision and it was deemed to be highly adverse to the applicant.

72. Thirdly, the issue was clearly capable of being responded to by the applicant if he had been given a fair opportunity in advance of the decision being made. Whilst I have not taken account of the accountant’s letter, am satisfied that similar evidence could, and in all likelihood would, have been provided if the applicant had been put on notice.

73. Fourthly, it is not in dispute that the existence of 50,000 unpaid shares was a legitimate arrangement under what I might generally describe as company law.

74. The “high threshold” established by the statutory materiality test has not, on the circumstances of this case, been met. Therefore, I am not bound to refuse relief in respect of the first ground of challenge.

75. In the present case, it is important to consider the second ground of challenge, relating to claimed irrationality, before reaching an ultimate conclusion on whether the applicant is entitled to relief. This is so because

the Companies House issue also has a direct bearing on the substantive consideration of the applicant's case by the respondent.

Ground 2: Irrationality

76. Mr Gajjar's written and oral submissions set out no fewer than 16 allegations of irrationality in respect of the respondent's decision. Ms Brown addressed each of these in turn. I propose to follow this approach, albeit that a number of the applicant's arguments can be dealt with relatively briefly.

77. Before turning to the specifics, I direct myself to the following judicial pronouncements on rationality challenges.

78. The legal basis for an irrationality challenge was helpfully described by the Divisional Court (Leggatt LJ Carr J) in R (Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649, at paragraph 98:

> "98. The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of "irrationality" or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic Wednesbury formulation it is "so unreasonable that no reasonable authority could ever have come to it": see *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 233-4. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143, 175 (Lord Steyn). The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error."

79. Rationality challenges attract a "high threshold": R (Sandiford v SSFCA), at paragraph 66 and R (Khatun) v Newham London Borough Council [2004]

EWCA Civ 55; [2005] QB 37, at paragraph 40, wherein Laws LJ observed that:

> "…the court has no role to impose what it perceives as ideal solutions under cover of the *Wednesbury* principle's application."

80. I now address all of the points made by the applicant in respect of his rationality challenge. I adopt the same order as set out in the written and oral arguments, save for the Companies House issue, which I leave until last.

Point 1: association with Immigration4U

81. The applicant asserts that his association with Immigration4U could not have been decisive of the question of dishonesty. The respondent agrees with this, but contends that this factor was a relevant consideration.

82. It is clear enough from the decision that the applicant's association with that particular firm was not considered to be decisive. The respondent was rationally entitled to consider it as a relevant consideration insofar as it gave rise to legitimate concerns which warranted further investigation.

Points 2-6: Mr Choksi's involvement

83. Several complaints are made about the way in which the respondent considered Mr Choksi's involvement in the funding of the company. These include the availability of funds themselves: the absence of any business plan provided to Mr Choksi, the absence of a written agreement, and the credibility of a five-year interest free loan: the detailed arguments are set out at paragraph 27.2-27.6 of the applicant's skeleton argument.

84. None of these contentions meet the rationality threshold, primarily for the reasons clearly set out by Ms Brown in her skeleton argument. In essence, I conclude that Mr Gajjar's submissions are, in effect, attempts at arguing the merits of the application and further information provided in response to the MTR. The actual availability of the £50,000 and not been put in dispute by the respondent. However, she was rationally entitled to rely on

concerns relating to the *applicant's* intentions and the circumstances surrounding the provision of the funds. For example, it was rational for the respondent to hold material concerns as to whether Mr Choksi had in fact seen a detailed business plan, together with the absence of any written agreement relating to what was clearly the loan of a significant sum of money. It is right that a different view could have been taken on the same evidence, but that is quite different from a demonstration of irrationality.

Point 7: lack of business activity

85. The applicant contends that it was "completely understandable" for him not to have engaged in business activity until his application had been decided. It has been asserted that the respondent "does not have a good track record" when it comes to the timeliness of making decisions.

86. This consideration was clearly raised in the MTR. The decision took proper account of the applicant's response. The respondent was rationally entitled to regard the absence of business activity as a relevant (but not decisive) factor when considering the application as a whole. The applicant had been entitled to carry on his business, but chose not to. It cannot be said that the respondent was precluded from holding a concern relating to that choice.

Point 8: reviewing the application form

87. It is right that the applicant's application had been made a number of years ago and that it might have been difficult for him to recall whether or not he reviewed the form before it was submitted, as contended by Mr Gajjar.

88. However, in my judgment it was not irrational for the respondent to have either expected the applicant to have such recall, given the importance of that application, or at least to have kept a copy of the form.

Points 9 and 10: interactions with Immigration4U

89. The applicant asserts that it was wrong of the respondent to effectively regard the use of Immigration4U for setting up the business and dealing with the application process as being demonstrative of dishonesty.

90. I agree with the respondent's counter-arguments. The applicant had been given a fair chance to address concerns as part of the MTR process. It is wrong to characterise the respondent's position as treating the interactions with Immigration4U as being either decisive or highly significant. The interactions, together with the applicant's responses to the MTR, rationally entitled the respondent to hold relevant concerns which were factored into the overall consideration of the applicant's application.

Point 10: the applicant's interaction with Mr Kazi Borkot Ullah and Fotik Khan Trading Ltd

91. The applicant contends that it was credible that he could not recall meeting Mr Ullah, that the setting up of business email address by that individual was immaterial, and that he had credibly explained his dealings with the other company.

92. These arguments are clear examples of simple disagreements with the respondent's consideration of a variety of factors. The factors were, I conclude, potentially relevant and considered in a rational manner. In particular, the individual and other company concerned were both directly linked to Operation Meeker. It would have been odd if the respondent had not taken these interactions into account.

Point 11: the respondent's failure to adduce "cogent evidence of dishonesty"

93. The applicant complains that the respondent had failed to adduce evidence such as a document verification report, relying instead on "innuendo" and his association with Immigration4U.

94. It is unclear to me in in what respect the respondent could or should have provided a document verification report. The point was not elaborated on in submissions. As to reliance on "innuendo", it is right that many, if not

most, of the factors relied on by the respondent were circumstantial in nature. However, that does not make the reliance irrational. As stated previously, the respondent's decision has to be read holistically.

Point 12: the Companies House issue

95. This aspect of the applicant's challenge is directly linked to the procedural unfairness argument with which I have already dealt with under the first ground of challenge. Here, it is said that the respondent was not rationally entitled to rely on an allegation of dishonesty in respect of the applicant's dealings with Companies House, specifically relating to the funding of the 50,000 shares. The decision-maker had misunderstood the legal position as regards the unpaid status of the shares. This erroneous consideration had formed a very important aspect of the respondent's overall view of the applicant's honesty and, in turn, the outcome of the decision-making process.

96. The thrust of the respondent's response to this is that even if the decision-maker had misunderstood the position (which I acknowledge was not expressly conceded), this factor was only one among many. Put shortly, even if an error could be demonstrated, it was immaterial. Reliance was placed on subsection 31(2A) of the 1981 Act, as it was in relation to the procedural unfairness challenge. Ms Brown submitted that the totality of the factors taken into account in the decision had to be considered. An example of this approach was the judgment of Laing LJ in Khan.

97. In response, Mr Gajjar urged caution before applying the statutory materiality test.

98. I have carefully considered the competing arguments relating to the Companies House issue. Although I have considered all of the other rationality points put forward by the applicant individually, above, I emphasise that I have also stood back and viewed the decision in its totality. The Companies House issue has to be seen in the context of my rejection of the other points.

99. The context also includes the nature of the allegation linked to the Companies House issue and its place amongst the other considerations which were taken into account. I will return to this, below.

100. As set out earlier in this judgment, there is no suggestion that the situation in which 50,000 shares in the applicant's company had been issued but remained unpaid was anything other than a legitimate arrangement. It is beyond dispute that there was in fact no inconsistency between the applicant's representation to Companies House that he held 50,000 shares in his company and the representation to the respondent to the effect that he had not in fact paid for those shares by way of the investment of £50,000. It is also apparent - and this is common ground - that the applicant had *not* told Companies House that he had in fact invested the £50,000 in terms of paying for the shares. The Companies House records (the Statement of Capital), which were available to the decision-maker and which were presumably considered (the "reports" filed by the applicant and referred to in the decision letter), did not raise any discrepancy.

101. I conclude that there was no evidential basis for the respondent to find that: (a) the applicant had told Companies House that he had in fact invested £50,000 into his company (i.e. by actually paying for the 50,000 shares); (b) there was any inconsistency between his representations to Companies House and those made to her; and (c) the applicant did not in fact hold 50,000 shares in his company. Those findings were, accordingly, irrational for want of any evidential support.

102. It follows that the following conclusions stated in the decision letter were also irrational, based as they were on unsustainable findings:

> "…you have made false representations to Companies House which is a Government Body. Therefore, the SSHD believes on balance of probabilities that you have completed paperwork with Companies House to have your company appear legitimate in order to satisfy the Tier 1 Entrepreneur rules."

[The full passage has already been quoted at paragraph 53, above]

103. I now turn once again to the question of materiality and subsection 31(2A) of the 1981 Act. I bear in mind all of the principles relating to the statutory test set out earlier at paragraph 68.

104. Having regard to those principles, I conclude that the respondent has been unable to demonstrate that the “high threshold” has been met in this case. In other words, I am not satisfied that it is “highly unlikely” that there would have been a substantially different outcome but for the irrational reliance on the Companies House issue. My reasons for this conclusion are as follows.

105. Firstly, I have previously concluded there are undoubtedly a number of other factors rationally taken into account by the respondent which weighed against the applicant. In combination, these presented a significant obstacle to the success of his 2013 application. In particular, the respondent was entitled to have held concerns relating to inactivity of the company, the fact that it was originally set up by Immigration4U, and Mr Choksi’s involvement. The factors surrounding the Companies House issue are an important consideration on my part.

106. Secondly, as mentioned earlier, several of the other factors relied on by the respondent are circumstantial in nature. They concerned the applicant’s associations with individuals and/or firms linked to Operation Meeker, rather than any specific and direct dealings by the applicant with a government body. The Companies House issue, on the other hand, did concern direct dealings by the applicant with a government body. In my judgment, this imbues this particular factor with more significance than it might otherwise have had.

107. Thirdly, it cannot properly be said that the Companies House issue was merely a peripheral consideration. It is apparent from the decision letter, particularly the passage quoted at paragraph 53 and again at 102, that it constituted a significant factor. The misunderstanding as to the 50,000 shares and the Companies House records led directly to the

conclusion that the applicant had made false representations to Companies House. That in turn went directly to the question of the applicant's overall honesty.

108. Fourthly, the 2013 application was refused with reference to the provisions of the Rules: paragraphs 322(1A), 322(5), and 276B(ii)(c). In respect of the first, the Companies House issue is expressly relied on in support of the conclusion that the provision applied. The same is true in respect of the second. Whilst consideration of the third does not expressly mention the Companies House issue, it is clear to me that the adverse conclusion would have been factored in. After all, questions of character and conduct were applicable as much to the third provision as to the first and second. I note also that the Companies House issue was again referred to in the "Summary" at the end of the decision letter.

109. In taking the above into account, I have borne in mind that the term "substantially different" in subsection 31(2A) of the 1981 Act does not equate with a test of whether the outcome would have been precisely the same, but for the public law errors.

110. Fifthly, the Companies House issue is the subject of two public law errors committed by the respondent in this case, albeit that they are interrelated; procedural unfairness and irrationality. The caution with which I approach the statutory materiality test is informed, to an extent, by this consideration.

111. The applicant is therefore not precluded from obtaining the relief sought by virtue of the operation of subsection 31(2A) of the 1981 Act.

Summary

112. On the basis of my conclusions set out in this judgment, the applicant's application for judicial review is granted in respect of both grounds of challenge.

Disposal

113. The parties are now invited to draw up an agreed draft order which reflects the terms of this judgment and deals with any ancillary matters.

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