Michaelmas Term
[2015] UKSC 59
On appeal from: [2014] EWCA Civ 2

JUDGMENT

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

before

Lady Hale, Deputy President
Lord Clarke
Lord Wilson
Lord Reed
Lord Hughes

JUDGMENT GIVEN ON

14 October 2015

Heard on 7 May 2015

Appellant	*Respondent*
Abid Mahmood Nazmun Ismail (Instructed by Fountain Solicitors)	James Eadie QC Mathew Gullick (Instructed by The Government Legal Department)

LORD WILSON: (with whom Lady Hale, Lord Clarke, Lord Reed and Lord Hughes agree)

Question

1. In 2008 the appellant, Mr Mandalia, who was then aged 25, came from India to the UK in order to study. His visa, as extended, was due to expire on 9 February 2012. On 7 February 2012 he applied to the UK Border Agency ("the agency") for a further extension of it in order to study accountancy. The rules referable to his type of application were that it had to be accompanied by a bank statement or statements showing that he had held at least £5,400 for a consecutive period of *28* days ending no earlier than a month prior to the date of his application. Mr Mandalia accompanied his application with a bank statement but it showed that he had held at least £5,400 for a consecutive period of only *22* days ending no earlier than a month prior to the date of his application. The statement which he provided did not cover six of the requisite 28 days. The extra coverage might have been either of the six days immediately following the period of 22 days covered by his statement or of the six days immediately preceding it; but in what follows it will be convenient to address the deficit in his coverage as being the latter. The agency refused Mr Mandalia's application for a further extension. The question is: did it act unlawfully in refusing his application without having first invited him to supply a further bank statement or statements which showed that he had also held at least £5,400 throughout those six preceding days? On 20 January 2014 the Court of Appeal, by a judgment delivered by Davis LJ with which Pitchford LJ and Sir Stanley Burnton agreed, gave a negative answer to that question: [2014] EWCA Civ 2, [2014] Imm AR 588. Mr Mandalia's appeal to this court requires us to consider, in particular, the agency's instructions to caseworkers which then applied to their processing of such applications.

The Rules

2. In March 2006 the Secretary of State presented to Parliament a White Paper entitled "A Points-Based System: Making Migration Work for Britain" Cm 6741. In Australia the rules for controlling immigration for the purposes of work or study had been encompassed in a points-based system and the White Paper heralded the introduction of an analogous system in the UK for the control of immigration for such purposes from outside the EU. According to the White Paper a key outcome of the system would be "a more efficient, transparent and objective application process" (paragraphs 3, 25). The system was introduced into the Immigration Rules ("the rules") as "Part 6A: POINTS-BASED SYSTEM", which became operative in

stages beginning in November 2008. Since becoming operative, the provisions of Part 6A, including the appendices to it, have been amended on numerous occasions. In *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568, [2014] INLR 291, Jackson LJ observed at para 4 that they had "now achieved a degree of complexity which even the Byzantine emperors would have envied". On any view, and contrary to a forecast in the White Paper, it is difficult for applicants, for many of whom English is not even their first language, to navigate their way around the requirements. It may be, however, that, as intended, the system is not difficult for caseworkers to administer. Certainly they have to a substantial extent been relieved of the obligation to consider whether to exercise discretions in their processing of applications. The sharp edges of the rules have cut out hard cases which have found their way to the courts and which have inevitably attracted at any rate the sympathy of the judges and sometimes – I speak for myself – nascent reservations about the suitability of the system which have not been easy to suppress. But suppressed they must be. For the management of this type of immigration, in principle highly valuable for the UK, is a profound social challenge, of which the complexities are beyond the understanding of the courts; and, by not exercising its right to disapprove Part 6A of the rules, Parliament has indorsed the Secretary of State's considered opinion that a points-based system is the optimum mechanism for achieving management of it.

3. The points-based system has five tiers. Into Tier 1 fall highly skilled workers, entrepreneurs and investors. Into Tier 2 fall ordinary skilled workers if sponsored by a UK employer. Tier 3, designated for certain low-skilled migrants, has never been brought into operation. Into Tier 4 fall students if sponsored by educational establishments and they are subdivided into "General" students, broadly encompassing adults, and "Child" students, broadly encompassing minors. Into Tier 5 fall temporary workers.

4. Mr Mandalia's application was therefore for leave to remain in the UK as a Tier 4 (General) Student.

5. Mr Mandalia wished to become a certified accountant by pursuing a two-year course of study at the BPP University College of Professional Studies. The college furnished him with a document entitled "Confirmation of Acceptance for Studies", by which he secured the points which satisfied requirement (c) of Rule 245ZX of the rules and paragraph 113 of "Appendix A: Attributes".

6. But requirement (d) of Rule 245ZX obliged Mr Mandalia also to secure points under "Appendix C: Maintenance (Funds)". An understanding of requirement (d) is achieved only by travel through seven stages.

i. Paragraph 1A of Appendix C provided:

> "(a) The applicant must have the funds specified in the relevant part of Appendix C at the date of the application.
>
> (b) …
>
> (c) If the applicant is applying as a Tier 4 migrant, the applicant must have had the funds referred to in (a) above for a consecutive 28-day period of time."

The relevant part of Appendix C was in paragraphs 10 to 14.

ii. Paragraph 10 provided that, as a Tier 4 (General) Student, Mr Mandalia had to score ten points for funds.

iii. Paragraph 11 provided that he would secure ten points only if the funds shown in tabulated form were available to him "in the manner specified in paragraph 13".

iv. The table in paragraph 11 required him to show not only funds with which to pay the fees for the first year of the course (being a requirement which Mr Mandalia satisfied) but also, and here I refer to the figures in the table as they stood on 7 February 2012, £600 per month for nine months (ie £5,400), as evidence of his ability to maintain himself while pursuing the course.

v. Paragraph 13 provided that funds would be available to Mr Mandalia only where "specified documents" so demonstrated.

vi. Rule 245A of the rules, as it stood on 7 February 2012, provided that "specified documents" meant documents specified by the Secretary of State in a publication entitled "Tier 4 of the Points Based System – Policy Guidance" ("the policy guidance").

vii. The version of the policy guidance operative on 7 February 2012, namely the version dated July 2011, made clear, at para 182, that the consecutive 28-day period identified in para 1A(c) of Appendix C to

> the rules was a period ending no earlier than a month prior to the date of the application and, at para 188, that, of the five types of document which could demonstrate availability of the funds, one was Mr Mandalia's bank statements.

7. The rules therefore required Mr Mandalia to demonstrate, in particular by the provision of bank statements, that he had held at least £5,400 for a consecutive period of 28 days ending no earlier than 7 January 2012.

Mr Mandalia's Application

8. Mr Mandalia completed the form appropriate to an application for leave to remain as a Tier 4 (General) Student. It ran to 43 pages. Section L of it was entitled "Maintenance (Funds)". Section L7 said:

> "The student must have £600 for each calendar month of their course up to a maximum of nine months. … Please state what this amount is:"

In the box Mr Mandalia wrote "£5,400". Section L24 said:

> "Please tick to confirm the documents submitted as supporting evidence to show the student has access to the required amount of money for maintenance and funds."

Mr Mandalia ticked the first box, entitled "Personal bank or building society statements".

9. The bank statement which Mr Mandalia enclosed with his application form, submitted by post with the requisite fee on 6 February 2012 and received by the agency on the following day, was a statement relating to a current account held in his name with HSBC. It covered the period from 29 December 2011 to 19 January 2012, namely 22 days. Importantly the statement was numbered sheet 64 and the opening entry for 29 December 2011 was a credit balance "brought forward" of £11,090.60. The closing balance was a credit balance "carried forward" of £12,071.05. Transactions occurring between those dates amounted only to eight modest debits and two less modest credits. The balance was at its lowest on 6 January 2012: it was then £11,018.34.

10. By letter to Mr Mandalia dated 8 February 2012, the agency acknowledged receipt of his application and said that it would be passed to a casework unit. The agency added:

> "If there is any problem with the validity of the application, such as missing documentation or omissions on the form, a caseworker will write to you as soon as possible to advise you what action you need to take to rectify the problem."

11. By letter to Mr Mandalia dated 21 April 2012, the agency, which had made no further contact with him following its letter dated 8 February 2012, informed him that his application had been refused in accordance with the rules and the policy guidance and that a decision had also been made for his removal from the UK pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act"). The agency made clear that the ground for refusal of his application was that he had failed to demonstrate that he had held £5,400 for a full 28-day period and that he had therefore failed to secure the requisite ten points.

12. It will already be apparent that nothing in the application form itself could have alerted Mr Mandalia to the requirement to enclose bank statements which demonstrated that his holding of at least £5,400 had endured for a consecutive period of 28 days ("the 28-day requirement"). It would have been easy for the agency to explain the 28-day requirement in its instruction in section L24. It is probable that, when he obtained the form, Mr Mandalia also obtained a leaflet entitled "Help Text" which, on the front of the form, the agency advised him to read prior to completing it. But, although not every page of the leaflet in its then current form is before the court, the agency accepts that, again, there was nothing in it to alert Mr Mandalia to the 28-day requirement. The Secretary of State relies, however, on the following advice set out at the beginning of section L of the form:

> "Before filling in this section of the form, the student should refer to the Immigration Rules … the help text leaflet available with the form and … Policy Guidance …"

The respective links to gaining access to the rules and to the policy guidance on the agency's website were duly set out within that sentence. So the Secretary of State is able to say that, were an applicant such as Mr Mandalia to follow the advice set out at the beginning of section L, he would, on arrival at Rule 245ZX of the rules and at para 1A of Appendix C, learn of the 28-day requirement; and that, on arrival at para 182 of the policy guidance, he would notice it again and would also learn that the 28-day period was required to end no earlier than a month prior to the date of the application.

The Proceedings

13. Mr Mandalia appealed to the First-tier Tribunal (Immigration and Asylum Chamber) against the agency's refusal of his application. He represented himself at the hearing before the Tribunal Judge; a Home Office Presenting Officer represented the Secretary of State. On 2 July 2012 the tribunal dismissed Mr Mandalia's appeal on the ground that his application had fallen foul of the 28-day requirement. He had enclosed with his notice of appeal statements numbered 62 and 63 relating to his account with HSBC. The statement numbered 63 was confined to transactions on 28 December 2011 and so Mr Mandalia had also enclosed statement numbered 62, which covered all preceding transactions from 29 November 2011 onwards. The statements demonstrated that, on the missing six days between 23 and 28 December 2011, Mr Mandalia's credit balance had been £11,280.30 for the first five days and £11,127.98 for the sixth day.

14. In May 2011 a controversial provision, inserted (by section 19(2) of the UK Borders Act 2007) into the Nationality, Immigration and Asylum Act 2002 as section 85A, had come into force. The effect of subsections (3) and (4) had been to disable the First-tier Tribunal from considering evidence adduced by Mr Mandalia in the course of his appeal unless he had submitted it to the agency in support of his application. Strictly speaking, therefore, his bank statements numbered 62 and 63 were inadmissible before the tribunal. The judge probably took the view that reference to those statements would be impermissible only if they were to provide a basis for allowing the appeal; and that, in briefly setting out his reasons for dismissing it, it would be unrealistic for him not to explain that Mr Mandalia's possession of the requisite £5,400 throughout the first six of the 28 days had by then become clear.

15. At the end of his reasons the judge of the First-tier Tribunal observed that, in the light of the fresh evidence, a further, more careful, application by Mr Mandalia for extension of his visa might well succeed. This court has received vigorous submissions on each side about the circumstances in which, on payment of a further fee, Mr Mandalia might have been able to make a further application. But in my view his ability to do so, to the extent that it existed, is irrelevant to the issue raised in the appeal.

16. Mr Mandalia took specialist advice about the possibility of an appeal to the Upper Tribunal (Immigration and Asylum Chamber) and, with the help of the adviser, applied to the Upper Tribunal for permission to appeal. The adviser was aware of a document which had been issued by the agency to caseworkers on 17 June 2011 entitled "PBS Process Instruction: Evidential Flexibility" ("the process instruction") and which had subsequently been published on the agency's website. The grounds of the proposed appeal were that, in refusing Mr Mandalia's application

without first having first drawn his attention to his failure to demonstrate that he had held the requisite £5,400 throughout the first six of the 28 days, the agency had unlawfully departed from its policy set out in the process instruction. Mr Mandalia also sought permission to appeal against the agency's decision to remove him from the UK on the ground that, in the light of the Upper Tribunal's construction of the terms, as they then were, of section 47 of the 2006 Act in *Ahmadi v Secretary of State for the Home Department* (which was later to be upheld in the Court of Appeal [2013] EWCA Civ 512, [2014] 1 WLR 401), the decision had been premature.

17. A judge of the Upper Tribunal duly granted to Mr Mandalia permission to appeal but he did so in somewhat ambiguous terms. Two other judges of the Upper Tribunal construed his permission as limited to the appeal against the removal decision; and on 12 December 2012, in the light of its decision in the *Ahmadi* case, the Upper Tribunal allowed Mr Mandalia's appeal in that respect. The result was however that the Upper Tribunal never addressed his challenge, by reference to the process instruction, to the First-tier Tribunal's decision to dismiss his appeal against the refusal of his application.

18. When in the Court of Appeal Mr Mandalia sought to renew his challenge to the refusal of his application, the Secretary of State responded to the effect that permission to make that challenge had been refused in the Upper Tribunal and that the Court of Appeal therefore had no jurisdiction to entertain an appeal in relation to it. Mr Mandalia countered by submitting that, on its proper construction, the Upper Tribunal's grant of permission *had* included permission to make that challenge; that the two judges of the Upper Tribunal who had considered otherwise had been wrong; that the Upper Tribunal should accordingly be taken to have dismissed that part of his appeal; and that the Court of Appeal therefore had jurisdiction to entertain his appeal against the dismissal of it. This issue was not resolved until the start of the substantive hearing of Mr Mandalia's appeal in the Court of Appeal, when it upheld his submissions in relation to it and turned to consider the merits of his appeal.

19. It follows, however, that the Court of Appeal was handicapped by the lack of any analysis of the effect of the process instruction on the lawfulness of the agency's decision by either of the specialist tribunals below. It was unfortunate not only that the judge's grant of permission to appeal to the Upper Tribunal was couched in ambiguous terms but also that other judges of the Upper Tribunal misconstrued it and so declined to address that part of Mr Mandalia's appeal which was based on the process instruction. But it was still more unfortunate that no reference had been made to the process instruction before the First-tier Tribunal. Mr Mandalia could not be expected to have been aware of it. But, irrespective of whether the specialist judge might reasonably be expected himself to have been aware of it, the Home Office Presenting Officer clearly failed to discharge his duty to draw it to the tribunal's attention as policy of the agency which was at least arguably relevant to

Mr Mandalia's appeal: see *AA (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 12 at para 13.

20. The Court of Appeal determined Mr Mandalia's appeal together with two other appeals in which the effect of the process instruction was also raised. In the first of the other appeals the Secretary of State was the appellant and Ms Rodriguez was the respondent. The agency had refused her application for extension of her student visa for failure to secure points under Appendix C. By reference to the process instruction, the Upper Tribunal had ordered that the agency's refusal be quashed. In the second of the other appeals Ms Patel was the appellant and the Secretary of State was the respondent. She was appealing against the order of the Upper Tribunal by which, in contrast, it had declined to quash the agency's refusal of her application for extension of her student visa for failure to secure points under Appendix C. In all three appeals the decision of the Court of Appeal went in favour of the Secretary of State. So it allowed her appeal in Ms Rodriguez' case and dismissed the appeals of Mr Mandalia and Ms Patel. There was some difference – which Davis LJ described as no real difference – between the facts in Mr Mandalia's case and those in the cases of Ms Rodriguez and Ms Patel. For they had both enclosed bank statements which did indeed cover the requisite 28 days but which showed that, on four of those days in the case of Ms Rodriguez and on one of them in the case of Ms Patel, their credit balances had fallen below the amount of which they were required to demonstrate possession. The Court of Appeal accepted that each of them would have been able to demonstrate possession of other funds which, had the agency drawn their attention to the deficit, would have repaired it; but it held that the agency had nevertheless been entitled to refuse their applications without having drawn it to their attention.

The Process Instruction

21. As its full title indicated, the process instruction was addressed to the agency's caseworkers who were processing applications for visas by reference to the points-based system. The reference in the title to evidential flexibility was an indication in shorthand that the instruction was that caseworkers should show some, albeit limited, flexibility in relation to applications from which requisite information had been omitted and, in particular, which had not been accompanied by requisite evidence.

22. The introduction to the process instruction was as follows:

> "In response to significant feedback from the caseworking teams, as well as from our customers, from August 2009 a flexible process was adopted allowing PBS caseworkers to

> invite sponsors and applicants to correct minor errors or omissions in applications both main and dependant submitted under Tiers 1, 2, 4 and 5.
>
> The instruction enabled caseworkers to query details or request further information, such as a missing wage slip or bank statement from a sequence. Three working days [were] given to the customer to provide the requested information.
>
> This instruction only applied to cases which would be refused solely on the absence of a piece of evidence or information. Where the application would fall for refusal even if the missing evidence was submitted, a request to submit this further information would not be made.
>
> The introduction of this instruction resulted in a reduced refusal rate. However, those that fell for refusal where multiple pieces of information were missing were often successful on appeal.
>
> Following analysis of allowed appeals and feedback from the National Audit Office … and Chief Inspector …, the original Evidential Flexibility instruction has been reviewed to meet the recommendations put forward in these reports …
>
> As such, there have been two significant changes to the original Evidential Flexibility instruction:
>
> 1) The time given to applicants to produce additional evidence has been **increased … to seven working days**; and
>
> 2) There is **now no limit on the amount of information that can be requested from the applicant**. However, requests for information should not be speculative, we must have sufficient reason to believe that any evidence requested exists."

23. The process instruction then identified 19 steps which the caseworker was to take "when an application has missing evidence or there is a minor error".

24. In step one the caseworker was to ask himself whether there was missing evidence. If his answer was "yes", he was to proceed to step two.

25. In step two he was to ask himself whether the application would fall to be refused even if the missing evidence was provided. If his answer was "no", he was to proceed to step three.

26. Step three was as follows:

> "We will only go out for additional information in certain circumstances which would lead to the approval of the application.
>
> Before we go out to the applicant we must have established that evidence exists, or have sufficient reason to believe the information exists.
>
> Examples include (but are not limited to):
>
> 1) bank statements missing from a series;
>
> 2) …
>
> 3) …
>
> 4) …
>
> The evidence listed in **Annex A** is not exhaustive, but provides caseworkers with guidance as to the circumstances when evidence can be requested."

In Annex A it was reiterated that it might be appropriate to ask an applicant under Tier 4 to provide "[m]issing bank statements from a series."

27. Step four addressed the caseworker who was unsure whether the evidence existed. He was to discuss the issue with his line manager. Here the instruction was that "[w]here there is uncertainty as to whether evidence exists, benefit should be

given to the applicant and the evidence should be requested". So the question was whether the line manager was satisfied that the missing evidence existed or had reasonable grounds to believe that it existed. If the answer to the question was "yes" or even if the answer was "unsure", the caseworker was to proceed to step five, which was to contact the applicant. The later steps are irrelevant to the appeal.

28. In that Mr Mandalia's application was made on 7 February 2012, it is agreed that the process instruction represented agency policy which in principle applied to it. It should be noted, however, that, in respect of all applications made on or after 6 September 2012, the process instruction was withdrawn and the facility for a caseworker to seek further information or evidence prior to determining an application was instead governed by a new rule, namely rule 245AA, inserted into the rules. The new rule, which was amended with effect from 13 December 2012 and re-amended with effect from 1 October 2013, seems to give caseworkers substantially less flexibility than did the process instruction. But the encouragement to contact an applicant survives if "[s]ome of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing)".

The Legal Effect of Policy

29. In 2001, in *R (Saadi) v Secretary of State for the Home Department* [2001] EWCA Civ 1512, [2002] 1 WLR 356, Lord Phillips of Worth Matravers MR, giving the judgment of the Court of Appeal, said in para 7:

> "The lawful exercise of [statutory] powers can also be restricted, according to established principles of public law, by government policy and the legitimate expectation to which such a policy gives rise."

Since 2001, however, there has been some departure from the ascription of the legal effect of policy to the doctrine of legitimate expectation. Invocation of the doctrine is strained in circumstances in which those who invoke it were, like Mr Mandalia, unaware of the policy until after the determination adverse to them was made; and also strained in circumstances in which reliance is placed on guidance issued by one public body to another, for example by the Department of the Environment to local planning authorities (see *R (WL) (Congo) v Secretary of State for the Home Department* [2010] EWCA Civ 111, [2010] 1 WLR 2168, para 58). So the applicant's right to the determination of his application in accordance with policy is now generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation but free-standing, which was best articulated by Laws LJ in *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, as follows:

> "68 … Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public."

30. Thus, in *R (Lumba) v Secretary of State for the Home Department (JUSTICE intervening)* [2011] UKSC 12, [2012] 1 AC 245 (in which this court reversed the decision of the Court of Appeal reported as *R (WL) (Congo)* but without doubting the observation in para 58 for which I have cited the decision in para 29 above), Lord Dyson said simply:

> "35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute."

There is no doubt that the implementation of the process instruction would have been a lawful exercise of the power conferred on the Secretary of State by section 4(1) of the Immigration Act 1971 to give or vary leave to remain in the UK.

31. But, in his judgment in the *Lumba* case, Lord Dyson had articulated two qualifications. He had said:

> "21 … it is a well established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers."

But there was ample flexibility in the process instruction to save it from amounting to a fetter on the discretion of the caseworkers. Lord Dyson had also said:

> "26 … a decision-maker must follow his published policy … unless there are good reasons for not doing so."

But the Secretary of State does not argue that there were good reasons for not following the process instruction in the case of Mr Mandalia. Her argument is instead that, properly interpreted, the process instruction did not require the caseworker to alert Mr Mandalia to the deficit in his evidence before refusing his application. So the search is for the proper interpretation of the process instruction, no more and no less. Indeed in that regard it is now clear that its interpretation is a matter of law which the court must therefore decide for itself: *R (SK (Zimbabwe)) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2011] UKSC 23, [2011] 1 WLR 1299, para 36, Lord Hope of Craighead). Previous suggestions that the courts should adopt the Secretary of State's own interpretation of her immigration policies unless it is unreasonable, made for example in *Gangadeen and Jurawan v Secretary of State for the Home Department* [1998] Imm AR 106 at p 115, are therefore inaccurate.

Interpretation of the Process Instruction

32. In step three of the process instruction a specific example was given of a situation in which the caseworker should request the applicant to provide further evidence: it was where a bank statement was "missing from a series". This court has received elaborate submissions about whether, in circumstances in which Mr Mandalia had submitted a bank statement numbered 64, his statements numbered 62 and 63 can be said to have been "missing from a series". The conclusion of the Court of Appeal was that they were not "missing from a series". Davis LJ said:

> "102 … this was not a "missing sequence" case; and it would again have been complete speculation on the part of the Secretary of State as to whether bank statements – if available at all – for the preceding period or the succeeding period would have shown the availability of funds in the required amounts."

The Secretary of State concedes that a bank statement numbered 64 clearly indicates that statements for the preceding period are "available"; but otherwise she commends the analysis of Davis LJ. Indeed in *R (Gu) v Secretary of State for the Home Department* [2014] EWHC 1634 (Admin), [2015] 1 All ER 363, Foskett J adopted it. The facts in the *Gu* case were almost identical to those in the present case but, by the date of Mr Gu's application, the process instruction had been withdrawn and instead the court had to consider the references in the first version of rule 245AA to a document omitted from a "sequence" as well as to a bank statement missing from a "series". In dismissing Mr Gu's application for judicial review of the refusal of his application, Foskett J held:

> "24 … something cannot be 'missing' from a sequence until the sequence itself exists. To my mind that means that at least the start and the end of the sequence must be in evidence for the sequence to exist. Something missing from it can only, therefore, be from within those two limits."

Thus emboldened by the analysis of two highly respected judges, the Secretary of State submits that it is only when the applicant has provided the caseworker with what she calls two "pillars", namely the pillar which marks the start of a series and the pillar which marks its end, that the caseworker can properly conclude that something is missing from the series which he should invite the applicant to provide.

33. Speaking for myself, I consider the Secretary of State's submission to be misplaced even at the high level of pedantry on which it has been set. Mr Mandalia's bank statements numbered 62, 63 and 64 formed a series. It must have been obvious to the caseworker, as he studied statement numbered 64, that it formed the last in a series and that the statement or statements which covered the preceding six days, and which turned out to be the statements numbered 62 and 63, were missing from the series.

34. But in my view it was not the task of the unfortunate caseworker even to attempt to split such hairs. The process instruction rightly stressed the need for flexibility by telling him:

a) in the introduction that there was now no limit on the amount of information that could be requested, provided that the request was not speculative;

b) in step three that bank statements missing from a series represented only an example of the further evidence which should be requested; and

c) in step four that, where there was uncertainty as to whether evidence existed, the applicant should be given the benefit of the doubt and it should be requested.

35. Conferred, as he was, with that necessary degree of flexibility, how could the caseworker have followed the process instruction otherwise than by requesting Mr Mandalia to provide the statement or statements which covered the first six of the 28 days? Of course it would have seemed possible to the caseworker that, although Mr Mandalia had held more than double the requisite funds throughout the later 22

days, he had not held the requisite funds throughout the first six days. But why was that possibility more likely than that an applicant who had provided statements covering only the first and last of the 28 days had not held the requisite funds throughout the intervening 26 days? In one sense every request by a caseworker for further evidence would have been "speculative" but what was there in Mr Mandalia's application to render a request to him more "speculative" than any other? Was there not, at the very least, doubt, the benefit of which should have been given to him?

Answer

36. I conclude that the answer to the question identified in para 1 above is "yes": the agency's refusal of Mr Mandalia's application was unlawful because, properly interpreted, the process instruction obliged it first to have invited him to repair the deficit in his evidence. I reach this conclusion without reference to the terms of the agency's letter to Mr Mandalia dated 8 February 2012, set out in para 10 above. The Secretary of State may well be correct to say that, however broad the apparent assurance that Mr Mandalia would be advised about deficits in his application, the intention of the letter's author was to limit the assurance to deficits in what the Secretary of State describes as the initial validity of the application as opposed to deficits which might emerge on its substantive consideration. But this distinction carries a subtlety which would have been lost on Mr Mandalia. No doubt he would reasonably have understood the letter to make clear that, were there to have been a deficit in his evidence of having held the requisite funds, it would be drawn to his attention before his application was refused. It is, however, unnecessary to decide whether the letter conferred on Mr Mandalia a legal entitlement to that effect.

37. The court should therefore allow this appeal; should overrule the decision in the *Gu* case; and should quash the refusal of Mr Mandalia's application so that, no doubt following the provision of further, updated information made by him pursuant to request, it may lawfully be re-determined.