Neutral Citation Number: [2021] EWCA Civ 19

Case No: C6/2019/1665

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Upper Tribunal, Immigration & Asylum Chamber
Tribunal Judge Allen
JR/4568/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE GREEN
and
LORD JUSTICE MALES

- -

Between :

R on the application of Taj	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -
- -

Mr Zane Malik (instructed by **Pioneer Solicitors**) for the **Appellant**
Ms Julie Anderson (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: Thursday 29th October 2020

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Approved Judgment

Lord Justice Green:

A. The Issue

1. This appeal concerns the application of the common law principle of procedural fairness to a points-based system ("*PBS*") for determining whether a person should be granted leave to remain ("*LTR*") in the United Kingdom as a Tier 1 (Entrepreneur) Migrant as set out under Paragraph 245DD of the Immigration Rules ("*the Rules*").

2. In particular the appeal concerns the application to the PBS of the fifth and sixth of the well-known principles of administrative fairness set out by the House of Lords in *Doody* [1994] 1 AC 531 at page [560] ("*Doody*") which concern the right of a person affected by a decision to make representations to the decision maker before the decision is taken and the right to know the "*gist of the case that he has to answer*":

> "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."
>
> And:
>
> "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."

3. Very shortly before the oral hearing in this appeal, the Supreme Court handed down judgments in *Pathan v SSHD* [2020] UKSC [41] ("*Pathan*") in which the Court addressed the application of principles of procedural fairness to a PBS relating to student visas, and held (by a majority), on the facts, that there had been a breach. The majority judgments clarify a number of issues of relevance to the present appeal. In the light of these judgments Mr Malik, counsel for the Appellant, helpfully refined his submissions. In this judgment I address the reframed case.

4. In the present case the Appellant was refused LTR upon the basis that a variety of facts about his application, in which he claimed to be running a successful small business, were inconsistent or inaccurate and gave rise to concerns that the business was not genuine. To come to this conclusion, the Respondent undertook a paper review of the application and supporting evidence and an interview was then held with the Appellant, during which a series of questions about the business were asked. This was accompanied by what was, in effect, a site inspection of the Appellant's business premises. At the culmination of this process, the Respondent had concerns about the viability and genuineness of the business in question and refused the application for LTR in a decision letter dated 5th April 2018 ("*the Decision*"). That Decision was upheld in judicial review proceedings. This is the appeal against that judgment.

5. The Appellant argues in this appeal that this three-part system of evaluation (paper assessment of application, interview, on-site visit) was procedurally unfair. The Respondent has an obligation to provide notice of "*concerns*" it holds either (a) because such an obligation is needed to ensure that the PBS is procedurally fair; and/or (b) because the concerns related to the truthfulness of the Appellant's account, and in such cases, the Respondent is required to make clear to an applicant that the account is not believed so that the applicant can address those doubts and concerns.

6. Fairness can be achieved by giving notice during the interview or during the visit or subsequently, for example in a second interview or in a "*minded to refuse*" letter. The Supreme Court in *Pathan* has confirmed that the *Doody* principles apply to a PBS, such as that applicable in this case, and the failure to afford the Appellant a chance to address these concerns meant that the procedure adopted was unfair and the resultant decision unlawful.

7. The Respondent disagrees and argues that the object behind a PBS is largely to replace discretion with clear, objective criteria. It reduces to the minimum the scope for individualised discretion. The way in which the criteria are drafted are transparent and suffice to enable an applicant to know the case that must be met, and all applicants are given a full and fair opportunity to present the best case that they can. If an applicant cannot meet those criteria then it follows, ineluctably, that the application fails. The converse also applies: if the criteria are met then the application is granted. A properly drawn PBS encapsulates transparency and fairness in its very structure. There has to be finality in this process. There is no right for such an applicant to be accorded repeat attempts to plug gaps and cure deficiencies or address concerns that the account being given is untruthful. The PBS is procedurally fair and the refusal Decision lawful, as the Judge correctly found.

B. <u>The Points Based System (PBS")</u>

Paragraph 245DD of the Immigration Rules

8. In order to understand the appeal, it is necessary to provide a description of the PBS. The requirements for LTR as a Tier 1 (Entrepreneur) Migrant are set out under Paragraph 245DD of the Rules. The test is drafted in binary terms: an applicant either satisfies the test and is granted LTR or fails in which case it is refused. The duty is placed upon the applicant to meet the requirements. An applicant must satisfy the Respondent that the application and the evidence tendered in support of it are "*genuine*".

9. The factual matters about which the Respondent must be satisfied are clearly set out in the Rules and include: the ability of an applicant to become a director of one or more businesses in the UK; that the applicant has adequate available finance which will be available at all relevant times to be invested in the business; that the applicant does not intend to take other employment in the United Kingdom. In support, an applicant must provide a business plan which includes how the applicant "*expects to make his business succeed*".

10. In assessing evidence submitted as part of an application, including as to the genuineness of the business, the Respondent evaluates the evidence on the "*balance of probabilities*". The Secretary of State may take into account the following factors:

(i) the evidence submitted; (ii) the viability and credibility of the source of the money relied upon; (iii) the viability and credibility of the applicant's business plans and market research into the chosen business sector; (iv) the applicant's previous educational and business experience or lack thereof; (v) the applicant's immigration history and previous activity in the UK; (vi) where the applicant has already registered in the UK as self-employed or as the director of a business, and the nature of the business requires mandatory accreditation, registration and/or insurance, whether that accreditation, registration and/or insurance has been obtained; and (vii) any other relevant information.

11. Paragraph 245DD provides:

> "**245DD. Requirements for leave to remain**
>
> To qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.
>
> Requirements:
>
> (a) The applicant must not fall for refusal under the general grounds for refusal, except that paragraph 322(10) shall not apply, and must not be an illegal entrant.
>
> (b) The applicant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A.
>
> (c) The applicant must have a minimum of 10 points under paragraphs 1 to 15 of Appendix B.
>
> (d) The applicant must have a minimum of 10 points under paragraphs 1 to 2 of Appendix C. …
>
> (h) Where the applicant is being assessed under Table 4 of Appendix A, the Secretary of State must be satisfied that:
>
> (i) the applicant genuinely: (1) intends and is able to establish, take over or become a director of one or more businesses in the UK within the next six months, or (2) has established, taken over or become a director of one or more businesses in the UK and continues to operate that business or businesses; and
>
> (ii) the applicant genuinely intends to invest the money referred to in Table 4 of Appendix A in the business or businesses referred to in (i);
>
> (iii) the money referred to in Table 4 of Appendix A is genuinely available to the applicant, and will remain

available to him until such time as it is spent for the purposes of his business or businesses;

(iv) if the applicant is relying on one or more previous investments to score points, they have genuinely invested all or part of the investment funds required in Table 4 of Appendix A into one or more genuine businesses in the UK;

(v) that the applicant does not intend to take employment in the United Kingdom other than under the terms of paragraph 245DE.

(i) The applicant must provide a business plan, setting out his proposed business activities in the UK and how he expects to make his business succeed.

(j) In making the assessment in (h), the Secretary of State will assess the balance of probabilities. The Secretary of State may take into account the following factors:

(i) the evidence the applicant has submitted;

(ii) the viability and credibility of the source of the money referred to in Table 4 of Appendix A;

(iii) the viability and credibility of the applicant's business plans and market research into their chosen business sector;

(iv) the applicant's previous educational and business experience (or lack thereof);

(v) the applicant's immigration history and previous activity in the UK;

(vi) where the applicant has already registered in the UK as self-employed or as the director of a business, and the nature of the business requires mandatory accreditation, registration and/or insurance, whether that accreditation, registration and/or insurance has been obtained; and

(vii) any other relevant information.

(k) Where the applicant has, or was last granted, leave as a Tier 1 (Entrepreneur) Migrant and is being assessed under Table 5 of Appendix A, the Secretary of State must be satisfied that:

(i) the applicant has established, taken over or become a director of one or more genuine businesses in the UK, and has genuinely operated that business or businesses while he had leave as a Tier 1 (Entrepreneur) Migrant; and

(ii) the applicant has genuinely invested the money referred to in Table 5 of Appendix A into one or more genuine businesses in the UK to be spent for the purpose of that business or businesses; and

(iii) the applicant genuinely intends to continue operating one or more businesses in the UK; and

(iv) the applicant does not intend to take employment in the United Kingdom other than under the terms of paragraph 245DE.

(l) In making the assessment in (k), the Secretary of State will assess the balance of probabilities. The Secretary of State may take into account the following factors:

(i) the evidence the applicant has submitted;

(ii) the viability and credibility of the source of the money referred to in Table 5 of Appendix A;

(iii) the credibility of the financial accounts of the business or businesses;

(iv) the credibility of the applicant's business activity in the UK, including when he had leave as a Tier 1 (Entrepreneur) Migrant;

(v) the credibility of the job creation for which the applicant is claiming points in Table 5 of Appendix A;

(vii) if the nature of the business requires mandatory accreditation, registration and/or insurance, whether that accreditation, registration and/or insurance has been obtained; and

(viii) any other relevant information.

(m) The Secretary of State reserves the right to request additional information and evidence to support the assessment in (h) or (k), and to refuse the application if the information or evidence is not provided. Any requested documents must be received by the Secretary of State at the address specified in the request within 28 calendar days of the date of the request.

(n) If the Secretary of State is not satisfied with the genuineness of the application in relation to a points-scoring requirement in Appendix A, those points will not be awarded. ….

> (p) The applicant must, unless he provides a reasonable explanation, comply with any request made by the Secretary of State to attend for interview."

The Interview

12. I have referred to the fact that the Respondent might adopt a multi-partite procedure which can include an interview. The questions posed and answers given during the interview in this case are in the court bundle. The questions are *pro forma*, in the sense that they are not specifically drafted to cater for the individual circumstances of an interviewee, but it is also clear from the template that the interviewing officer is able to ask supplementary questions. In other words, the questioning is not entirely mechanical and incorporates some flexibility to cater for individual circumstances.

13. The questions are comprehensive. There are 48 headline questions, but many have multiple sub-parts to them. The questions (logically, given that the purpose of the interview is to test the credibility and genuineness of the applicant's business) cluster around a small number of main issues or topics. It is worth summarising the issues covered by the questions. There are questions designed to obtain general information on the applicant and the business including: the name of the business; its date of incorporation; its trading address and the length of time that the business has traded from that address; whether the premises are owned or rented and if the latter, the terms of the lease; whether at the identified address there is actual evidence of observance of Companies House rules (e.g. concerning the erection of a sign showing the company address and other required information); the insurance position of the business; and the existence of health and safety requirements put in place at the business premises.

14. There are also questions about the viability or credibility of the business including: the nature of the business activity in question and who the customers/clients of the business are and as to the nature and extent and ownership of those client/customer businesses. The applicant is asked to provide a "*detailed*" description of the services provided to the clients/customers identified and the "*outcome*" of that business activity. There are questions focusing upon the nature of the background or market research conducted by the applicant in deciding whether to invest in the business, and the results of the research. The applicant is asked about the source, nature and extent of investment funds, and about the expenditure on the business made by the applicant to date, including upon advertising and use of websites There are many questions about the applicant including: the relationship of the applicant to the business; the role played by the applicant in the business; and the applicant's background in employment and business designed to determine the nature and depth of business experience the applicant has. There are questions on the applicant's background including immigration and work status and business experience.

15. There are questions on the employment practices of the business including: the number and identities of all employees; their longevity in employment; their rights and other entitlements; applicable rates of pay; whether they have joined the Work Place Pension Scheme; as to the methods used in their recruitment; and whether employees work from the business premises or from home and if the latter, how they are managed and how the applicant keeps in contact with them. And there are questions seeking relevant documentation, including those demonstrating that the

business has been registered with the appropriate authorities, such as Companies House and HMRC.

16. At the end of the interview the applicant is asked to confirm that, in effect, an adequate opportunity has been given to enable the applicant to provide all of the information and evidence that they wish.

The On-Site Inspection

17. The interview may be followed up by an on-site inspection by an investigating officer. In the present case, the interview was held at premises chosen by the Appellant, said to be the business office, and the opportunity was taken for the officer to view the premises.

The Home Office Guidance

18. The Respondent has published a detailed (118 page) guide to the application process entitled "*Tier 1 (Entrepreneur)*". The latest version (Version 24.0) is dated 29th March 2019. The Guide is based upon Paragraphs 245D and DF of the Rules and paragraphs 35-53 of Appendix A. This identifies every aspect of the test and describes the evidence that the Respondent is seeking from an applicant. It sets out at length what the Respondent is looking for when determining whether an application is "*genuine*".

C. The Facts

The Applications leading up to the Decision

19. I turn now to the fact of the instant appeal. The Appellant is a citizen of Pakistan and was born on 11th January 1988. He was granted leave to enter the United Kingdom as a Tier 4 (General) Student, on 18th December 2009 valid until 17th February 2011.

20. On 24th February 2011 he was granted LTR in the United Kingdom as a Tier 4 (General) Student until 23rd November 2011. On 15th December 2011 he was granted LTR in the United Kingdom as a Tier 1 (Post-Study) Migrant until 15th December 2013. On 26th February 2014 he was granted LTR as a Tier 1 (Entrepreneur) Migrant until 26th February 2017.

21. On 22nd February 2017 the Appellant applied for LTR to remain as a Tier 1 (Entrepreneur) Migrant under PBS and for a Biometric Residence Permit. An interview and site visit took place in late 2017 at the trading address specified by the Appellant for the business relied upon in his application ("*T2MC Limited*"). This was at 359 High Road, Ilford, IG1 1TF (an estate agent office on the main high street in Ilford with a conventional windowed shopfront displaying properties, signed "Swiss Estates"). The registered address for T2MC Ltd was the Appellant's residential address, which was different to the trading address.

The Decision

22. By letter dated 5th April 2018, the application for a further visa as a Tier 1 (Entrepreneur) Migrant was refused. The basis was that (i) the Appellant had failed to meet the requirements for the grant of 10 points under Appendix C of the Rules and

(ii) the Appellant had failed the genuineness test of paragraph 245DD(k) when assessing on the balance of probabilities the points listed at paragraph 245DD(l) of HC 395. Various concerns are set out under the heading "*Non-Points Scoring Reasons for Refusal*". The Respondent was not satisfied: (i) that the Appellant had established, taken over or become a director of one or more genuine businesses in the UK and had genuinely operated that business; (ii) that the Appellant had genuinely invested the money referred to in Table 5 of Appendix A into one or more genuine businesses in the United Kingdom, (iii) that he intended to continue operating one or more businesses in the United Kingdom and did not intend to take employment other than under the terms of paragraph 245DE.

23. With regard to the credibility of the Appellant's business activity in the United Kingdom, he had named two clients, Avid Support Limited ("*Avid*") and Core Atlantic Limited ("*Core Atlantic*"). He had said that for Core Atlantic, he set strategies, aims and priorities and held progress and review meetings, provided internal and external audits and, provided marketing and business plans. For Avid, he said that he undertook web design, performed market research and prepared action plans.

24. However, no details of Avid Support Limited were found at Companies House matching the details stated on his contract with them or, any details he had provided about them during the interview. There was a company listed as Avid Support Ltd whose details differed significantly from the details shown on his contract. It was noted that their address on the contract was said to be 414B, 4th Floor, Victoria House, Victoria Road, Chelmsford, CM1 1JR, and the contract was signed by Imad Masood. The address for "Avid Support Ltd" at Companies House showed as being 11 Brisbane Road, Ilford, Essex, IG1 4SR and the director was shown as Jawad Bhatti. In addition, Avid Support Ltd had not had any other trading addresses since incorporation on 10th June 2016. These discrepancies were said, in the Decision, to raise concerns as to the credibility of the business and as to the purported contractual arrangements relied upon to show that the business was genuine. The point was made that there was only an Avid Support ***Ltd*** listed at Companies House and the claimed client Avid Support ***Limited*** did not appear to be registered and this was said to raise further concerns regarding the genuineness of the contract.

25. In addition, the Respondent could not find an online presence for Avid such as a website, even though the Appellant claimed to have created a web design for them.

26. The Appellant had been asked to provide details of market research he had carried out prior to investing in his business. He said that he had researched local businesses such as Core Atlantic to find out what they needed and how he could provide it. In relation to the results of this research he said: "*Very positive especially after Brexit (sic). All companies are looking for staff. Core Atlantic Ltd very short of staff*". This answer contrasted with previous responses and also with the contracts he had provided with regard to the nature of the work he claimed to conduct. The response called into question his earlier responses as to the type of work carried out for Core Atlantic.

27. The Home Office visiting officer, who conducted the interview, had observed that there was no visible sign at the premises displaying his company name. The Appellant was told by the officer that he was required to erect a sign showing his

company name and his registered company address wherever his business operated. He was then asked to explain why he had not chosen to comply with this requirement. He replied by saying he was waiting for a sign to be put up but was not sure when this would be. His lack of awareness of the relevant legislation and apparent lack of urgency to erect a sign exacerbated concerns as to the genuineness of the evidence being tendered.

28. The Appellant explained that his employees worked mostly from his business premises but occasionally from home. No health and safety measures were in place at the business premises. The interviewing officer observed that the office was very small and questioned the feasibility of two employees and a director conducting work in such a space.

29. On 18th April 2018, the Appellant applied for an administrative review of the Decision. On 16th May 2018, after review, refusal of the application was maintained.

D. The Judicial Review before the Upper Tribunal: The Judgment under Appeal

30. The substantive hearing before UTJ Allen was held on 9th April 2019. The UTIAC's order refusing judicial review and permission to appeal and perfected judgment was promulgated on 18th June 2019.

31. The gravamen of the claim was that: (i) the procedure adopted by the Respondent was unfair in that the Appellant was not given a fair opportunity to know the case that was being made against him and that he therefore did not have a fair chance to advance his case; (ii) in any event the Decision was irrational given the very minor respects in which the Appellant's evidence and information were incorrect and/or that perfectly logical explanations existed to explain away the discrepancies. The Judge dismissed the arguments.

32. In relation to procedural fairness, the Judge cited the fifth and sixth principles set out in *Doody* (*ibid*) (set out at paragraph [2] above). Applying *EK (Ivory Coast)* [2014] EWCA Civ 1517 ("*EK (Ivory Coast)"*) he held that the *Doody* principles did not apply without significant modification to the PBS in use given the different contexts to the two cases (see Judgment paragraph [46]). Also as recorded in *EK (Ivory Coast)* and in other authorities, an acceptable price of legal certainty was that the application of those clear and certain rules could create "*hard edged decisions*" which could lead to "*harsh*" outcomes.

33. The judge applied these principles to the facts before him. He held:

> "47. I accept that the instant case is not one concerned with failure such as that of the applicant in that case to put the right occupation code on the initial application and failing to read or not taking into proper account guidance provided, but nevertheless the requirements of the Rules are clear as to what is required, and in my view an applicant has to give very careful consideration to the evidence being put forward to support a claim designed to obtain leave under paragraph 245DD. The applicant, as Mr Ostrowski argued, has the opportunity to provide whatever evidence he wishes to put

> forward in support of his application and is bound to realise, particularly in the case of an applicant such as Mr Taj who has made a previous application, that there is likely to be a visit to his premises and an interview, and that therefore the onus is on him to show that he is operating a credible business. In that regard it is surely important for him to give thought to what weaknesses or difficulties there may be in the application that he puts forward. It is also relevant in this case to bear in mind the declaration that he signed at the end of the interview in confirming that he had been given the opportunity to provide additional information relevant to his application and to clarify the information he had already given and to have the opportunity to make further comments and that he had understood the questions put to him."

34. In relation to the principle that a person affected adversely by a decision should be given the gist of the reasoning so that he or she knew the case that had to be met, the judge, again, focused upon the structure of the Rules of the PBS which broke down the qualifying criteria into precise requirements to be met. He endorsed the argument of the Respondent that the case to be met was intrinsic in the Rules themselves and the questions posed in interview:

> "48. With regard to the Doody principles, Mr Ostrowski accepted that an applicant in the position of this applicant was required to be given the gist of the respondent's case. He argued, as set out above, that this was done by the fact of the applicant being able to satisfy the requirements of the Rules and that the irreducible minimum of information he should have been given was from the structure of the points-based system and more specifically from the questions asked at interview, demonstrating the Secretary of State's concerns. I see force to this point. No issue can, I think, be taken with the need to have a structured interview, but issue may be taken, a point I shall come into shortly, with the extent to which the system has to contain some measure of flexibility."

35. The nub of the judge's conclusion on procedural fairness is set out in paragraph [55] of the judgment. This centred upon the fact that the relevant factual matters were under an applicant's control and that a fair opportunity was given to applicants to put the best possible case forward. Were the Respondent to be subject to a duty to put concerns to an applicant prior to an adverse decision this would undermine the "*efficiency and speed*" of the system:

> "55. In my view no procedural unfairness has been made out. The context as set out above is all important. I accept Mr Ostrowski's point that in effect the applicant received the necessary irreducible minimum of information he was required to be given from the structure of the points-based system and from the questions asked at interview. I do not think the respondent's concerns about the name of Avid Support, Avid Support having a different trading address, Avid Support

contract being assigned by someone other than the director, the lack of online presence, the recruitment services point, the size of the office point and the health and safety issues were points that required to be put to the applicant for response. Whether it is a matter of inconsistency with internal documents, inconsistency with external information or a conclusion that the decision-maker is likely to draw adverse conclusions from what was said at interview, *the process that would be required to meet the applicant's concept of a fair hearing would in my view take the matter outside the required efficiency and speed of the PBS process.* As Mr Ostrowski argued, it would potentially necessitate a series of follow-up interviews to responses that were given, which in my view would go outside the purposes of the PBS process. In this regard I bear in mind the fact that the applicant had every opportunity to prepare for the interview and to bring with him whatever information he chose, and that he agreed at the end that he had had every opportunity to provide additional information or clarify information given that he had understood the questions and had had the opportunity to make further comments. Matters such as discrepancies between company names and directors/managers' names, the lack of any online presence for Avid Support Limited, the at least potentially ambiguous nature of his answer to question 15 concerning Core Atlantic being very short on staff, an absence of any sign displaying his company name in contravention of regulations and his lack of any apparent awareness of the need to make provision for health and safety were all points which he could have anticipated might give rise to difficulty in which he was in a position to prepare to guard against. The same point can be made with regard to the size of the office. It is clearly a small office and it was not incumbent in my view on the officer to put to the applicant the point of concern about the feasibility of three people working in such a space."

(emphasis added)

36. The Judge then turned to the rationality challenge. He started by summarising the test to be applied:

> "57. In essence the same issues arise in the different context of rationality, bearing in mind that the test requires it being established that the decision was so outrageous in defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it (Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 410)."

37. Then, he addressed each and every criticism made of the "*concerns*" which led the Respondent to refuse the application (Judgment paragraphs [58]-[63]). He rejected one of the concerns as in effect, trivial, but accepted the others and in the light of this,

concluded that there *were* material concerns remaining at the end of the day and that the Decision was accordingly rational.

E. Appellant's Submissions on the Appeal

38. In the light of the judgments of the Supreme Court in *Pathan (ibid)* Mr Malik, for the Appellant, refined his submissions. Without, I hope, doing an injustice to his concise and helpful arguments, I would summarise the re-framed case as follows: (i) *Pathan* establishes that the *Doody* principles do apply to all procedural aspects of a PBS; (ii) these principles are of fundamental importance to the rule of law since they go to the heart of natural justice; (iii) a failure to adhere to these principles is sufficient, without more, to see a decision set aside and the analysis is not to be made subject to some overarching principle of materiality; (iv) it is evident from the Decision that the Respondent did have "*concerns*"; (v) these included as to the truthfulness of the Appellant's account; (vi) these "*concerns*" could have been put to the Appellant in any convenient form, such as a "*minded to refuse letter*", and it was not necessary (as had earlier been argued) to hold a second interview for that purpose; (vii) the failure to put these concerns to the Appellant was procedurally unfair; (viii) it was relevant to take into account that there are severe consequences in law (as described for example in the judgments of Lord Kerr and Lady Black in *Pathan* at paragraphs [115]-[117]) to the Appellant of having been denied LTR and thereby becoming an overstayer at risk of removal; (ix) any administrative inconvenience which the Respondent would suffer as a result of being required to put concerns to applicants was irrelevant in the light of *Pathan*; (x) even if there was a materiality override, had the "*concerns*" been put to the Appellant, he could have addressed them and satisfied the Respondent that he should be granted LTR; (xi) in any event, even if the system was lawful and procedurally fair the decision on the merits was still substantively irrational.

39. Mr Malik argued that we should follow the guidance in *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812 ("*Citizens UK*") where Singh LJ, at paragraph [70], cited *R v Hackney London Borough Council, ex p Decordova* (1995) 27 HLR 108 ("*Decordova*") at page [113], per Laws J who, in the context of a housing decision, but by reference to immigration law as well, stated:

> "In my judgment where an authority lock, stock and barrel is minded to disbelieve an account given by an applicant for housing where the circumstances described in the account are critical to the issue whether the authority ought to offer accommodation in a particular area, they are bound to put to the applicant in interview, or by some appropriate means, the matters that concern them. This must now surely be elementary law in relation to the function of decision-makers in relation to subject matter of this kind. It applies in the law of immigration, and generally where public authorities have to make decisions which affect the rights of individual persons. If the authority is minded to make an adverse decision because it does not believe the account given by the applicant, it has to give the applicant an opportunity to deal with it."

40. Later in *Citizens UK* Singh LJ cited the Court of Appeal in *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364 ("*Q v SSHD*") as authority for the

proposition that before a decision maker concluded that a claimant was not telling the truth, he had to be given the opportunity of meeting any concerns or at least should be informed of the gist of the case against him.

41. Mr Malik also relied upon the guidance given by the Upper Tribunal in *R (Mushtaq) v Entry Clearance Officer of Islamabad, Pakistan (ECO - procedural fairness) IJR* [2015] UKUT 224 (IAC) which he contended was to similar effect. The Headnote states:

> "… Interviews serve the basic twofold purpose of enabling applications to be probed and investigated and, simultaneously, giving the applicant a fair opportunity to respond to potentially adverse matters. The ensuing decision must accord with the principles of procedural fairness."

42. By reference to *Pathan* and to these cases it is argued that the Decision was adopted without the Appellant being put on notice as to the concerns about: (i) inconsistencies in the name of the name of the Appellant's business clients; (ii) inconsistencies in evidence about the trading addresses of clients; (iii) the fact that one of the two contracts which amounted to the business of the Appellant was signed by someone other than the director; (iv) the absence of an online presence of the client for whom the Appellant claimed to have constructed a website; (v) inconsistencies in the description of the business said to be performed by the Appellant; (vi) the small size of the office and its apparent inadequacy for the conduct of the business described by the Appellant; (vii) health and safety compliance.

43. As to the fact that the Appellant signed a declaration at the end of the interview that he had been accorded the opportunity to provide additional information and to make further comments, since the Appellant was unaware of the decision maker's concerns, and no material questions were put in the interview which raised them, the declaration was meaningless: it was unrealistic to expect that the Appellant, without cause, would know that he needed to provide further documents or comments.

44. In relation to rationality the arguments of the Appellant are set out in detail in the Judgment at paragraphs [57] – [64]. There is no need to set them out in any detail in this judgment. The criticisms of the Decision and the endorsement by the Judge of the Decision focus upon alleged failures properly to understand answers given in interview, errors in the inferences that can properly be drawn from answers, and failures to address relevant considerations.

F. Issue I: Procedural Fairness and the PBS

45. I turn now to my conclusion in relation to Issue I: procedural unfairness. For the reasons set out below, I do not accept this ground of appeal. I deal below first with the argument that there is a general obligation on the Respondent under the PBS to provide notice of concerns arising and, then, subsequently, with the sub-issue relating to concerns about truthfulness.

The Judgments in Pathan

46. It is convenient to start with the judgments of the Supreme Court in *Pathan*. The facts are important. I would summarise them as follows. A PBS is used for the grant of LTR to non-EU nationals who wish to work or study here. There are five tiers. The relevant tier was Tier 2 (General) Migrant. To obtain LTR an applicant must be sponsored by an employer licensed by the Home Office to sponsor migrants. Guidance issued by the Home Office states that an applicant must have a valid certificate of sponsorship ("*CoS*") provided by his sponsor and that if he does not the Home Office will reject his application. The system is prescriptive and there is no discretion about this. The Secretary of State does have a discretion to grant leave outside the PBS in exceptional circumstances and a power to revoke a licence at any time.

47. Mr Pathan made his application and was sponsored by his employer, Submania Ltd ("*Submania*"). It was his second application for Tier 2 leave. Submania held a sponsor's licence. It provided Mr Pathan with a valid CoS as of the date of his application for LTR. However, unbeknown to him, while his application was outstanding, the Home Office revoked the CoS. The Home Office did not inform Mr Pathan of this and his application was rejected upon the basis that his sponsor was no longer licensed so he had not fulfilled the conditions for the grant of LTR.

48. The principal issue on the appeal was whether the Secretary of State's failure to inform the Appellant of the revocation of his sponsor's licence was reviewable upon the basis that principles of procedural fairness and natural justice required a person to have an opportunity to be heard on any material information which the decision-maker acquired and of which he was unaware. Both the Upper Tribunal and the Court of Appeal rejected Mr Pathan's judicial review challenge to the decision of refusal.

49. The Supreme Court upheld the appeal by a majority (4:1) upon the basis that there had been a breach of the principle of procedural fairness for the Respondent not to have informed Mr Pathan that his sponsor's licence had been withdrawn (the duty to give notice). A minority (Lady Arden and Lord Wilson) went on to hold that the duty of procedural fairness *also* meant that the Secretary of State had to give Mr Pathan an opportunity to avert that difficulty. The majority on this point (Lord Kerr and Lady Black in a joint judgment and Lord Briggs in his separate dissenting judgment) concluded that the grant of an extension of time was a matter of substance outside the scope of the principle of procedural fairness.

50. In the present case, the argument is based upon a failure to give notice which the majority treated as a procedural matter. For present purposes, I therefore concentrate upon the reasons that led the majority to hold that there was a breach of the duty of procedural fairness in failing to give notice to Mr Pathan that the CoS had been revoked. From the majority judgments, from the case law that they endorse and from a judgment which post-dates *Pathan*, I would draw the following conclusions:

(i) ***PBS and procedural fairness***: The Doody principles of fairness apply to PBS, but the manner of their application will be fact and context specific: *Lloyd v McMahon* [1987] AC 625 at pages [702] – [703]; *Doody* page [560d-g] paragraph [52] per Lord Mustill; *Pathan* paragraphs [55], [104]; *Topadar v SSHD* [2020] EWCA Civ 1525 ("*Topadar*") at paragraph [59].

(ii) ***The public interest behind procedural fairness requirements***: The principle of procedural fairness supports important public interest values: (a) a person's intuitive expectation of a what a just system entails or the dictates of "*fundamental justice*" (*Pathan* paragraphs [49] [107], [124], [125], [126]; *Osborne v Parole Board* [2014] AC 1115 ("*Osborne*") paragraph [68]; *Secretary of State for the Home Department v AF* [2012] AC 269 paragraph [72]); (b) the promotion of the rule of law under which decision-makers hear from those who have something to say since this promotes congruence between the actions of decision makers and the law which should govern their actions (*Osborne* paragraph [71]; *Pathan* paragraphs [50]); and (c), the promotion of long term cost savings over short term expenditure. Procedures which involve an immediate cost, but which contribute to better long-term decision making, are in reality less costly than they at first appear (*Osborne* paragraph [72]; *Pathan* paragraphs [51], [52]).

(iii) ***The absence of a pointlessness (materiality/utility) test***: Because of the broader, public interest, reasons for the principle of procedural fairness, the courts do not undertake any detailed analysis of whether had the breach not occurred, it would have made any difference. In *Pathan* the majority were unimpressed by the Respondent's arguments that to grant relief would be pointless. The majority considered that the breach did deprive Mr Pathan of, at the least, an opportunity to ameliorate his position. Lady Arden extolled the virtues of the policy considerations behind procedural fairness (paragraphs [48]-[52]) and she agreed (paragraph [72]) with Lord Kerr and Lady Black on this point. At paragraphs [118] - [130] Lord Kerr and Lady Black discuss the principle of pointlessness. They explain that had the Respondent given notice it might have made a difference. But they also highlight the great importance of the principle of procedural fairness *per se*. In paragraph [131], they state that the duty to give notice to someone adversely affected by a procedural failure *"... cannot be defined solely by the consideration that it is pointless for that person to make representations with a view to reversing or avoiding the effect of the decision*." If observance of the principle (i.e. acting fairly) would or could or might have made a difference, then the Court will intervene but the converse if not true: the Court might still intervene even if it appeared that the breach had no effects such that to grant relief would be pointless, given the high public interest attached to the role that the principle of procedural fairness plays in the context of natural justice and the rule of law. In paragraphs [132] – [134] Lord Kerr and Lady Black thus explain why, on the facts, the failure to give notice did deprive Mr Pathan of the opportunity to take mitigating steps and they were of the view that the failure was not therefore pointless. However, they also observe (paragraph [134]) that a fairness analysis is not to be judged with the benefit of hindsight, *ex post facto*. This is because at that point in time there was "*no way to know*" whether Mr Pathan would have been able to take steps to mitigate his dilemma. If this is so, then speculation as to what might have happened, had the breach not occurred is not relevant. Further, in paragraph [135] they add that the failure was unfair "*in itself*" for another reason, namely because failing to give Mr Pathan notice of the revocation of the CoS licence accelerated the point in time at which he became an overstayer: "*To deny him the greater opportunity to avoid those consequences was in itself unfair*" and that this was a conclusion which did not

depend upon any judgment as to whether Mr Pathan would have taken steps to avoid that outcome Lord Wilson agreed with Lord Kerr and Lady Black in relation to this part of their judgment (paragraph [201]).

(iv) ***Systemic and operational failings***: The principles apply to individual decisions taken by virtue of the operation of the system (operational failings) but also to administrative systems (systemic failings) (*Pathan* paragraph [44]).

(v) ***Procedural fairness is a standalone obligation***: A challenge based upon procedural fairness does not have to be linked to a substantive challenge, for instance a rationality challenge (*Pathan* paragraphs [32] – [35] and cases cited thereat).

(vi) ***Administrative convenience and cost do not amount to a justification for procedural fairness***: If a Court finds that there is procedural unfairness then the fact that remedying the breach might result in cost or administrative inconvenience to the decision maker is irrelevant *(R (Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481 at paragraph [8]; *R v Secretary of State for the Home Department ex P Fayed* [1998] 1 WLR 763 per Lord Woolf; *Pathan* at paragraph [47]).

Is there a Duty to put an Applicant on Notice of General Concerns about an Application?

51. I turn now to consider whether there is a duty to put general concerns about the genuineness of a business to an applicant. By use of the expression "*general*" I am referring to concerns which arise regardless of whether the applicant's account is considered to be truthful or not. As was made clear in *Pathan* the application of the requirement of procedural fairness is fact and context sensitive.

52. In my judgment the Judge did not err. He correctly concluded that the PBS fell on the right side of the fairness line. My reasons are as follows.

53. First, the principle of procedural fairness concerns substance and not form. Ms Anderson, for the Respondent, accepted this when she argued that: "*The regulatory language underscores that the requirement is not one as to form (so that leave to remain could be purchased by setting up a structure that appears compliant). It is a test of substance*…". Her argument was based upon the need to prevent avoidance for instance by the creation of artificial structures that looked good on paper, but which were in truth devoid of substance. The converse also applies, the decision maker must look to the substance of an application to ensure, for instance, that odd discrepancies and errors in the paper work or in answers to questions posed in interview do not prevent an otherwise solid and acceptable application being accepted. I did not detect in Ms Anderson's submissions any demurral from this proposition. What matters is whether an applicant, in substance, establishes that the business is genuine. In my judgment the Judge adopted a rounded analysis of the evidence set out in the Decision. His approach - like that adopted in the Decision - was based upon substance and not form.

54. The second point is that the judgment in *Pathan* does not, in the final analysis, enable the Appellant in the present case to argue by analogy to the facts of that case. In *Pathan* a critical evidential component of the applicant's case for LTR (the validity of

the CoS) was under the exclusive control of the Secretary of State who revoked the certificate thereby rendering the application for LTR bound to fail without telling the applicant of this fundamental change of circumstances. There was nothing that the applicant could do about this and he was not at fault. Whether the educational establishment was certified or not was a state of affairs over which the applicant had no control or influence and, in the event, no knowledge. See generally the factual reasons why the majority considered that the principle of unfairness was engaged at paragraphs [69], [107], [112] and [215]. Lord Kerr and Lady Black considered, at paragraph [104] of their judgment, that "*… the rules of natural justice may require a party to be afforded time to amend his case in a way that cures an otherwise fatal defect of which he had, **without fault on his part**, previously been unaware*" (emphasis added). It is clear from the judgments that key determinants of fairness will focus upon (a) who has *access* to the information needed to support an application for LTR; and (b) who has *control* over that information. In my view access and control are key determinants and serve to distinguish between the facts of *Pathan* and the present case. Unlike in *Pathan,* here the Appellant had both access to and control over every fact relevant to the success or failure of his application. The scope of the evidence to be submitted is narrow and exclusively in the possession and knowledge, and therefore under the control, of an applicant, <u>not</u> the state. There is no part of that evidence the validity of which can be stripped away by unilateral state action. In *Topadar* (*ibid*), a case also decided shortly after, but in the light of, *Pathan*, the appellant came to the United Kingdom with leave to enter as a Tier 4 (General) Student. He made an application seeking to vary his existing leave and be granted leave to remain as a Tier 2 (General) Migrant. The application was refused on 27 September 2018 and following an administrative review, the decision was upheld. The Court of Appeal, in the light of *Pathan* and for similar reasons, also distinguished the facts of that case (ibid paragraph [58]) when upholding the decision in issue.

55. Thirdly, the PBS is open and transparent. The Appellant knew full well the evidence that needed to be provided and the relevance of each evidential matter to the test to be applied. This flows from the Rules themselves and is reflected in questions posed in interview. Further information is provided by the Home Office Guidance. There is no mystery in an applicant being required to provide detailed information about his customers and clients and it is not information that should be hard to come by, or which is especially complex.

56. Fourthly, it is not unreasonable in such circumstances to expect that the burden of providing the information should lie with the applicant, as it does under the Rules. If a series of inaccurate or incomplete pieces of information are tendered, responsibility fairly lies at the door of the applicant (see the quotation from *Pathan* paragraph [104] set out in paragraph [54] above). If the decision maker is then led to entertain doubts by virtue of the submission of this inadequate evidence, then this is not of such a nature as to trigger a duty on the part of the decision maker to institute some additional, incremental, system or procedure to allow an applicant a second chance to get it right.

57. Fifthly, the system is specifically designed to reduce administrative discretion and, in this way, the risk of inconsistent or arbitrary decisions is minimised. This is a strength of the system since a routine application of the system should, by its nature, ordinarily lead to a fair outcome. Nonetheless, the system incorporates a necessary

degree of flexibility, for instance in relation to the questions to be asked in interview, which means that the system is capable of adapting to individual circumstances. The Judge made the same observation having explained that in *Anjum v SSHD* [2017] UKUT 406 the UT had pointed out that some degree of flexibility might be needed to make a PBS fair.

58. Sixthly, as the Judge noted, the Appellant had every opportunity to prepare for the interview and to bring with him whatever information he chose. Nothing in the system hindered the Appellant in his ability to put together a convincing case. Moreover, at the end of the interview he confirmed that he had understood the questions and had been accorded the opportunity to make further comments. I accept Mr Malik's point that this does not enable an applicant to address deficiencies in the material and evidence submitted which are influencing the decision maker, but which are not brought to the attention of an applicant. But it *is* relevant to an analysis of whether the system is intrinsically fair in enabling an applicant having the opportunity <u>at least once</u> to advance his/her best case.

59. Seventhly, I also agree with Mr Malik that <u>if</u> the system (systemically or operationally) had been intrinsically unfair (as it was in *Pathan*) then the fact that steps needed to make it fair would be expensive or administratively inconvenient would be nothing to the point. Here however the basic system is, in my judgment, intrinsically fair. I would add that the two reasons given by the Judge for his conclusion (efficiency and speed – see paragraph [35] above) are not in this context irrelevant. The fact that it is administratively inconvenient for the Respondent to make a system fair is no defence (see paragraphs [50(vi)] above); but, <u>*if*</u> the system is procedurally fair then a policy which seeks to enhance finality and efficiency, which includes the need to avoid drawing out procedures longer than is necessary, is in my view a relevant and valid public interest consideration and explains why the Respondent does not wish to add extra administrative layers to the present PBS which are not necessary to maintain basic fairness.

60. Eighthly, Mr Malik sought to convince the Court that had the Appellant been given a chance to address the concerns he would have done so. He referred the Court to a witness statement that had been served during the judicial review proceedings below. This had been subject to criticism by the Judge who admitted it but did not accord it much if any weight. During the appeal Mr Malik realistically accepted that the statement was essentially argument and assertion and not real evidence and, ultimately, he did not place reliance upon it. Had I found that the system to be unfair I would not, following *Pathan,* have engaged in a pointlessness or materiality analysis. However, since I conclude that the system is fair the issue becomes academic.

61. Finally, I note that in certain authorities pre-*Pathan*, the Courts have observed that the application of PBS can lead to unfair and harsh results but that, in effect, this is an acceptable trade-off for a system which is clear precise and predictable: See for instance *Talpada v SSHD* [2018] EWC Civ 841 at paragraph [36] and *Mudiyanselage v SSHD* [2018] EWCA Civ 65 at paragraph [65] cited in the Judgment below at paragraph [47] (see paragraph [32] above). The impression given by these observations is that a PBS is tough for acceptable policy reasons. Following *Pathan* the way in which the argument might be refashioned is that *provided* that a PBS is systemically and operationally fair then the fact that a negative decision can have

serious and potentially harsh consequences for an applicant and his or her family is not due to the PBS, but to the consequences flowing from having failed to obtain LTR and becoming a overstayer. Put another way the principle of procedural fairness, as applied to a PBS, does not import policy considerations which then permit unfairness, or which dilute its requirements. Indeed, the analysis of the Supreme Court in *Pathan* in relation to the public interest points in the opposite direction.

62. I therefore conclude that it was not unfair, systemically, that the PSB did not incorporate, as part of its system, a requirement on the decision maker to put the Appellant on notice of general concerns entertained as to the genuineness of the application and the business in question; and nor was it unfair, operationally, on the facts of the case.

Is there a Duty to put an Applicant on Notice of Concerns about Truthfulness?

63. This brings me to a sub-issue which is whether that conclusion is different in a case where the concerns are as to the truthfulness of an applicant's account.

64. Mr Malik argued that at base the "*concerns*" held by the decision maker related to the truth or veracity of the account given by the Appellant. He relied upon authorities (referred to above at paragraphs [39]-[43] and discussed below) which indicate that if a decision maker is intending to refuse an application upon the basis that the truth of an applicant's account is to be disbelieved then that emerging conclusion should be put to the applicant before an adverse decision is taken.

65. In my judgment these authorities do not assist the Appellant. This is for two main reasons. First, the cases cited relate to contexts which are far removed from the present and they do not in any event lay down a hard and fast principle which this court is bound to apply. Second, in any event, the present case is not at its core about the veracity of the applicant but is about the paucity and inadequacy of the evidence submitted concerning the Appellant's business.

66. It is helpful to consider in greater depth *Q v SSHD* which was relied upon in *Citizens UK*. I start though with a general observation about *Decordova* (*ibid*, see paragraph [39] above). There, as the quotation from the case makes clear, the issue of the truthfulness of the applicants account was "*critical*" to the issue being decided. I consider below whether that is the case here.

67. In *Q v SSHD (ibid)* the Court was concerned with what it considered to be a wholly deficient interview process designed to test the truthfulness of an asylum seeker's account and, in particular, to decide whether the applicant applied for asylum "*as soon as reasonably practicable after [his] arrival in the United Kingdom*".

68. The Court identified a number of key principles. First, that the burden of persuasion lay with the asylum seeker. Secondly, that the Secretary of State must act fairly both in setting up a fair system to enable decisions to be made and as to its *de facto* operation (systemic and operational fairness). Thirdly, (applying *Doody*) what fairness required depended upon the circumstances of the case. Fourthly, the importance of ensuring that the system was fair (to an applicant and to the public interest) was affected by the "*draconian*" consequences of refusing an asylum application (e.g. it had the effect of rendering such a person destitute). Fifthly, a

fairness duty was needed because the determination to be made was one of fact for which there was no right of statutory appeal and the right of judicial review which did exist was necessarily limited so far as conclusions of fact were concerned. It was therefore of "*particular importance to ensure that the Secretary of State follows a fair procedure in reaching his conclusion about the facts.*"

69. The Court of Appeal upheld the decision of the High Court that the system was not fair. At first instance the Judge had identified the sorts of information that the decision maker needed and how, but by its nature, it would be obtained from the narrative account of the asylum seeker. Collins J commented in paragraphs [19] to [21] of his judgment as follows:

> "I am satisfied that in port arrivals cases further detail must be asked about reliance on advice and, if an account of what happened at the airport is considered incredible, an opportunity should be given for further explanation. In lorry cases, vagueness about the nature of the lorry or the journey should again be investigated, particularly if, as has been the case in these and I gather in many claims, it is to be said that such vagueness means that the Secretary of State is not satisfied that the Claimant arrived when he said he did. I do not suggest any extra questioning need be at all lengthy. What is needed will depend on the circumstances, but the reasonableness of the delay in claiming asylum can only be properly decided on if sufficient information is provided. At the very least, the Claimant must be given the chance to rebut a suggestion of incredibility and to explain himself if he can. All that may be needed is a warning that the account is too vague or is incredible having regard to known practices at ports or it was not reasonable to rely on advice or to obey instructions. In those latter cases, it is not uncommon that threats are made that the Claimant's family will be made to suffer if instructions are not obeyed. Equally, I am well aware from my position as President of the Immigration Appeal Tribunal (the "IAT") that in some countries to claim asylum at a port will result in immediate refusal to enter and removal by the police. This has led some to believe that it is essential to gain entry before claiming asylum."

70. The Court of Appeal agreed. It examined the questions posed during interview and questioned whether they were adequate to obtain the information necessary to enable a fair decision to be made. It measured them against the purpose of the exercise and whether the warnings given to applicants before interview were sufficient to enable applicants to understand the purpose of the interview and what was expected of them. The analysis undertaken by the Court of the system deployed on the ground was detailed. At paragraph [91] the Court concluded:

> "91. We do not think that the questions asked at present enable the interviewer (let alone the decision maker) to have a sufficiently full picture for a fair decision to be made. In the light of the conclusions set out above, fairness requires the

> interviewer to try to ascertain the precise reason that the applicant did not claim asylum, say, at the airport or immediately after being let out of a lorry. This calls for interviewing skills and a more flexible approach than simply completing a standard form questionnaire. For example, depending upon the circumstances, it may well involve the need to ask at least some questions relating to the state of mind of the applicant. That may in turn involve asking him what advice or instructions he was given by his agent or facilitator, although it is fair to say that in only one of the four cases of applicants who said that they arrived by air did the applicant say that he had been told by the agent not to claim asylum at the airport but later. We recognise in this regard that it is not for the court to say what questions should be asked in any particular case or how interviews should be conducted. Suffice it to say that we are in no doubt that the system at present in place does not satisfy the test of fairness."

71. The Court then considered whether procedural fairness demanded that applicants, whose accounts were to be disbelieved, should have communicated to them the gist of why they were to be disbelieved. The Court held that fairness *did* require that the gist of the concern be communicated in advance of the decision. This is the conclusion that is relied upon before us.

72. To what extent therefore does this line of authority indicate that in all cases, when the decision maker gets to the point of forming a view that an application should be rejected, the gist of operative concerns should be communicated to the applicant? Put another way is a duty to put evolving and potentially dispositive concerns about truthfulness an absolute, or is it fact and context sensitive?

73. In my view, it is fact and context sensitive. This follows from the reiteration in *Pathan* of the position set out in many earlier cases that the application of the *Doody* principles of procedural fairness were (i) governed by context; and (ii) to be applied both to the system in issue but also to the specific facts of individual cases.

74. In my judgment, the principles of procedural fairness as applied to the PBS in issue do not compel the decision maker to communicate evolving concerns about truthfulness.

75. First, my starting point is that the PBS in issue is, otherwise, fair and affords applicants a full, transparent, and informed opportunity to advance their best case in order to obtain LTR.

76. Secondly, the context in the present case is very different to that in *Q v SSHD* (ibid)] and in *Citizens UK*. The nature of asylum applications is such that the applicant will be recounting events for which there may be no easy proof. This might cover the reasons for the claim for asylum and as to the methods of travel which brought the applicant to the United Kingdom and as to what they have done in the United Kingdom since arrival and why. There may be no or only sparse documentary or other tangible proof against which to measure and test an applicant's account. The decision might rest in large measure upon the conclusion of the officer as to the veracity of the applicant and the evaluation of truth may thus necessarily be core to the decision-

making process. The same can be said of the issue addressed to the judgment in *Decordova* where veracity was "*critical*" to the issue being decided.

77. An application for LTR as an entrepreneur is different. The proof needed will be largely documentary and the particulars independently verifiable. The veracity of an applicant's account should not lie at the heart of the process. An applicant should be able to establish the case for LTR using: emails with clients; invoices; business plans; evidence of advice given; management accounts; correspondence with regulators; correspondence with accountants and other professional advisers; profit and loss figures; internet-based evidence about clients and their activities, etc. This evidence should speak for itself. I accept of course that an applicant's oral explanations may be relevant, and its truthfulness might be taken into account, but the pith and substance of a decision should be capable of resting upon other evidence.

78. For these reasons I reject the submissions that case law establishes a right to have concerns about truthfulness communicated to the applicant in the context of this particular type of PBS. I also reject any suggestion that on the facts it was operationally unfair of the decision maker not to put concerns as to truthfulness to the Appellant.

79. For these reasons I reject the argument that the PBS is procedurally unfair.

F. Issue II: Rationality

The Approach to be Adopted

80. I turn now to the second ground of appeal, namely rationality. For the reasons that I set out below I do not consider that the Judge erred in his conclusions on rationality. I have though one caveat to the approach adopted by the Judge. He articulated (judgment paragraph [57]) the rationality test as requiring the Appellant to show that the decision was "*so outrageous in defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it*". Without any elaboration or qualification if this language is used, strictly, to govern a case then the hurdle placed before almost *any* claimant for judicial review would be high indeed. This test, in its unalloyed form, risks a judge being asked to make a near subjective assessment of what is meant by a "*defiance*" of logic or "*accepted moral standards*" and then, having made that evaluation, proceeding yet further to consider when that "*defiance*" had become sufficiently ("*so*") "*outrageous*" as to warrant judicial intervention.

81. The modern articulation of rationality is somewhat less subjective and more prosaic and focuses upon: whether the decision maker took into account an irrelevant consideration or ignored a relevant consideration, or whether the judge wrongly construed a key fact (such as a document) or otherwise drew illogical inferences from common ground facts, etc. If the Judge did make such an error and it is or might be material to the outcome then, ordinarily, a court will quash the decision and remit it.

82. If there is no clear error such as that described, and it is said only that the decision is irrational, in the sense that no reasonable decision maker could have come to that conclusion, the Court will work out the appropriate margin of judgment or discretion to accord to the decision maker. There are many authorities which in broad terms

mark out the cases where a broad margin is accorded to the decision maker. These include: where the decision is an essentially political one and/or one is imbued with a high policy content; or where the decision is based upon complex and uncertain technical or scientific evidence in respect of which there might be no single, unequivocal, answer; or where the decision is taken on a precautionary basis to address some future uncertain but significant risk, such as a health or environmental risk. Where, however, the decision has none of these hallmarks and is more mechanical or "micro" then the Court will accord a far smaller margin of judgment.

83. In short, the nature of a rationality challenge is fact and context specific. Mr Malik, for the Appellant, advanced his submissions along these lines. He took us to the various Q&As which flowed from the interview and, based upon close textual analysis, submitted that the inferences drawn from them by the decision maker were illogical or inadequate or involved taking irrelevant matters into account, and that the judge erred in upholding the Decision.

84. I agree with the basic approach advanced by Mr Malik and it actually accords with the approach that the Judge adopted which was to consider each and every criticism made of the inferences drawn by the Respondent to the answers to questions posed in interview, which led to concerns, and then to form a view as to where it was a proper inference to draw.

85. In the present case, the Decision is not in itself political or one which involves issues of policy. It does not involve an assessment of complex technical or scientific evidence. It is not a decision designed to protect on a precautionary basis public health or the environment, for instance. It is a nuts and bolts decision based upon narrow facts, relating to one individual. The Rules are drafted to be binary: an applicant either meets the criteria and gets LTR or does not and it is declined. The system is structured to minimise the decision maker's discretion. The officer applies a well-trodden system involving a tick box exercise to ensure that the relevant documents have been submitted and then an evaluative exercise to see whether the application is credible and genuine by reference to established criteria. Evidently, some discretion or judgment is called for by the officer, but the comprehensive and structured nature of the evaluative process limits it significantly.

86. On this basis there is no reason in principle why a court should refrain from quashing a decision premised upon a material error made by an officer. No important issues of politics or policy would be engaged by such a result. It is also relevant that a mistake by an officer may have severe consequences for the applicant, as the Supreme Court repeatedly pointed out in *Pathan* and as Mr Malik emphasised before us.

87. But against this is the fact that *provided* the system in and of itself is fair (as to which my conclusion in relation to Issue I is relevant) then a routine application of that system to an applicant is by its nature likely to produce a rational, justified, result. In the context of a fair PBS, the hurdle to be surmounted in a rationality challenge is therefore likely to be relatively high.

The Approach applied by the Judge

88. With these observations in mind I turn to the analysis of the Judge. As already observed, he considered each factual argument raised by the Appellant as to the Q&A

process and he set out the competing arguments of the Respondent. The approach was detailed. The conclusion of the judge on these criticisms were not all one way. He accepted some of the criticisms made of the analysis in the Decision, but not the others. This is not a case where the judge overlooked or failed to address a relevant matter or took into account irrelevant considerations or failed to perform the necessary detailed assessment. Nor did he fail to address the materiality of errors that he found existed. For instance, the judge was unimpressed by the reliance made in the Decision on the semantic difference between Avid Support ***Limited*** and Avid Support ***Ltd***. He could see "*… no materiality whatsoever to the difference between Avid Support Limited and Avid Support Ltd. I do not understand why such a trivial point was taken in the decision letter*."

89. However, he saw "*more substance*" in other matters such as the fact that the documents gave inconsistent addresses and different ownership details for Avid Support. This was one of the only two clients which the Appellant's business had and the inability of the Appellant to provide accurate and verifiable details was legitimately a matter of concern (paragraph [58]). Of real concern was the absence of any online presence for Avid Support such as a website. The Appellant claimed to have carried out web design for Avid Support but there was no evidence of them having a web presence. It had been argued before the judge (and the point was repeated before us) that the website might have been down at the point when a search was performed. But that was pure speculation and conjecture; it was open to the Appellant to provide chapter and verse to the officer to establish that such a website did in fact exist, and he did not.

90. Also of concern was the Appellant's answer to the question in interview about his performance of market research. The Appellant had made reference to Core Atlantic being very short on staff. In the Decision it was pointed out that there was an unexplained discrepancy between this answer and another relating to the work that he did under the contract with Core Atlantic which had no reference to recruiting staff. The Judge said that it was "*… to say the least a curious answer which certainly bears no relevance to what he had said in answer to question 7 as to the goods or services his business provided to Core Atlantic*".

91. Also of concern was the absence of a visible sign at the premises displaying the company name, and its registered company address or wherever it operated from. The Appellant had explained this upon the basis that his office was "*shared*" with an estate agent. But the Judge concluded that whether or not the office was shared, the legislative requirement still applied (the Companies (Trading Disclosures) Regulations 2008, Regulation 3) and the Respondent was therefore legitimately concerned at a failure to comply with relevant regulations and that this failure was not irrelevant to the credibility of the business operation.

92. The Judge also held that the decision maker was entitled to be concerned about the complete absence of compliance with health and safety requirements at the office. The absence of any health and safety requirements in place at the premises was a matter warranting understandable concern as to the genuineness of the claimed job creation.

93. Finally, the decision maker was rightly concerned at the size of the office and whether it was feasible for two employees and a director realistically to conduct work in such

a space. The judge held that this was a "*matter of lesser significance*" (since some staff were said to work periodically from home), but not wholly lacking in *all* relevance.

94. The business described by the Appellant in his information and in interview was an insubstantial, thin undertaking with but two clients about whom the Appellant could not give accurate details and from whom minimal revenues were generated. The Judge observed, in my view correctly, that since this was the Appellant's second application for an entrepreneur visa, he should have known what level of detail was to be expected of him. The business that was the basis of the Appellant's application was not new. It had been in existence for some years.

95. In my judgment, the decision maker was entitled to have real concerns about the genuineness of the business and the Judge, on the basis of his careful point by point analysis, was justified in upholding the Decision. There is no basis upon which this Court can properly interfere.

96. I would reject the rationality challenge.

G. Conclusion

97. It follows from the above that I would dismiss the appeal.

Lord Justice Males:

98. I agree.

Lord Justice Peter Jackson:

99. I also agree.