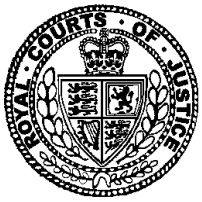

Neutral Citation Number: [2019] EWHC 1226 (Admin)

Case No: CO/4054/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2019

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

THE QUEEN **(On the application of ZARANA SUNNY KHAJURIA)**	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr Rajiv Sharma and **Mr Hiren Patel** (instructed by **Hiren Patel Solicitors**) for the **Claimant**
Mr Zane Malik (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 2 April 2019

- -

Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Martin Spencer :

Introduction

1. The Claimant in this Judicial Review claim challenges the Secretary of State's decision of 4 July 2018 to refuse her application for further leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant and to uphold that refusal at administrative review. The Claimant also challenges the legality of Paragraph 46-SD(h)(i) of Appendix A to the Immigration Rules, pursuant to which the Secretary of State took his decision.

Factual Background

2. The Claimant is a citizen of India and was born on 10 July 1985. She has three dependents, namely, her husband and two children. Her husband is Sunny Khajuria, who was born on 14 November 1983. Her two children are Kush Khajuria, born on 21 September 2011 and Neev Khajuria born on 13 November 2015. The dependents are also citizens of India and do not have any freestanding claim to reside in the United Kingdom.

3. The Claimant arrived in the United Kingdom on 12 January 2009, with an entry clearance as a Tier 4 (General) Student, valid until 31 August 2010. She was granted further leave to remain as a Tier 4 (General) Student on 31 August 2010 until 30 January 2012.

4. She was granted further leave to remain as a Tier 1 (Post Study Work) Migrant on 6 March 2012 until 6 March 2014. During the currency of this leave, the Claimant joined a business called Rose Hotel and Spa Ltd on 11 December 2013. This had been incorporated on 20 February 2013 and on 14 April 2013, it had closed its PAYE scheme following a change in the law which came into effect on 6 April 2013. This was on the advice of Financial Accountants, Ashworth Billington Ltd. In a statement dated 7 June 2018, Mr T Clow of Ashworth Billington explained that advice by reference to HMRC Guidance which stated:

> "Introduction to PAYE
>
> As an employer, you normally have to operate PAYE as part of your payroll. PAYE is HM Revenue and Customs' (HMRC) system to collect Income Tax and National Insurance from employment.
>
> You don't need to register for PAYE if none of your employees are paid £116 or more per week, get expenses or benefits, have another job or get a pension. However you must keep payroll records."

Mr Clow explained that, in his experience, HMRC would close down any schemes where no liability exists for Tax and National insurance. He said that all employees of Rose Hotel & Spa Ltd were in sole employment there and were paid less than £116 pw

so that the PAYE scheme was closed down, and there was no obligation on the company to file Real Time Information (see footnote 1 below) to HMRC. In October 2013, RTI became the acceptable method for reporting tax payments for Tier 1 employees.

5. The Claimant was granted further leave to remain as a Tier 1 (Entrepreneur) Migrant on 28 February 2014 until 28 February 2017.

6. The Claimant made an application for further leave to remain as a Tier 1 (Entrepreneur) Migrant on 31 January 2017. The Secretary of State refused that application on 26 June 2017. The Claimant applied for administrative review in respect of that decision on 4 July 2017. The Secretary of State refused that application on 1 August 2017 and maintained his decision.

7. The Claimant made a fresh application for further leave to remain as a Tier 1 (Entrepreneur) Migrant on 12 August 2017. The Secretary of State again refused that application on 21 May 2018. The Claimant applied for administrative review in respect of that decision on 7 June 2018. The Secretary of State refused that application on 4 July 2018 and, on the same day, issued a replacement decision refusing the Claimant's application for further leave to remain as a Tier 1 (Entrepreneur) Migrant. This is the decision which is challenged. The basis of the decision was Paragraph 46-SD(f)(i) of Appendix A to the Immigration Rules: see below paragraph 15.

8. The Claimant sent a pre-action protocol letter to the Secretary of State on 13 July 2018. The Secretary of State responded to that letter on 13 August 2018 and maintained his decision. The Claimant issued this Judicial Review claim on 17 October 2018. The Secretary of State filed the Acknowledgment of Service on 9 November 2018.

The Secretary of State's Decision

9. The Secretary of State, in summary, says that the Claimant, under Paragraph 46-SD(h)(i) of Appendix A to the Immigration Rules, was required to produce printouts of Real Time Information ("RTI")[1] submissions made to HMRC but failed to do so. The Secretary of State, accordingly, awarded no points to the Claimant for "Creation of jobs in the UK", and, as she had insufficient qualifying points (see paragraph 13 below), refused her application.

Grounds of Judicial Review

10. The Claimant advances two grounds of Judicial Review:

[1] Under RTI, information about tax and other deductions is transmitted to HMRC by an employer every time an employee is paid. Employers using RTI are no longer required to provide information to HMRC using Forms P35 and P14 after the end of the tax year, or to send Forms P45 or P46 to HMRC when employees start or leave a job. Since April 2014 all employers have been required to report in real time with 1.9 million schemes covering 48 million employees now reporting through RTI: see https://www.gov.uk/govemment/publications/real-time-information-improving-the-operation-of-pay-as-you-earn.

(i) First, Paragraph 46-SD(h)(i) of Appendix A to the Immigration Rules, insofar as it requires submission of RTI, is unreasonable and, thereby, unlawful ("Ground 1").

(ii) Secondly, the Secretary of State's failure to exercise residual discretion in favour of the Claimant, or to consider exercising that discretion, is unlawful. ("Ground 2").

Legislative Framework

11. Section 3(1) of the Immigration Act 1971 ("the 1971 Act") concerns the grant of leave to enter or remain and provides as follows:

> Except as otherwise provided by or under this Act, where a person is not a British citizen;
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;
>
> (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;

12. The Immigration Rules are made by the Secretary of State under section 3(2) of the 1971 Act which provides as follows:

> The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality).
>
> If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at

> latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid).

13. Paragraph 245DF of the Immigration Rules, so far as relevant, provides as follows:

> To qualify for indefinite leave to remain as a Tier 1 (Entrepreneur) Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain wig be granted. If the applicant does not meet these requirements, the application will be refused.
>
> …
>
> (c) The applicant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A.

14. Table 5 in Appendix A to the Immigration Rules, as at the relevant time, and so far as material, provides that an applicant would obtain mandatory 20 points if he or she has:

> (a) established a new business or businesses that has or have created the equivalent of at least two new full time jobs for persons settled in the UK,
>
> or
>
> (b) taken over or invested in an existing business or businesses and his services or investment have resulted in a net increase in the employment provided by the business or businesses for persons settled in the UK by creating the equivalent of at least two new full time jobs.
>
> Where the applicant's last grant of entry clearance or leave to enter or remain was as a Tier 1 (Entrepreneur) Migrant, the jobs must have existed for at least 12 months of the period for which the most recent leave was granted.

15. Paragraphs 46 and 46-SD of Appendix A to the Immigration Rules, as at the relevant time, and so far as material, provide:

> 46. Documentary evidence must be provided in all cases. The specified documents in paragraph 46-SD must be provided as evidence of any investment and business activity that took place when the applicant had leave as a Tier 1 (Entrepreneur) Migrant or a Tier 1 (Post Study Work) Migrant, and any investment made no more than 12 months (or 24 months if the applicant was last granted leave as a Tier 1 (Graduate Entrepreneur) Migrant)

> before the date of the application for which the applicant is claiming points.
>
> 46-SD. The specified documents in paragraphs 41(b) and 46 are as follows.
>
> …
>
> (h) if the applicant is required to score points for job creation in Table 5 or Table 6, he must provide the following:
>
> (i) evidence to show the applicant is reporting Pay As You Earn (PAYE) income tax appropriately to HM Revenue & Customs (HMRC), and has done so for the full period of employment for which points are being claimed, as follows:
>
> (1) for reporting up to and including 5 October 2013 either:
>
> (a) printouts of Employee Payment Records and, unless the start date of the employment is shown in the Employee Payment Record, an original HMRC form P45 or form P46 (also called a Full Payment Submission) for the settled worker showing the starting date of the employment, or
>
> (b) printouts of Real Time-Full Payment Submissions which confirm the report of PAYE income tax to HMRC (if he began reporting via Real Time before 6 October 2013); and
>
> (2) for reporting from 6 October 2013 onwards, printouts of Real Time-Full Payment Submissions which confirm the report of PAYE income tax to HMRC.
>
> The evidence in (1) or (2) above must show the total payments made to the settled workers as well as the tax deducted and date which they started work with the applicant's business.

16. Paragraph 49 of Appendix A to the Immigration Rules, as at the relevant time, provided:

> 49. A full time job is one involving at least 30 hours of work a week. Two or more part time jobs that add up to 30 hours a week will count as one full time job, and may score points in Tables 5 and 6, if both jobs exist for at least 12 months. However, one full time job of more than 30 hours work a week will not count as more than one full time job. If jobs are being combined, the employees being relied upon must be clearly identified by the applicant in their application. Jobs that have existed for less than 12 months cannot be combined together to make up a 12 month period.

17. Paragraph 51 of Appendix A to the Immigration Rules, as at the relevant time, provides:

> 51. The jobs must comply with all relevant UK legislation including, but not limited to, the national Minimum Wage and the Working Time Directive.

The Claimant's Submissions

18. The Claimant submits that Rule 46-SD(h)(i), requiring as it does the production of printouts of Real Time-Full Payment Submissions which confirm the report of PAYE income tax to HMRC, is "partial and unequal" in its operation between different classes – i.e. applicants who operate businesses that are required by HMRC to operate RTI and those that do not – and is therefore unlawful as offending against the principle laid down in *Kruse v Johnson* [1898] 2 QB 91, as applied in ex parte *Manshoora Begum* [1986] Imm AR 38. It is submitted that in both classes of applicant, the business is genuinely operating and the substantive principled requirement of job creation has been met. The requirement that is not met is simply that of a practical evidentiary nature.

19. This is characterised by the Claimant as an issue of "principle v practicality" which was an issue considered by the Supreme Court *in MM (Lebanon) & Others v Secretary of State* [2017] UKSC 10. That case concerned the Minimum Income Requirement ("MIR") inserted into the Immigration Rules in July 2012 for non-EEA family members wishing to join their British partners here. The MIR required that the sponsoring partner have a gross annual income of at least of £18,600 with an additional £3,800 for the first dependant non-EEA national child and £2,400 for each additional child. Only the sponsor's earnings are taken into account: the prospective earnings of an entering partner and any support from third parties are ignored. At paragraph 76 of the judgment, the court referred to the margin of appreciation permitted by the Strasbourg court on an "intensely political" issue such as immigration control, but then stated:

> "However, this important principle should not be taken too far. Not everything in the rules need be treated as high policy or peculiarly within the province of the Secretary of State, nor as necessarily entitled to the same weight. The tribunal is entitled to see a difference in principle between the underlying public interest considerations, as set by the Secretary of State with the approval of Parliament, and the working out of that policy through the detailed machinery of the rules and its application to individual cases. The former naturally includes issues as the seriousness of levels of offending sufficient to require deportation in the public interest. Similar considerations would apply to the rules reflecting the Secretary of State's assessment of levels of income required to avoid a burden on public resources, informed as it is by the specialist expertise of the Migration Advisory Committee. By contrast rules as to the quality of evidence necessary to satisfy that test in a particular case are, as the Committee acknowledge, matters of practicality

> rather than principle; and as such matters on which the tribunal may more readily draw on its own experience and expertise."

20. Relying on *MM*, the Claimant submits that the problem in the present case is that the practical deficiencies cannot be remedied by the expert tribunal as such applications will never be before the tribunal in a statutory appeal. In those circumstances, it is submitted that the rule should be struck down as unlawful, unreasonable or ultra vires.
21. In relation to Ground 2, the Claimant submits that the Defendant has otherwise failed to consider whether the reason that the Claimant is unable to provide the requisite evidence is sufficiently compelling to warrant departure from the rules. By reference to *Thebo v Entry Clearance Officer Islamabad (Pakistan)* [2013] EWHC 146 (Admin), it is argued that a mandatory rule may not be unlawful simply for being mandatory if there is a residual discretion open to the decision maker. In such circumstances, discretion should be considered and exercised where circumstances warrant such an exercise of discretion and the Defendant should have considered the exercise of such discretion in this case given the reasons for the Claimant's inability to provide the evidence required by the rules. It is submitted that the covering letter to the Claimant's application, explaining the reason why the Claimant was unable to provide RTI evidence, was or should have been sufficient to put the Defendant on notice of the Claimant's wish to have discretion exercised in her favour.

The Defendant's submissions

22. For the Defendant, it is submitted in relation to Ground 1 that the rules themselves are clear and unambiguous: in order to qualify for Tier 1 (Entrepreneur) leave, the Claimant was required to score the necessary 75 mandatory points and, in order to do so, was required to submit RTI evidence. Rule 46-SD requires in terms under (h) (i) (2) that, for reporting from 6 October 2013 onwards, the applicant must provide evidence in the form of print outs of real time – full payment submissions (i.e. RTI) confirming the reports of PAYE income tax to HMRC.
23. It is acknowledged by the Defendant that a rule can be condemned for being unreasonable as per *Kruse v Johnson* and ex parte *Begum*. The test for unreasonableness is a high one and rules in secondary legislation can only be treated as unreasonable if partial and unequal in their operation as between different classes, or if manifestly unjust, disclosing bad faith or involving oppressive and gratuitous interference with the rights of the subject which would find no justification of the minds of reasonable men. It is submitted on behalf of the Defendant that there is a rational and legitimate objective behind the requirement to submit RTI namely to ensure there is cogent evidence, easily and expeditiously verifiable from HMRC, that the applicant for the jobs in question is reporting income appropriately to HMRC and has done so for the full period of employment in question. This corroborates that the jobs actually exist and assists in ensuring that the jobs created comply with the national minimum wage legislation and do not fall below the PAYE threshold.

24. Mr Malik, for the Defendant, further submits that impossibility to comply with the rule in question needs to apply to everyone, not just a particular class. He refers to the judgment of Mitting J in *Britcits v Secretary of State for the Home Department* [2016] WL 01745138 where, having referred to the principle of *Kruse v Johnson* and *MM (Lebanon)*, he said:

> "29. A relatively modern example of the application of this principle, on which Miss Lieven relies, is ex parte Manshoora Begum. Paragraph 52 of the Immigration Rules then in force impose similar requirements for adult dependants as Rule 317 of the 1994 Rules, but contain the additional requirement that they must have a standard of living substantially below that of their own country. Simon Brown J held that that proviso made it logically impossible for any dependant adult relative to gain admission. If the sponsor could maintain them in the United Kingdom without the support of public funds, so he could send enough money that they may live above a substantially sub-standard level. The offending proviso therefore failed the Kruse v Johnson test.
>
> 30. The analogy with present facts is imperfect. The Rule in issue does not make it logically impossible for a dependant relative to gain admission, it simply makes it exceptionally difficult to do so. It may or may not make it more likely that dependant relatives in prosperous countries can gain admission than those from poor or middle-income countries. Much may depend on their precise circumstances and the care facilities available to them in each country. A rich country may make adequate provision for care at no or at an affordable cost to the recipient. Care may not be available at all in a strife-torn poor country. But it is not logically impossible for the rule to operate without arbitrariness or unjustifiable unfairness in the very limited number of cases in which admission may be granted. The Kruse v Johnson challenge therefore fails."

Mr Malik submits that, far from being impossible for anyone to comply with the rule, the vast majority of Tier 1 (Entrepreneur) applicants can and do comply with the rule and the Claimant's inability to do so is highly exceptional.

Discussion

25. In my judgment, although the rule operates in such a way that someone in the position of this Claimant cannot comply with it because she does not operate a PAYE system which involves submission of RTI, that does not make the rule invalid. It is not possible for a person such as this Claimant to define herself as a class, namely the class of those who do not provide RTI information and then, having so self-defined herself, then rely upon the doctrine of impossibility. The fact is that the policy of the legislation is to elevate the evidential requirements in applicants for Tier 1 Leave To Remain into part of the principle, not merely part of the practicality. As Burnett LJ (as he then was) observed in *Kaur v Secretary of State for the Home Department* [2015] EWCA Civ 13 at paragraph 41, the points based system "is designed to achieve predictability, administrative simplicity and certainty" and "it does so at the expense of discretion, that is to say it is prescriptive". Furthermore, as Sullivan LJ said in *Alam v SSHD* [2012] EWCA Civ 960 at paragraph 35, in noting there is no flexibility in the points based system, "the price of securing consistency and predictability is a lack of flexibility which may result in 'hard' decisions in individual cases." The case of this Claimant is

just such a "hard" decision but that does not mean that the rule is unreasonable. As Sullivan LJ further said at paragraph 45 in *Alam*:

> "I endorse the view expressed by the Upper Tribunal in *Shahzad* that there is no unfairness in the requirement in the PBS that an applicant must submit with his application all of the evidence necessary to demonstrate compliance with the rule under he seeks leave. The Immigration Rules, the policy guidance and the prescribed application form all make it clear that the prescribed documents must be submitted with the application, and if they are not the application will be rejected. The price of securing consistency and predictability is a lack of flexibility which may well result in 'hard' decisions in individual cases but that is not a justification for imposing an obligation on the Secretary of State to conduct a preliminary check of all applications to see whether they are accompanied by all of the specified documents, to contact applicants where this is not the case, and to give them an opportunity to supply the missing documents. Imposing such an obligation would not only have significant resource implications it would also extend the time taken by the decision making process, contrary to the policy underlying the introduction of the PBS."

In my judgment this all supports and underscores Mr Malik's submission that the provision of RTI, as part of the detailed system for calculating points under the PBS, has a rational and legitimate objective. Although he disputed, on the evidence, that the Claimant was unable to demonstrate that it was in fact impossible for her to comply with the rule, it is not necessary to resolve this dispute: upon the assumption that she is unable to meet the rule through no fault of her own, that is insufficient to establish that the rule is unreasonable and therefore unlawful.

Ground 2 discretion

26. The authorities relied upon by Mr Malik in supporting the lawfulness of Rule 46-SD also support the lack of discretion and the need for the Secretary of State to consider his/her discretion in a case where the claimant is unable to provide the necessary evidence.
27. For the Defendant, Mr Malik points out that the Claimant has not made an application for discretionary leave to remain outside the rules for which there is a specified form with a specific fee. The situation which has arisen here is identical to what happened in *Sayaniya v SSHD* [2016] EWCA Civ 85 where Beatson LJ said:

> "40. … In this case, the terms of the letter of refusal do not expressly refer to the Secretary of State's discretionary power to consider a case outside the rules in that language. However, section E of the letter headed 'Option to make new application' states that it is open to a person to submit a fresh application with full supporting evidence and the fee or to apply for leave to remain in another capacity again with the evidence and the fee.

> 41. The operation of this discretion to grant leave outside the rules in the context in which applications must be made before the expiry of leave or within 28 days of its expiry if they are treated as valid applications is unclear. The Secretary of State can take a considerable period to determine an application that was made before the expiry of a person's leave. She took almost eight months to make a decision on this appellant's application, so that by the time the decision was made he was well outside the 28 day period. The appellant has not, however, applied for such reconsideration and, not withstanding my concern, it would not be appropriate for the court to assume that the Secretary of State would regard herself as precluded by her decision on the application under the rules from considering an application outside the rules appropriately and lawfully. If, when an application is made, she does so regard herself, that decision can be challenged."

On that basis, Mr Malik submits that the Secretary of State was fully entitled not to consider discretionary leave outside the rules and he submits that there is no discretion to dispense with the evidential requirement to supply RTI information to an applicant within the rules.

28. In my judgment, Mr Malik is again right in his submissions. The system operates in such a way as to allow officials in the department to essentially 'tick boxes' in relation to any application and if a box cannot be ticked, for example because the required evidence has not been provided, then to reject the application. This enables the system to be operated efficiently, expeditiously and strictly: the strict operation of the system avoids the risk of different treatment of those who are unable to comply with the strict provisions and therefore the risk of discrimination or partiality. This was the import of the decision of the Court of Appeal in the various cases considered in *Mudiyanselage v SSHD* [2018] EWCA Civ 65. Underhill LJ, having surveyed the authorities, stated:

> "56. … The clear message of those authorities is that occasional harsh outcomes are a price that has to be paid for the perceived advantages of the PBS process. It is important not to lose sight of the fact that the responsibility is on applicants to ensure that the letter of the requirements of the PBS is observed: though that may sometimes require a good deal of care and attention to detail, because of the regrettable complexity of the rules, it will normally be possible to get it right."

Sir Brian Leveson P reiterated the point:

> "145. These are hard edged decisions but the requirements of the PBS, the rules and the guidance are precise. Those who seek to make applications of this nature must take the utmost care to ensure that they comply with the requirements to the letter; they cannot expect discretionary indulgence beyond the very limited areas provided by evidential flexibility. To such extent as this is not already obvious, it would be of value if any form or document made available to applicants to assist them made clear

> the vital importance of ensuring that the material provided meets the precise requirements of the rules on the basis that it cannot be assumed that there will be a subsequent chance to correct or supplement that which has been provided."

29. For the above reasons, in my judgment this application for judicial review must fail.

30. However, I would wish to add this. It seems to me to be arguable that, in her particular circumstances, this Claimant has in fact provided the same job creation as would be provided by someone who has created full-time rather than part-time jobs and who therefore operates a PAYE system with submission of RTI. Thus, the system appears to operate to let the person who has provided the full-time jobs with RTI to be able to provide the necessary evidence for Tier 1 (Entrepreneur) leave to remain but the person who has provided only part-time jobs and who does not operate a PAYE system not to be able to do so. If, therefore, this Claimant were to make an application for leave to remain outside the rules, I would hope that the Secretary of State would consider such an application sympathetically given the circumstances. However, this will, in the end, be a matter for the Secretary of State to consider in the exercise of his discretion and if such an application were to be refused, then any challenge to that decision would have to consider the precise basis for the decision and the matters relied upon. As it is, this application for Judicial Review is dismissed.