IAC-FH-LW-V2

IN THE UPPER TRIBUNAL

JR/04568/2018

Field House,
Breams Buildings
London
EC4A 1WR

9 April 2019

THE QUEEN
(ON THE APPLICATION OF)
DANISH TAJ

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE ALLEN

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Mr Z Malik, instructed by Pioneer Solicitors appeared on behalf of the Applicant.

Mr N Ostrowski, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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JUDGE ALLEN: The applicant seeks judicial review of a decision of the Secretary of State dated 5 April 2018 refusing his application for leave to remain as a Tier 1 (Entrepreneur) Migrant. The respondent was not satisfied that the applicant had met the requirements to enable him to be awarded 10 points under Appendix C of the Immigration Rules and refused his application as it was decided he had not met the genuineness test of paragraph 245DD(k) when assessing on the balance of probabilities the points listed at paragraph 245DD(l) of HC 395.

1. Mr Taj had previously been granted leave to enter the United Kingdom as a Tier 4 (General) Student, on 18 December 2009. That leave was until 17 February 2011. On 24 February 2011 he was granted leave to remain in the United Kingdom as a Tier 4 (General) Student until 23 November 2011, and on 15 December 2011 he was granted leave to remain in the United Kingdom as a Tier 1 (Post-Study) Migrant until 15 December 2013. Subsequently, on 26 February 2014 he was granted leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant until 26 February 2017. He made the application which led to the decision under challenge on 22 February 2017.

2. In the decision letter the respondent set out various concerns under the heading “Non-Points Scoring Reasons for Refusal”. The respondent was not satisfied that the applicant had established, taken over or become a director of one or more genuine businesses in the UK and had genuinely operated that business; he was not satisfied that he had genuinely invested the money referred to in Table 5 of Appendix A into one or more genuine businesses in the United Kingdom, 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.

3. The decision-maker set out the seven criteria noted down at paragraph 245DD(l) of HC 395, which had been considered it was said, concentrating particularly on items (i), (iv) and (v).

4. With regard to the credibility of the applicant's business activity in the United Kingdom, the respondent noted that he had named two clients, Avid Support Limited and Core Atlantic Limited. He had said that for Core Atlantic Limited he set strategies, aims and priorities and held progress and review and provided internal and external audits and also provided marketing and business plans. For Avid Support it was stated that he did web design, market research and action plans.

5. Concerns were raised due to the fact that no details of Avid Support Limited could be found at Companies House matching the details stated on his contract with them or any details he had provided about them during the interview. It was noted that there was a company named Avid Support Ltd listed at Companies House but their 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 to this, Companies House showed that Avid Support Ltd had not had any other trading addresses since it was incorporated on 10 June 2016. It was said that the fact that the above details differed in such a way raised concerns as to the credibility of his contract and the credibility of his business activity in the United Kingdom as a whole.

6. The point was also 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.

7. In addition the respondent said that he had been unable to find any other online presence for Avid Support Limited such as a website, and the fact that the applicant claimed to have conducted web design for them but there was no evidence of them having a web presence further added to the existing concerns.

8. He had been asked to provide details of any market research he had carried out prior to investing in his business. He said that he had researched local businesses such as Core Atlantic Limited to find out what they needed and how he could provide it. When asked the results of his market research he said as follows: “Very positive especially after brexit (sic). All companies are looking for staff. Core Atlantic Ltd very short of staff”.

9. This response was regarded as contrasting with previous responses he had provided and also the contracts he had provided with regard to the nature of the work he claimed to conduct. It was said that his response gave the impression that he recruited staff for their business which raised concerns as this called into question his earlier responses provided with regard to the type of work carried out for Core Atlantic business.

10. A further point of concern was that the visiting officer at the interview had observed that there was no visible sign at the premises displaying his company name. The applicant was told by the officer that Companies House legislation said that he was required to erect a sign showing his company name and his registered company address and wherever his business operated. He was then asked to explain why he had not chosen

to comply with this requirement to which he replied by saying he was waiting for a sign to be put up but was not sure when this would be. His apparent lack of awareness of the relevant legislation and apparent lack of urgency to erect a sign further added to existing concerns regarding the credibility of his business operations.

11. Under (v) when he gave details as to where his employees worked from he said that they mostly worked from his business premises but occasionally worked from home. He was asked to provide details regarding any health and safety requirements he had in place at his business premises to which he replied that he had none. This was said to add to existing concerns, as it would be a mandatory requirement for any employer in the United Kingdom and his little awareness of it raised concerns as to the genuineness of his claimed job creation.

12. A final concern was that the interviewing officer observed on visiting the business premises that the office was very small and questioned whether it was feasible that two employees and a director could realistically conduct work in such a space. This was regarded as casting further doubt upon the credibility of his job creation and business activity in the United Kingdom.

13. Permission to challenge this decision was refused on the papers by Judge Kekić but subsequently granted following an oral hearing by Judge Kopieczek.

14. In essence the challenge is made first on the basis that the respondent’s decision is procedurally unfair; and secondly, that it is irrational. These points were developed in the skeleton arguments and in submissions before me, and I shall address the points made below.

15. There was a preliminary issue raised by Mr Ostrowski concerning the amended witness statement which had been put in by the applicant. It was accepted that permission had been granted by a Tribunal lawyer to admit the amended witness statement, but it was argued that the evidence was interwoven with submissions and comment which was entirely improper in the statement and also there was no statement of truth as required by the CPR.

16. Mr Malik agreed that there were submissions and comments in the statement and that was improper, but there was no application to set aside the lawyer's decision and he was content if it were admitted for little weight to be attached to it.

17. I stated that the evidence had been admitted by the Upper Tribunal lawyer, and there had been no application to set it aside and it would remain part of the relevant documents in the case, though bearing in mind in particular the fact that it was not signed contrary to CPR requirements I would attach little weight to it.

Submissions

18. In his submissions Mr Malik noted in reference to the interview notes that there were misspellings, for example in Core Atlantic's name which was spelt as "Gold" and in relation to Avid Support: "Support" was written as "Sport". This was important with regard to the online presence issue. There were only follow-up questions at questions 8 and 9. Question 15 concerning Core Atlantic and the search for employees issue was linked to question 14 and was concerned with the market research carried out before the business was set up. The applicant had given candid answers. Likewise, with regard to Companies House legislation and the sign, the answer was set out. It was unclear what was meant by health and safety

matters and the respondent had taken issue with the recorded answer, but that was what the note said. The interview notes were the Secretary of State's evidence. Mr Malik accepted that usually in judicial review proceedings the Secretary of State's evidence would be accepted as being accurate unless certain exceptions applied and that it would be unrealistic for him not to accept that the Tribunal was likely to prefer this evidence and he was content to proceed on that basis, but he argued that in any event on the basis of the evidence the applicant should succeed.

19. In Mushtaq [2015] UKUT 224 (IAC) guidance was provided as to how interviews should be conducted. The purpose of the interview was to give a fair opportunity for the interviewee to respond to potentially adverse matters. The gist of the case to be answered was to be put to the applicant before the decision was taken. The Entry Clearance Officer's concerns in that case had not been put to the applicant at the interview.

20. Reliance was also placed on Anjum [2017] UKUT 406 (IAC) which was a Tier 1 (Entrepreneur) case. Reliance was placed in particular on paragraphs 19 to 21 and 25 to 28. The relevant principles were set out there. A rounded assessment of all the relevant factors set out at paragraph 245DD(l) was required and the evidence submitted could not be ignored with the focus being on something else.

21. In the instant case it could be seen that nothing had been said about (ii) or (iii) but the decision-maker jumped from (i) to (iv).

22. Mr Malik had four particular points to make. The first raised concerns arising from the decision letter at page 47 of the trial bundle where the concerns about alleged discrepancies in identity of individuals and addresses was not put to the applicant at the interview as required by Mushtaq and Anjum.

The point contrasting Limited with Ltd was absurd and there was no sense to the distinction being drawn. The point about the different signatory for the director and a different address from the Companies House address was not put to the applicant at interview. The contract between the applicant's company and Avid Support Limited could be seen at page 225 of the bundle. It could be seen there that Amad Masood was the authorised signatory and the address given was 414B, 4th Floor, Victoria House, Victoria Road, Chelmsford. The contract did not say that Mr Masood was the director and that was relevant to the Secretary of State's point that Mr Masood was the authorised signatory and the manager. The contract did not say he was the director. Also it gave the trading address. The Secretary of State was wrong if he was saying that only a director could sign a contract and that was irrational. It was also irrational if the Secretary of State said that a company could only use the address on the Companies House register. Any concern there was with respect to the client and not the applicant.

23. Mr Malik's second point was that the concern of the Secretary of State about the lack of an online presence for Avid Support Limited had not been put to the applicant and it was unfair. No details had been provided as to the research carried out, which search engine had been used (if any) and when it had been done. There was nothing in the point. There could be a website but it is not available from the particular search engine or it might have been down at the time. An explanation could have been provided if the applicant had been asked. Again it was a concern about a client and not about the applicant's company and was manifestly unfair and irrational.

24. With regard to the point about market research and Core Atlantic Limited, the response of the Secretary of State in respect of this was irrational. If there were any ambiguity

the burden was on the officer to ask follow-up questions which, if put to the applicant, would have been answered. In any event it was irrational to take the answer as meaning that he was providing recruitment services to Core Atlantic. There was no basis for that conclusion. In answer to question 7 he had said what services he was providing.

25. Mr Malik's next point concerned the reference to Companies House legislation and the need to display the company's name at the premises. Mr Malik was aware of no such legislation and there was no basis for this being a legal requirement, and in any event it only recorded part of the applicant's answer. He had said that there was no sign as the office was shared. There had been a failure to recognise the applicant's answer, and to fail to engage with his answer was irrational. Again the matter should have been followed up if there were concerns and it was unfair not to put the concerns to the applicant.

26. The next point argued by Mr Malik concerned the reference in the decision letter to health and safety requirements. It was not known what this meant. It was not a question concerning the applicant's awareness of his obligations and it was not put to the applicant in that form and should be contrasted with his answer elsewhere in the interview concerning employees' rights where he had given a fair answer. If a parallel question had been put as to what he understood the law to be then he could have answered it. There was no basis for concluding that the lack of awareness about health and safety justified the conclusion reached. He had complied with all that the law required him to do.

27. The final point concerned the issue about the size of the office. It was considered that it was doubtful that three people could work in such a space and this cast doubt on the credibility of the application. There was no clarification of

what “very small” meant. The officer had taken no measurements. The respondent had failed to engage with the answer given. In response to question 47 at the interview it could be seen that employees sometimes worked from home so there was no basis to conclude that all of them worked at the same time from the premises, but anyway there was no evidential basis to find the premises were not fit for purpose for three employees. The question had not been put to the applicant and he had not been asked what the measurements were or asked follow-up questions and this was unfair and irrational. The respondent had been unaware that all three did not work there at the same time and had not taken this into account.

28. The decision-maker had not addressed sub-paragraphs (vi) and (vii). Points were denied as the respondent was not satisfied as to genuineness not because relevant documents had not been put in. The decision was as a consequence irrational and unfair.

29. In his submissions Mr Ostrowski first of all took me to authorities concerned with PBS cases and in particular EK (Ivory Coast) [2014] EWCA Civ 1517 which contrasted the context of that case which was a PBS case with the situation in Doody [1994] IAC 531 where what was at stake was the liberty of the subject. Though the circumstances were very different from the instant case, this was relevant with regard to the nature of PBS cases. It should be noted that doubt had been cast on what had been said by the Upper Tribunal in Naved [2012] UKUT 14 (IAC), criticising it on the basis that it paid insufficient attention to the issue lying at the heart of cases in this area, which concerns the fair balance to be struck between the public interest in having the PBS regime operated in a simple way and the interests of a particular individual who may be detrimentally affected by such an

operation. Reference was also made to Talpada [2018] EWCA Civ 841 at paragraph 36, quoting from Underhill LJ in Mudiyanselage [2018] EWCA Civ 65, paragraph 56, that occasional harsh outcomes are a price that has to be paid for the perceived advantages of the PBS process, and also at paragraph 145 in that decision that those who seek to make applications of a PBS nature must take the utmost care to ensure that they comply with the requirements to the letter.

30. As regards the process in this case, this was the applicant's second entrepreneur visa application. He was able to put in whatever he wanted and there was no need for an interview but it seemed to be the Secretary of State's practice to carry out interviews. The interview had to be for the purpose of assessing the application and the supporting evidence with the PBS requirements and to show there was a credible business being operated by the applicant. He clearly understood the purpose of the interview. It was relevant also to note his declaration at the end of the interview that he had understood the questions put to him, confirmed that he had been given the opportunity to provide additional information relevant to his application or clarify the information he had already given and had been given the opportunity at the end of the visit to make further comments. It was clearly appropriate for Mr Malik not to challenge the veracity of the interview record given the declaration. The applicant had had the opportunity to be accompanied by a representative and had chosen not to. He was completely free at interview to answer however he saw fit and to provide additional information as he saw fit.

31. Mr Ostrowski's next point concerned the practical consequences if the applicant's argument was right with regard to fairness. In essence he was saying that if there was inconsistency between what he said and external information that any concerns should be put to the applicant, or if there was an

inconsistency between internal documents and answers at interview, then the interviewer should put that to the applicant and also perhaps put to him where there were adverse conclusions to be drawn from what he said at interview. These covered the factors set out by Mr Malik which were said to come out to procedural unfairness.

32. If the applicant were right then it would require a radically different interview process from that currently in existence. It would make a quite lengthy interview a lot longer (this interview had lasted nearly two hours). Every answer given would require consideration of whether it contradicted something external or internal and the interviewer would have to decide whether he or she was likely to come to adverse conclusions and if so whether that needed to be put to the applicant. It would be lengthy, disjointed and never-ending. One interview might lead to another and that to a third or even possibly a fourth. More was being required than procedural fairness demanded here.

33. As regards the principles set out in Doody, the fifth principle stating that there must be an opportunity to make representations had clearly been met. The sixth requirement that the gist should be made available was also satisfied in that that came from the requirements of the Rules themselves. From cases such as London Reading College [2010] EWHC 2561 (Admin) and Liral Veget [2018] EWHC 2941 (Admin) and Bayani (1990) 22 HLR 406, it was clear that there was an irreducible minimum of information an applicant should be given and that had been given. The applicant knew what the Secretary of State's concerns were from the structure of the PBS system and more specifically from the questions asked at interview. These showed the Secretary of State's concerns and that was the mechanism by which the decision was made. What had to be satisfied was within the Rule and it was wholly within the

applicant's control, in contrast to cases where the concerns were about employees such as in Liral Veget. In B [2003] EWHC 1689 (Admin), the question at paragraph 50 was the need to be careful not to impose unrealistic and unnecessary burdens on those required to make the decisions.

34. With regard to the authorities relied on by Mr Malik, what was said in Mushtaq was problematic as there would be circumstances or adverse matters which would not immediately be in the interviewer's mind. In that case there were obvious limitations with the interview questions and the conclusions drawn, in contrast to this case. As regards Anjum, a misunderstanding of answers was at the heart of the case, whereas in the instant case it was more an argument that the applicant should have had the chance to expand on answers given.

35. With regard to the points made by the applicant, it was accepted that the point about different names and trading addresses had not been put to him, but that was in the category of matters which had been raised by Mr Ostrowski concerning discrepancies between what was said at interview and what was now known from hundreds of pages of supporting documentation. The gist of the concern was whether it was a legitimate business or not. The online presence point was an external matter and it would be unreasonable for the Secretary of State to have to identify such a point during the currency of the interview. It did not matter that no details had been given as to when it had been sought to access web presence. The gist was raised in the interview. Requiring a checking process demanded too much.

36. Whether or not questions 14 and 15 were linked, it was open to the respondent in light of the answer given to question 15 to

regard it as contradictory to the answer given to question 7 and the respondent was entitled to take it at its face value.

37. With regard to the health and safety point, the response was a simple one and the question was clear. It was not unfair to place reliance on that. Question 47 was a more detailed question, but it was not a question of whether more detailed questions could have been asked, rather whether it was procedurally unfair to rely on a simple answer to a simple question.

38. The issue as regards office size was not a question but a conclusion resulting from the site visit. There was no reference to the legislation about the amount of size required but the question was whether it was feasible.

39. The decision was based on an amalgamation of the answers given rather than on particular ones. As regards the point about having to have a company name at the premises, this was required in the Companies (Trading Disclosures) Regulations of 2008 at regulation 3, so there was an obligation.

40. As regards irrationality, there were four discrepancies in respect of the director/manager and the address of the company and no explanation had been given. It was a high hurdle to show irrationality as it had to amount to an outrageous defiance of logic in the decision that no sensible person could arrive at. In light of the discrepancies which were of varying degrees of importance, it was open to the respondent to conclude as he did. The same general point held true with regard to the signage and the health and safety and size of the premises points. There was no irrationality in the decision.

41. By way of reply Mr Malik argued that cases such as EK (Ivory Coast) and Talpada were concerned with the points scoring

aspects of the points-based system in contrast with this case. Paragraph 28 of EK made that clear. Authorities such as London Reading College were, Mr Ostrowski accepted, plainly different and the considerations in those cases did not apply here. There were challenges to decisions to revoke sponsor licences and there would be decisions after suspension and an opportunity to respond to concerns. Likewise with Bayani and B. They were different cases. There was no issue with regard to a failure to make enquiries with third parties in this case. The relevant authorities were Mushtaq and Anjum and they provided the proper guidance for the Tribunal in this case.

42. It was too late to raise the point about regulations concerning the requirements of the company's name. The point had been made that there was no reference to any such regulation and it was too late to raise it now. It should be borne in mind that there were points in Mr Ostrowski's schedule which did not appear in the decision, and the Tribunal had to consider the lawfulness of the decision rather than any explanation of points in it made subsequently. The decision-maker had not engaged with sub-paragraphs (ii), (iii) and (vii) of paragraph 245DD(l). It had not been argued that if there were irrationalities the Tribunal should use its discretion to refuse in any event. The decision was unlawful for the reasons given.

43. I reserved my decision.

Discussion

Fairness

44. A valuable starting point will be what was said in Doody [1994] 1 AC 531 at 560, in particular Lord Mustill's fifth and sixth principles, as follows:

> "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 that:

> "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".

45. EK (Ivory Coast) is as is said at paragraph 1 of the judgment of Lord Justice Sales concerned with the application of the general public law duty of fairness in the context of the points-based system for applying for leave to enter or remain in the United Kingdom.

46. In paragraph 36 Sales LJ specifically contrasted the context in that case with that in Doody. He noted that in that case what was at stake was the liberty of the subject, whereas the PBS regime was intended to minimise the need for making sensitive and difficult evaluative judgments of the kind that fell to be made by the Secretary of State in Doody, and the interests of applicants which are at stake were of far less weight. He went on to say that in the present context what is in issue is whether an applicant for leave to enter or remain can persuade the Secretary of State to grant them something in relation to which they had no prior right or expectation, in accordance with a simple and mechanistic points system.

47. I do not read this guidance as confined to the particular type of points-based case with which the Court of Appeal was

concerned in EK. It is in my view sufficiently clear from the language used by Sales LJ that it was intended to have general application to points-based system cases, and noting the contrast between those and cases with facts such as those in Doody. Likewise, in Talpada, I note the quotations there at paragraph 36 from Mudiyanselage and also at paragraph 37 that the points-based system can lead to "harsh outcomes" and "hard edged decisions". 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. These are all important points of context.

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.

49. Mushtaq sets out the uncontroversial proposition that common law principles of procedural fairness apply to the decision making processes of Entry Clearance Officers. It is said that the interview serves a 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 fifth and sixth general principles enunciated by Lord Mustill in Doody were particularly borne in mind.

50. There is however a further point to be borne in mind in relation to Doody which comes through in EK (Ivory Coast) and other authorities, and that is,as set out above, the importance of context. As noted in EK, the context in Doody was very different from that of PBS cases, and the issue of context particularly with regard to those two general principles was not a point specifically addressed in Mushtaq, though it is clear from Doody itself that context is important. The Tribunal found irrationality in respect of two of the factors identified by the Entry Clearance Officer in that case as being adverse, three being regarded as giving

rise to procedural unfairness, in that specific matters which caused the interviewing officer concern were not put to the applicant. A general point made at paragraph 19 was that fairness will often require that the interviewer invite the subject to clarify or expand an answer or probe a response.

51. As noted, there is no direct reference in that case to the need to consider the context of fairness, and also it was not a PBS case where the particular general points made in EK (Ivory Coast) have relevance.

52. Anjum however was a PBS case. It was said there that an immigration interview may be unfair, thereby rendering the resulting decision unlawful, where inflexible structural adherence to prepared questions excludes the spontaneity necessary to repeat or clarify obscure questions and/or to probe or elucidate answers given. It was concluded that on any reasonable and fair showing the interview answers demanded further probing and clarification together with a linkage to the business plan. As Mr Ostrowski pointed out in his skeleton argument, Anjum turns upon the interpretation of the applicant's answers to questions concerning the development of his business and the acquisition of an additional business rather than as in this case answers to practical and specific questions about the operation of his business. The further point he makes is that in Anjum the applicant was not given the chance to comment on correct or amplify an area of his responses which again contrasts with this case.

53. A further point of contrast is that there is no recognition in Anjum of the PBS context which, as I have noted above, I consider to be of significance. Accordingly, I consider that it is better regarded as a decision on its own facts.

54. In examining the facts of the case in the appropriate legal framework, I proceed to consider the fairness issue first,

bearing in mind the basis upon which the decision was made and addressing the question of whether the Secretary of State's process in this case was procedurally unfair.

Procedural Unfairness

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.

56. Bringing these matters together, I consider that no procedural unfairness has been identified in this case, bearing in mind the PBS context, and the specific concerns of the Secretary of State.

Rationality

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).

58. The first point here is the issue concerning the company and the directors/managers' names. I should start by saying that I 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. Of more substance is the fact that the contract which the

Secretary of State saw showed Avid Support Limited's trading address as being the Victoria Road, Chelmsford address and the authorised signature being that of the manager, Mr Amad Masood. However, the details for Avid Support Limited at Companies House gave the Brisbane Road, Ilford, Essex address and the director as being Jawad Bhatti. The fact that the Chelmsford address is described as the trading address on the contract does not seem to me to be a matter of major significance. In my view it was open to the respondent to have a concern about the different addresses provided and the fact that the contract was signed by Mr Masood the manager and there was no reference to the director Mr Bhatti.

59. Of further and perhaps greater significance is the absence of any online presence for Avid Support Limited such as a website. The applicant had claimed to have conducted web design for Avid Support but there was no evidence of them having a web presence and that understandably added to the concerns of the decision-maker. Again I see no irrationality in that regard. It is purely conjectural to suggest that the site might have been down or to argue that the respondent could and should have provided details as to which search engine he used and when the researches were carried out. The point is a clear one in the decision letter and it was a legitimate matter of concern.

60. The next point concerns what the applicant said in answer to question 15 when asked what the results of his market research were and he made reference among other things to Core Atlantic Limited being very short on staff. This was treated as contrasting with his answer as to the work that he did under the contract with Core Atlantic which had no reference to recruiting staff. In this regard I think it was again open to the respondent to be concerned as he was about the answer. It is 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. It may only have been a clumsy answer, but it was the answer given and it was one which the respondent was entitled to regard with some concern.

61. The next point concerns the absence of a visible sign at the premises displaying the company name. The fact that the respondent did not identify the relevant regulations that require direction of a sign showing a company's name and its registered company address or wherever it operates in no sense in my view invalidates the point made there that there was, as it was described "Companies House legislation" setting out that requirement. The applicant's response was simply that there was "no sign of company as office is shared called Swiss Estates". The applicant stated he was waiting for a sign to be put up but he was unsure of when this would be. Although the first part of that is missing from the respondent's consideration of the evidence, that is of no materiality. Whether or not the office was shared the legislative requirement exists, (the Companies (Trading Disclosures) Regulations 2008, regulation 3) and the respondent was legitimately concerned at the failure to comply with the relevant regulation, which was not irrelevant to the credibility of the business operation.

62. The same point can be made with regard to the question put to the applicant as to what health and safety requirements he had in place at the premises, to which his answer was: "None". In my view the question was a simple and clear one. The respondent was not obliged to set out in any detail what health and safety requirements he was referring to. Although the applicant gave greater detail when asked at question 42 what rights his employees were entitled to under employment law, the absence of any health and safety requirements in

place at the premises is again a matter which gave rise to understandable concern as to the genuineness of the claimed job creation.

63. The final point, that of the size of the office and the concerns of the officer as whether it was feasible for two employees and a director realistically to conduct work in such a space, this is a matter of lesser significance. It was a judgment based not on measurements but simply on a view taken, bearing in mind that the applicant said in interview that his employees worked on the shop site but occasionally worked from home and therefore it was reasonable to infer that three people would be using the room. As I say it is not a major point, but it is not a point entirely lacking in substance and was part of the overall consideration. I bear in mind Mr Malik's point that the decision-maker only specifically addressed sub-paragraphs (i), (iv) and (v) of paragraph 255DE(l). It was however made clear at page 2 of 8 of the decision letter that the respondent had considered the following factors and it can be taken from that consideration that there were no concerns about the matters that were not specifically addressed, i.e. sub-paragraphs (ii), (iii), (vi) and (vii). That in my view does not, in any sense, invalidate the decision. The respondent reminded himself at page 6 of 8 that the genuineness test had not been met when assessing on the balance of probabilities the points listed at paragraph 245DD(l).

64. In conclusion, I consider that the irrationality challenge, like the fairness challenge is not made out. The respondent's decision taken overall represents a conclusion on the evidence in the context of the correct legal test that has not been shown to be irrational, bearing in mind in particular the high threshold for irrationality laid down in the case law.

65. It follows that this application is refused. I will hear the parties on costs and any ancillary matters at the handing down of the judgment unless such matters can be agreed in advance.~~~~*0*~~~~