IN THE UPPER TRIBUNAL

JR/202/2020 (v)[1]

Field House,
Breams Buildings
London
EC4A 1WR

1st September 2020

THE QUEEN
(ON THE APPLICATION OF MR FARHAN AHMAD FARID)
Applicant

and

THE SECRETARY OF STATE FOR HOME DEPARTMENT
Respondent

BEFORE

UPPER TRIBUNAL JUDGE RIMINGTON

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Ms M Gherman, instructed by Farani Taylor Solicitors appeared on behalf of the Applicant.

Mr W Irwin, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGEMENT
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[1] The coding in this order is in accordance with the Senior President's Judges' and Members' Administrative Instruction No. 2

JUDGE RIMINGTON: The applicant challenges by way of judicial review the defendant's decision dated 28th August 2019 ("the Decision") refusing the applicant's entry clearance application as a Tier 1 (Entrepreneur) Migrant under the points—based system and maintained by an Administrative Review decision dated 17th October 2019.

2. The applicant is a Pakistan national who wished to undertake a franchise from Wolf Italian Street Food. His application was refused under paragraph 245DB(f) of the Immigration Rules. The other requirements of the points—based system were satisfied.

3. The history to the application was that the applicant was refused entry to the United Kingdom in 2014 and 2015 as a visitor and in May 2017 he applied for entry clearance as a Tier 1 (Entrepreneur) Migrant and his application was refused by an Entry Clearance Officer on 9th June 2017 following an interview on 8th June 2017. Following an agreement by the respondent to reconsider the decision his application was again refused on 11th June 2018 following interviews on 16th May 2018 and 25th May 2018 (second and third interviews) but once again the respondent agreed to reconsider the application. Following an interview on 17th June 2019 (the fourth interview) the Entry Clearance Officer again refused the application and an administrative review dated 17th October 2019 maintained the Decision.

4. The decision of 22nd May 2017 refused the application on the basis that in his first interview the applicant stated his intention was "to open a franchise Italian fast food 'Wolf Italian Street Food'", that he had £200,000 in his account to invest in his business which had been given to him by a friend, Mr Syed Ali, but he had failed to demonstrate a viable business plan and there were inconsistencies in his projections of his growth profits. Following permission to

appeal being granted by Upper Tribunal Judge Southern the respondent agreed to reconsider her refusal and the judicial review application was withdrawn by consent. The second refusal was made on the basis of his lack of experience in the "food industry" and it was noted that he did not have an investment partner but he had sourced the funds from a business partner of his in Pakistan and that he was attempting to relocate to the UK for personal reasons rather than pursue an entrepreneurial endeavour. Overall, his responses raised a concern as to the level of knowledge attained and research conducted concerning his market and the business environment he wished to target.

5. On 19th and 22nd August 2019, following the fourth interview, the applicant's solicitors provided updated documents showing that the third party who had provided the £200,000 for investment had changed.

6. The application was again refused for the third time. Judicial review proceedings were commenced on 17th January 2020 and Upper Tribunal Judge Coker granted permission on 19th February 2020 as follows 'although the grounds are lengthy and read initially as a disagreement with the decision reached, overall it is arguable that the decision of the respondent is infected by public law error'.

7. The relevant immigration rule sets out as follows:

> *"245DB. Requirements for entry clearance*
>
> > *To qualify for entry clearance as a Tier 1 (Entrepreneur) Migrant, an applicant must meet the requirements listed below. If the applicant meets those requirements, entry clearance will be granted. If the applicant does not meet these requirements, the application will be refused.*

Requirements:

…

(f) *Where the applicant is being assessed under Table 4 of Appendix A, the Entry Clearance Officer must be satisfied that:*

(i) the applicant genuinely 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;

(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) that 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 245DC.

(g) *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.*

(h) *In making the assessment in (f), the Entry Clearance Officer will assess the balance of probabilities. The Entry Clearance Officer 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; and

(vi) any other relevant information."

8. The challenge to the Decision cited effectively three grounds,

(i) the interviews were conducted in a procedurally unfair manner,

(ii) the adverse credibility findings were irrational and/or arrived at in a procedurally unfair manner and

(iii) the respondent failed to take into account material evidence relating to the applicant's employment and education and the applicant's business plan.

9. Ground (i) In the first ground it was submitted that the manner in which the interviews were conducted was procedurally unfair, the poor transcribing of the interviews had prejudiced the applicant and his answers could not properly be analysed and assessed by the decision maker and some of the transcribing did not make sense . There was a use of ellipses because the interviewer could not hear the applicant thereby cutting out the answers, making them difficult to understand and causing them to jump between topics. The challenge concentrated on the fourth interview, which had asserted that the interviewer seemingly could not hear the applicant but did not alert him to the same. For example

"*8. …*

- *Q.9, p.64: 'sounded like'*
- *Q.11, p.64 'production of (something)'*
- *Q.14, p.66: '… (Mumbling) …'*
- *Q.19, p.67: '(… something like blame again)', '(Mumbling)'*
- *Q.24, p.71: '… so why should … … … … … … … … and … … .'*
- *Q.32, p74: '(Something not understandable)'*
- *Q.33, p.75: '(mumbling …)'*
- *Q.35, p.76-77 '(something mumbled)', '(not sure of name)', '(not sure of name mentioned)'*

- *Q.36, p.7 ' (mumbling…)'*
- *Q.37, p.77: '(unclear)'*
- *Q39, p.79: '(unclear – annually …??)'*
- *Q.40, p.79: '(Some name mentioned – Tim Entwistle – Looked up on Google)', '(Requested to repeat name and spell) Then (Rainbran …??)', 'This is early morning …??'"*

10. It was asserted that simply because the applicant indicated he was happy at the time did not mean that the interview was procedurally fair, which it was not. Reliance was placed on **R (on the application of Anjum) v Entry Clearance Office, Islamabad (entrepreneur - business expansion - fairness generally) [2017] UKUT 00406**, which at the headnote set out:

> *"(ii) 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."*

The decision maker had relied almost exclusively on the interview in coming to the decision that was not properly transcribed.

11. The applicant was asked about his business plan at question 19 and was accused of skirting around the question but he was not given the chance to rectify this before the line of questioning moved on. It was incumbent upon the respondent to put this matter to the applicant before making such an adverse credibility finding. That was procedurally unfair.

12. Reliance was also placed on **Mushtaq, R (on the application of) v Entry Clearance Officer of Islamabad, Pakistan (ECO procedural fairness) [2015] UKUT 224**, in particular where the headnote recorded:

> *"(ii) ECO 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."*

13. The grounds referred to **Balajigari v Secretary of State for the Home Department [2019] EWCA Civ 673** and **R (ex parte Doody) [1994] 1 AC 531,** which stated the following principle:

> *"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."*

14. Although the defendant argued that the applicant was asked numerous times as to his business plan the interviewer did not explain when his answers were unsatisfactory for him to comment so that he knew the gist of the case he had to answer and this was an example of inflexible structural adherence to prepared questions.

15. Ground (ii) Intertwined with the procedural fairness challenge it was asserted that the adverse credibility findings were irrational and examples were given.

> *"a. Input into business plan"*

16. The applicant gave responses which showed he was a genuine entrepreneur and indicated his research input into his

business plan in the third interview. It was incumbent upon the respondent to put the matter of 'skirting around' the business plan rather than moving on immediately.

"b. Plans for the future and product knowledge"

17. The applicant gave various answers in relation to the future of his business and at no point was it put to the applicant he had not given adequate answers. There was no indication as to when it was put to the applicant that his answers were unsatisfactory for him to comment. He was criticised because he had never visited an Italian street food establishment but he was not asked about this.

"c. Failure to know minimum wage"

18. It was conceded that he did not know the UK minimum wage but this was not material or substantial. He gave a full breakdown of the number of people he would employ and in the third interview had given answers in relation to his proposed business in the UK and his extensive research.

"d. Location"

19. The applicant had no entry clearance to visit the UK and therefore to make adverse credibility findings on this basis and criticise the applicant for not entering the UK was irrational. He could not be criticised for not choosing another specific location in the United Kingdom but he had stated that the Wolf franchise had a property adviser. This indicated he was a genuine entrepreneur. The applicant had always indicated Hounslow as a proposed area but in the event, he did indicate that Scotland could be a choice for the future owing to the franchise's expansion there but it was not a requirement of the Immigration Rules that he had to have many location options in mind. He had given reasons for the choice of Hounslow and outlined the research such as the UK food

eating out market was growing rapidly and the food business in the UK was growing rapidly. There had been a decrease in unemployment and an increase in national wages (question 27) and the UK £16,400,000,000 food market was expected to grow (question 27).

20. The applicant clearly had done detailed research in relation to the location of his proposed future business.

"e. Marketing and fund allocation"

21. The applicant was asked how he would spend the £200,000 and did not mention what funds would be used for marketing (question 30 of the fourth interview) but later went on to state that £70,000 would be used for marketing over a three year period. The respondent claims that this shows the applicant was not able to "talk about how they propose to spend their funds and how they would use them to aid the business" but the applicant had clearly explained the marketing budget was derived from circa 4% of the net revenue.

22. If the Entry Clearance Officer specifically wanted a breakdown of the £70,000 s/he could have asked this question but did not.

23. The Decision did not explain how the applicant rationally did not have sufficient knowledge of his expenditure or explain why his answers were not satisfactory. The Entry Clearance Officer did not give the applicant an opportunity to clarify his answer at question 39.

24. The applicant discussed the allocation of funds and financial breakdowns in the following questions in interview.

Question 21 (salaries),

question 30 (fees for the business unit, legal fees, royalties, equipment, infrastructure, furniture),

questions 40 to 43 (turnover for his business),

question 44 (the calculation of those profits) and

questions 40 and 46 (fees to be paid to the franchisor).

25. It was submitted that this demonstrated him to be a genuine entrepreneur and the respondent had failed to consider the detailed responses to other answers.

"f. Reasons for relocating"

26. The applicant was criticised for allegedly relocating for personal reasons rather than to pursue a business but he had been through over two and a half years of litigation, showing his commitment, and any decision to move must be one that involved a personal consideration. The applicant had extensive research of his local area. To only reference one statistic, that is the 2001 census, was an artificially restrictive analysis of the applicant's evidence.

Third ground: Failure to take into account material evidence

27. The applicant had substantial experience in the food industry and the respondent had not even made a cursory reference to this in the refusal. He had tertiary education in the form of a BSc in agriculture with significant emphasis on food technology and had been employed in the food industry and food supply chains, for example at PepsiCo in Pakistan. His most recent employment in the agrochemical sector was based on food technology.

28. The respondent indicated the applicant had worked in the 'potato industry', which artificially diminished the applicant's background and skills. The respondent averred in

the response to the pre—action Protocol that this experience was not entirely transferable to an Italian street food establishment but no rational reasons were given why extensive academic experience in the agricultural field and years of experience in business and the food industry were not transferable. This was irrational and a baseless assertion. The applicant had extensive educational and employment experience.

29. Further, there was a failure to take into account material evidence in the form of a business plan. The applicant had provided an extensive business plan setting out all the above—mentioned business considerations but none of it had been considered by the respondent nor had the respondent explained why no weight should be placed on this professional and detailed document. There was one reference to one statistic and this did not show the respondent took the plan holistically or properly into account.

30. The respondent also argued that the applicant was unable or unwilling to explain involvement in the plan but it was submitted that this was not the case.

The respondent's defence

31. In response, the respondent addressed the grounds in a different order but submitted that:

32. Ground 1: Procedural fairness

(1) In relation to procedural unfairness the applicant was asked on more than one occasion about the specifics of his business plan, for example at questions 6, 20 to 22, 24 to 26, 29 to 30, 35 to 37 and specifically question 19 of the fourth interview.

(2) In relation to his lack of clarity concerning his longer term plans the transcript showed that the applicant more than once was asked concerning his future plans.

(3) In relation to his marketing budget the transcript showed the applicant was given ample opportunity to explain in detail his expenditure on this point.

(4) At the conclusion of the interview the applicant was asked whether he understood the questions and whether he wished to add anything at question 48 and he did not reply.

33. The applicant was afforded ample opportunity to explain his intentions in relation to his business in the UK.

34. Procedural fairness did not require an Entry Clearance Officer when interviewing an applicant for entry clearance to put matters to the applicant in the manner suggested before drawing an adverse credibility finding from his answers as could be seen from **ex parte Doody [1994] 1 AC 531**. In **R (Dirshe) v Secretary of State for the Home Department [2005] EWCA Civ 421**, in the context of asylum interviews the Court of Appeal held that the requirement of procedural fairness was met so long as the applicant has "an adequate opportunity to challenge [the] reliability or adequacy" of the interview record.

35. In the present case this opportunity was afforded to the applicant by way of administrative review. In **Mapah v Secretary of State for the Home Department [2003] EWHC 306 (Admin)** Pitchford J dismissed a claim brought by a francophone asylum seeker who had argued inter alia that the lack of a complete verbatim record of his interview was procedurally unfair but in that case it was acknowledged that problems in interpretation could and do occur and that "records cannot always, despite exhortation, be literally verbatim".

36. In the applicant's case the Entry Clearance Officer explained that "I have to record both my questions and your answers and so will be typing as we speak". The respondent accepted that the transcript contained numerous typographical errors as well as errors of grammar and syntax but denied that this had any bearing on the Entry Clearance Officer's assessment of credibility. It is evident the Entry Clearance Officer strived to ensure as accurate a record of the applicant's answers as possible including his hesitations and digressions. The applicant's suggestion that the transcription might adversely affect his credibility was simply unsustainable. The mistakes on typing and syntax did not prevent the Entry Clearance Officer from properly analysing and assessing the answers as shown by the Decision.

37. In relation to the adverse credibility findings with regard to business plan and his longer term plans, the applicant was given ample opportunity to address these points but he was also afforded the opportunity to challenge those findings as part of the administrative review, an opportunity which he availed himself of.

Ground 3: The Entry Clearance Officer was reasonably entitled to conclude that the applicant's application was not credible

38. There were various criticisms made of the reasonableness of the Entry Clearance Officer's Decision but these amounted to no more than disagreements with the decision and did not disclose any public law error.

39. The respondent was entitled to find that the applicant' s persistence in seeking lawful entry to the UK was unrelated to the genuineness of his intention to establish himself as an entrepreneur, particularly in light of the vague and rambling nature of many of his answers to the Entry Clearance Officer's questions.

40. Secondly, the Entry Clearance Officer was reasonably entitled to find that the answer concerning his input into his own business plan was vague and evasive. There was criticism that the respondent had failed to explain why 'no weight should be placed on the professional and detailed document' (business plan) but given the applicant's inability or unwillingness to explain the extent of his involvement in his business plan, taken together with the vague quality of many of his other answers it was entirely reasonable for the Entry Clearance Officer to place relatively little weight on the details contained in the business plan.

41. Thirdly, when the Entry Clearance Officer asked the applicant whether he was going to specialise in Italian street food the Entry Clearance Officer was entitled to place weight on the applicant's very hesitant response that "no-one's plans is final till ever, we can change, we can brand mix" and "Italian and brand mix may be the other option but right now we are going for Italian street food". This showed a remarkable degree of uncertainty for an applicant professing to invest £200,000 in a business.

42. Fourthly, the Entry Clearance Officer was equally entitled to find that despite three interviews over a period of two and a half years there was no evidence that the applicant had ever visited an Italian street food establishment nor that he had ever tasted any of the food from Italian Wolf Street Food.

43. There was no averral or witness statement from the applicant to contradict this finding nor was there anything baffling about the Entry Clearance Officer's finding that the applicant, a food technologist with no prior experience of operating a street food franchise, did not have relevant commercial experience to operate an Italian street food franchise in a country that he had never visited.

44. Fifthly, it was reasonably open to the Entry Clearance Officer to conclude that the applicant's answers concerning his choice of location for his business and his lack of research into alternative locations was indicative of a lack of his genuineness as an entrepreneur.

Ground 2: The Entry Clearance Officer took into account all relevant evidence

45. Whilst the Entry Clearance Officer's characterisation of the applicant's experience was terse, it was not inaccurate and did not amount to a material error when stating:

> "It is acknowledged that the first refusal did not include all your client's experience in the food industry including their BSc in agriculture, food technology, PepsiCo and the agrochemical sector. However, it is considered that the skills your client holds are not entirely transferable to an Italian street food establishment."

46. The respondent was, in any event, entitled to clarify the point in her pre—action response, see **R v City of Westminster, ex parte Ermakov [1995] EWCA Civ 42, [1992],** which made clear that such material is perfectly appropriate for the purposes of "elucidation" and "confirmation".

47. It was submitted that the applicant's lack of research for his choice of location concerned the Entry Clearance Officer but the applicant submitted that the respondent failed to take account that the applicant had done "detailed research in relation to the location of his proposed future business". In fact, the Entry Clearance Officer did not find the applicant had failed to undertake any research on this point but he had included statistics taken from the 2001 census in relation to Hounslow and stated he was not satisfied that the applicant

had conducted any "recent research on where you propose to locate your business" .

48. Moreover, the applicant complained that he had provided an extensive business plan setting out all the above-mentioned business considerations but that none of it had been considered by the respondent. This, however, was directly contradicted by the Entry Clearance Officer's Decision, which explicitly referred to the contents of the business plan stating "I note that in your business plan you included statistics from a Hounslow 2001 census".

49. In relation to the ECO's finding that the applicant's inconsistent answers concerning his marketing budget the applicant claims that he "clearly explained that the marketing budget is being derived from c. 40% of the net revenue". It was an obvious point that the net revenue could not sensibly be used to fund marketing at the initial launch and the Entry Clearance Officer was in any event entitled to note that "a genuine entrepreneur would be able to talk about how they spend their funds and how they will use them to aid the business". As the respondent's pre—action response made clear, "a genuine entrepreneur would be able to give a more exact breakdown of what, more specifically, £70,000 worth of marketing would be spent on, than newspapers' and 'social media'".

Submissions at oral hearing

50. In his submissions Mr Irwin submitted that the principles in relation to procedural fairness were laid down in **R v Secretary of State for the Home Department, ex parte Doody**. This case was distinct from **Balajigari**, which was of little or no assistance because:

(a) In **Balajigari** cases fundamental rights were engaged and the applicants had been in the UK for extended periods. In this instance the applicant had no private or family life.

(b) In **Balajigari** cases clear findings of dishonesty and of reprehensible conduct were made. Here there were questions about the applicant's credibility in his ability to be able to establish a business and there was no finding he had been dishonest.

(c) It was not standard practice to interview ILR candidates although the Secretary of State retained a discretion to do so. At paragraph 159 of **Balajigari** the court considered a case in which the applicant had been interviewed prior to making an adverse decision and was only *just* satisfied that the interview was insufficient and the only reason the court was not satisfied was because the applicant was given no notice at all of the nature of the issues to be canvassed in the interview. That contrasted with the facts of this case where the applicant knew in general terms the issues he was required to address.

(d) There were no human rights consequences to the applicant in this case.

51. In terms of the interview transcripts there was no procedural unfairness. It was well-established following **Mapah** and **Dirshe** that the requirement of procedural fairness was met if an applicant had an adequate opportunity to challenge the reliability or the adequacy of the interview record and the decisions in **Mapah** and **Dirshe** came in the context of asylum appeals in which the fundamental rights on asylum were engaged and where the standard procedural fairness demanded was of the highest nature.

52. The applicant had a chance to respond and more than adequate opportunity to address the issues which the respondent considered in the course of making the decision. The applicant's business plan was explored extensively in the course of the interview and his future plans were explored in the same way.

53. There was no procedural unfairness and any assessment of procedural fairness must take account of the facts of the case.

54. In response, Ms Gherman submitted that the duty to disclose the case adverse to the applicant did not depend on pre—existing rights and she cited paragraph 50 of **Balajigari**. There was also the duty in the interview process to be more specific.

55. Secondly, there was the finding that he was not a genuine entrepreneur and she referred to paragraph 125 of **Karagul v Secretary of State for the Home Department [2019] EWHC 3208 (Admin)**. The findings were serious and would have future consequences. Thirdly, the genuine entrepreneur test was very wide and it was not possible to know from the vast wide ambit of concerns the gist of what was of concern.

56. Further, she submitted that at the administrative review there were challenges to the interview. The reliability of the interview was challenged in the pre—action Protocol letter. The reliability of the interview was of central importance.

57. In relation to ground 2 and rationality, Mr Irwin submitted that looking at the evidence in the round the respondent was unarguably entitled to reach the conclusion that the applicant's application should be refused. The applicant's responses in interview were vague, the applicant had never visited an Italian street food establishment, had no

experience in running a street food franchise and there was no public law error.

58. Specifically, Ms Gherman submitted there were challenges to the interview process. The reliability was challenged to the pre—action Protocol. The interviews gave an impression of carelessness.

59. In his submissions in relation to ground 3 and taking into account all relevant evidence, Mr Irwin submitted that the respondent was entitled to find that the experience of agriculture and the food industry was of little or no relevance to running a fast food franchise in Hounslow. The challenge to the decision noted the applicant had worked in the potato industry but that he did not have the requisite experience to run his proposed business. That was rational. Regarding location the respondent was concerned the applicant had not done recent research and relied on the 2001 census.

60. The respondent took into account evidence in the round. The respondent was concerned about the approach to the marketing budget. In relation to the business plan it was clear that the Secretary of State took into account the contents of the business plan. It formed a substantial part of the basis of the questioning of the applicant and there was specific reference to the business plan.

61. Ms Gherman submitted that the business plan had not been properly taken into account. There was only one reference to the marketing budget and the answers were consistent with the business plan and showed that the applicant was a genuine entrepreneur, for example his reference to £70,000 for the marketing was correct and he had details of the salaries of employees.

Analysis

62. I address each ground in turn but have logically taken ground 3, in relation to the consideration of relevant evidence prior to ground 2 on rationality.

63. In relation to the first ground, the following principles on fairness are set out in **Doody**:

> *"1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. 2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, [my underlining] and this is to be taken into account in all its aspects. 4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. 5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

64. The standards of fairness are not immutable and can vary in relation to decisions of a particular type. The principles of

fairness are not to be applied identically in every situation. As identified in **Doody** "What fairness demands is dependent on the context of the decision." That said, the question of whether there has been procedural fairness or not is an objective question for the court to decide.

65. This was an entry clearance application for a business visa. That is a rather different context from an asylum claim or even one where an applicant has established a private or family life within the UK as in **Karagul** and **Balajigari**. In **Karagul**, the applications were made by claimants who were residing in the United Kingdom under the agreement establishing an association between the European Economic Community and Turkey. It may be the case as Ms Gherman submits that there do not need to be pre—existing rights to invoke principles of procedural fairness but the context as seen from **Doody** is still relevant.

66. There are further distinct differences between this application and the applications made in **Balajigari** and in **Karagul**.

67. **Karagul** was an example of a case where there was an unequivocal finding of dishonesty which demands the highest of fairness in procedure and again in **Balajigari** there was a clear finding of dishonesty in relation to the applicant and their applications were refused under paragraph 322(5) of the Immigration Rules. In **Karagul**, the decisions under challenge had *concluded* that the applicants either had not genuinely established a business or genuinely intended to establish a business and the applications were made "in bad faith or dishonestly". That is not the ultimate conclusion that can be drawn from the Decision under challenge.

68. The Decision contained various adverse conclusions on genuineness for example 'a genuine entrepreneur would openly

be able to talk about the input they had made into their own business plan' and 'I do not find it reasonable that a genuine entrepreneur would invest over £200,000 with no clear plans for the future' and 'you have not conducted any significant research into the UK minimum wage and I do not find this conducive of a genuine entrepreneur', but there was, in conclusion, no clear finding of dishonesty, nor reprehensible conduct, or a clear allegation of a false based application in this Decision when read as a whole.

69. The Entry Clearance Officer expressed in the course of the reasoning his doubts about the credibility of the application. For example, when addressing credibility, having reviewed the response to a question on location of the business and whether the applicant had looked outside the UK, the Entry Clearance Officer cited the applicant's answer

> "… 'no … I applied only for UK and therefore I am trying to be there for UK' and also said 'I don't think I should see any other country where my base roots are there, my business partners are there, my family's friends are there, I'm adoptable person'

and the Entry Clearance Officer observed on the credibility of the application as follows:

> 'these comments indicate that you are looking to relocate to the UK for personal reasons rather than to pursue an entrepreneurial endeavour. Your intentions bring into doubt your credibility as a Tier 1 Entrepreneur."

70. Credibility can contain more than one meaning and it must be considered in the context used. As Mr Irwin indicated, if he applied for the position of a Lord Chief Justice at his stage in his career he would not be a credible candidate; he may be misguided but not dishonest. In the Decision under challenge

there was no threat or finding as in **Adedoyin [2012] EWCA Civ 939.**

71. In the whole analysis of the Decision, which was extensive, these observations merely render his business plans in context, that is he was not primarily a businessman but more wished to move for his children's education. That approach to the evidence was open to the Entry Clearance Officer, who was assessing the quality of the evidence, and was not wholly irrelevant when considering whether the applicant could credibly establish a business in the UK.

72. As pointed out by Mr Irwin, there was no indication of any consequences or threat that the application was made on a false basis and the applicant was advised as to how to proceed with an administrative review should he wish to challenge the Decision.

73. Indeed, the Decision continues to the concluding point which is axiomatic to the refusal as follows:

> *"Your responses raise a concern to the level of knowledge attained and research conducted concerning the market and business environment you wish to target and operate within. In light of this there are doubts concerning your ability and intention to establish an entrepreneurial enterprise in the UK.*
>
> *I have considered your application and circumstances; however, I am not satisfied on the balance of probabilities, that your business plan or intentions are viable and credible. I am therefore not satisfied that you meet the requirements of paragraph 245DB(f) of the Immigration Rules."*

74. Whatever the preamble to the actual reason for refusal and the doubts held by the Entry Clearance Officer it was the

viability and credibility of the *business* which was fatal to the application.

75. **Karagul** sets out various principles in relation to procedural fairness at paragraph 106 at (ix) and (x) where 'genuine intention or wish' is concerned and those principles identify that an interview should be conducted and stated at 106 (xii)

> *"In cases where the application is potentially to be rejected on a lack of genuineness basis, fairness standards may equally be satisfied be a "minded to refuse" process on the terms identified in **Balajigari** at [55]. That is by (i) indicating a suspicion of bad faith and particulars; (ii) giving an opportunity to respond and (iii) taking that response into account".*

76. Even, however, in cases of dishonesty, as seen from paragraphs 159 to 160 in **Balajigari** it may, in some circumstances, be sufficient if an interview was conducted prior to the adverse decision.

77. In paragraph 48 of **Balajigari** the reasoning of Lord Woolf MR from **R v Secretary of State ex parte Fayed [1998] 1 WLR 763** p 777 is employed as follows:

> *'I appreciate there is also anxiety as to the administrative burden involved in giving notice of areas of concern. Administrative convenience cannot justify unfairness, but I would emphasise that my remarks are limited to cases where an applicant would be in real difficulty in doing himself justice unless the area of concern is identified by notice. In many cases which are less complex that that of the Fayeds the issues may be obvious. If this is the position notice may well be superfluous because what the applicant needs to establish*

will be clear. If this is the position notice may well not be required'.

78. Pausing there, this applicant was interviewed four times. It is evident that the applicant was aware of the general concerns of the Entry Clearance Officer, from three previous interviews and refusals (albeit they were set aside). At the close of his interview in 2017 he stated that "my intention is to be a genuine businessman, I wish to move to the UK to help my children's education, UK is a better way of life for me and my family". He was aware that the genuineness of the business was in issue.

79. The general topics of concern were raised in previous interviews (all of which were evidence relevant for deciding the application), when the applicant was legally represented and he knew full well which factors might be explored. One of the key points of the immigration rule under paragraph 245DB is that 'the applicant genuinely 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'. The applicant cannot be surprised that his proposals are being tested on that basis nor that the viability or credibility of the business is at stake and the applicant must have known the areas which would come under scrutiny.

80. In his interview of 2017, he was specifically asked about his business plan and who wrote it, the location he had chosen, whom he would employ, how he would advertise the business and his potential profits. He also knew that the long—term planning was in issue because this was raised at questions 34 to 38 of the 2017 interview. His previous employment was also in issue at question 17 of both the 2017 and 2018 interview and indeed he gave details of his previous experience.

81. As a genuine businessman the applicant would not need notice of basic questions on basic business practice such as employment, legislation, and how to deploy a marketing budget. The questions were clear and not obscure, and the Entry Clearance Officer should not have to give reasons for obvious and logical concerns deduced from the answers.

82. There was criticism of the fourth interview as being replete with spelling mistakes, typing errors, ellipses and syntactical difficulties and that it failed to allow the applicant to be expansive.

83. On careful reading, however, the criticisms included in Ms Gherman's skeleton argument relate to sections where the applicant was being over—expansive, answering a different question from that which he was asked and/or giving information which was clearly not relevant. In contrast with **Anjum**, the interview here had a structure but, as seen from the questions, was not inflexible. The content of the interview demonstrated that the Entry Clearance Officer did not adhere rigidly to a script, but asked for clarification and made spontaneous further enquiries on certain questions. The Entry Clearance Officer also repeated questions which were unclear or not answered. The applicant's responses were verbose (answers to questions 9, 11 and 14), rambling (question 24) and discursive. Large sections of the answers were not even relevant (for example questions 14, 19, 32, 33).

84. The applicant was given ample opportunity to answer questions including on the business plan for example at questions 19 and 20. Most of the answer to question 19 did not relate to the question. Although he confirmed that he could understand and respond in English, his language was syntactically poor and difficult to discern. That theme is evident in more than one of the interviews. For example in the interview on 16th May

2018 the applicant stated that Exalde Consultancy wrote his business plan and when pressed added

> *'I had to rely on online reseach for businesses in the UK and after finalising the business with my cousin Mrs Samina Hussain she has been in the Uk since 1998 and currently she is a self employed driving instructor … Then my input was business opportunities in the UK the casue of my research regarding the best opportunities in a full business there in the UK'*.

That is a short example of the responses given.

85. At one point at question 33 of the fourth interview the applicant apologised for forgetting the question. At question 35, the meaning of the answer is clear. An interviewer's typed recording does not have to be perfect particularly where the recording is a challenge owing to an applicant's overly long and unfocussed answers. It was explained at the outset that the Entry Clearance Officer was going to be recording the interview by typing as he interviewed. The applicant indicated that he was content at the outset of the interview to be interviewed in English and content at the close of the interview.

86. The Entry Clearance Officer asked 50 ranging questions which were clear and direct and in some instances despite the circumlocuitous and unfocussed nature of the answers repeated the questions. It was suggested that the dots in the interview suggested sections missing but these appeared more to reflect natural pauses or drawing of breath during a long answer. Even so, the meaning of the answers when the question is answered is sufficiently clear and did not prevent the Entry Clearance Officer from examining the application methodically and evaluating all of the evidence which the process demands and the Decision reflects. The applicant's phrasing is not

precise, but this does not affect the materiality of the answers the applicant does eventually give. Spelling mistakes made in the written recording are unsurprising but did not obscure the meaning of the answers.

87. The applicant had ample opportunity to make representations on his own behalf before the Decision was taken, knew the scope of the Immigration Rules, had extensive professional help both legal and commercial, and was asked on several occasions about his business plan. It is not for the Entry Clearance Officer to point out every deficient answer or raise every query or point at the time of the interview which needs to be considered both in part and as a whole. As stated in **Karagul** at paragraph 106 (vii), 'In general, if an applicant is asked questions (or for information) in the processing of an application, that does not imply that the remainder of their application is necessarily in order and is compliant … If a court can identify a rational reason why a decision to interview or seek additional material was made, it will not interfere'.

88. The criticism of the interview recording is unsustainable. A careful reading of the responses in the various interviews demonstrate that the applicant's responses were unstructured and untargeted. The deficiencies in the English do not appear to be a result of the poor translation or recording but of the applicant's own language ability. He confirmed he was content to be interviewed in English.

89. An Entry Clearance Officer needs to give the applicant a fair opportunity to put his case but it is for the applicant on the balance of probabilities to prove that case. When interviewing the Entry Clearance Officer needs to tread a line between asking questions and allowing the applicant unimpeded, as far as an interview will allow, to display his knowledge of his

business and the venture proposed. By its very nature the applicant should be conversant with the details of his business and explain that to the Entry Clearance Officer. It is not a requirement that every concern which occurs to the Entry Clearance Officer, who no doubt interviews numerous applicants with a wide range of business proposals, should be rehearsed with the applicant. That would be interminable and go beyond the principles of fair procedure. The applicant was aware of the broad issues and the applicant had ample opportunity to explain and respond appropriately.

90. There was no procedural public law error in the conduct and recording of the interview.

91. In relation to the third ground and taking into account material evidence, it is incorrect to state that the Entry Clearance Officer did not make even cursory reference in the refusal to the applicant's previous experience. The Decision specifically states: "You were asked about relevant experience that you had in the food industry." The key word here is 'relevant'. The Entry Clearance Officer recorded that the applicant had worked in the potato industry and noted that this may be related to the food industry but he was clearly not satisfied that the applicant had the **relevant** experience required to successfully open and run an Italian street food franchise. It was also open to the Entry Clearance Officer to state that the applicant had never visited an Italian street food establishment or tasted any of the food from Italian Wolf Street Food. This was an observation that the Entry Clearance Officer was entitled to make and his observation that there was a "lack of experience in the food industry along with a lack of knowledge of the products you propose to sell" clearly refers to the fact that the applicant does not have experience in running a fast food restaurant in a country which he had never visited before. There was no evidence to the contrary.

Indeed, the Entry Clearance Officer was also entitled to make the observation that the applicant had never visited the United Kingdom and it was self—evidently relevant. Obviously the applicant could not visit unlawfully but as an observation it was correct. Many applicants have previously visited the United Kingdom for example as students and thus this remark is not irrational.

92. The applicant clearly has experience in food technology and in the food supply chain, but that is not experience specific to a fast food restaurant. It is self—evident why extensive academic experience in the agricultural field might not be transferable to this particular highly competitive field of commercial activity and the reference to "the potato industry" may be terse but not inaccurate.

93. The business plan was indeed taken into account by the Decision. On page 2 the Decision states, "during the interview you were asked 'who wrote your business plan'", to which the applicant answered:

> *"Yes, my inputs. My business plan the food industry growth because food is the basic need in every container everywhere and fast food industry, fast Asian food industry growth, so I worked on that market potential and therefore after getting in touch the different companies like I told you, McDonald's, and Subway, when I could not fulfil their requirement of coming there and signing their agreement of our rent … Nine months of trainings."*

The applicant clearly understands the question and generously the Entry Clearance Officer has omitted from the Decision that the applicant in fact states "I have not put any inputs there in business plan". The remainder of the answer was effectively irrelevant. The Entry Clearance Officer sets out, however, rationally that he was not satisfied as to the contributions

the applicant made to the business plan and this cast doubt on the genuineness of the application. As stated above there was, however, no definitive finding of dishonesty. At the close of the answer the applicant states "and all discussions remain on telephone, WhatsApp, email and they also gave me the business plan on the basis of last twelve months of turnover of their first business unit of Chiswick."

94. Thus, to the question "who wrote your business plan and what input did you have in the business plan?" the answer shows the applicant wasted the opportunity in his response. Nevertheless, this demonstrates that the Decision maker contemplated the business plan for the Decision and explored the plan extensively during the interview. The business plan and the applicant's future plans (which were indeed uncertain) were both referenced adequately in the Decision. When the applicant stated 'no one's plan is final till ever, we can change, we can brand mix', the Entry Clearance Officer was rationally entitled to conclude 'I do not find that a genuine entrepreneur would invest over £200,000 with no clear plans for the future'. I employ the reasoning given above with reference to 'genuine entrepreneur' as being 'credible' rather than 'dishonest'.

95. The Entry Clearance Officer made reference to the fact that the respondent was concerned that the applicant had not done any **recent** research regarding the location of his business and also had concerns about applicant's approach to the marketing budget, stating:

> *"When asked how you will spend the £200,000 you did not mention any of the funds being used towards marketing however at interview you stated that £70,000 over three years would be spent on marketing. It is expected that a genuine entrepreneur would be able to talk about how they*

propose to spend their funds and how they will use them to aid the business."

96. That was an entirely rational observation which the Entry Clearance Officer was entitled to make. The applicant clearly had no clear understanding of how the funds were going to be used even to the point he had not identified in fact that there was a discrepancy on the marketing budget within the business plan itself. The respondent was unarguably entitled to conclude that the applicant in his answers had failed to set out how his marketing budget would be applied to help his business or explain how net revenue could be tapped initially for that purpose.

97. Overall, it is clear the Entry Clearance Officer took into account the contents of the business plan, which formed a substantial part of the basis for questioning of the applicant in interview and is specifically referred to. The Entry Clearance Officer •referred to the key documentation in the Decision and there is no indication that he failed to take into account relevant evidence. It is obvious why the interview would feature so prominently in the Decision because it reflects the applicant's understanding of his putative business.

98. With reference to the second ground, rationality, when reading the decision as a whole the respondent was unarguably entitled to reach the conclusion that the applicant's application should be refused. The relevant immigration rule was lawfully applied. The decision was within the range of reasonable responses that the application was not viable. I employ my reasoning above which has explored various issues in detail. There was no clarity on the long—term plans, no knowledge of the UK employment legislation which is critical, and the applicant had not had relevant experience. He had general

experience on food matters, but the Entry Clearance Officer was entitled to conclude these would not transfer. The Secretary of State was asking whether the applicant was genuine such that the business was viable and credible, and it was on that basis that the rationality of the decision should be considered. The Entry Clearance Officer does not need to refer to every piece of evidence but that said, in conjunction with the business plan, key elements of the applicant's knowledge and business understanding were highlighted in the interview and fatal such as the contribution to and discussion of the business plan, and the lack of knowledge of the basic employment legislation such as the minimum wage. These are basic questions that any entrepreneur establishing in the United Kingdom should be able to answer. Bearing in mind that the applicant had explained in his application that his role of the applicant was that of Chief Executive Officer his lack of knowledge was even more surprising.

99. As the Decision observes, the interview clearly revealed a lack of input into the business plan and vagueness. The circuitous and vagueness of the responses given to the Entry Clearance Officer unarguably entitled the Entry Clearance Officers to place little weight on the evidence that the applicant wished to specialise in Italian street food. That the submissions assert the applicant is a genuine business entrepreneur does not address the difficulties with the interview and the Entry Clearance Officer was entitled to treat the interviews (of which there were four) as fundamental in demonstrating whether the applicant was able to establish a business in the United Kingdom within six months or indeed at all.

100. The fact that he had spent two and a half years on an application does not in itself make the application viable and the Entry Clearance Officer was unarguably entitled to take

into account the applicant had no prior experience of running a street food franchise. The immigration rule under consideration here employs the conjunctive 'and' between 'genuinely intends' and 'is able to establish' Both limbs need to be fulfilled.

101. This is a business that the applicant himself was intending to establish and run; it was unarguably rational for the Entry Clearance Officer whilst acknowledging that the application had been ongoing for sometime, to find that relying on very dated statistics from well before the date of the application did not demonstrate expected recent research. Understably rationally, the Entry Clearance Officer would have expected the applicant to be able to talk in detail about his application but the applicant did not despite the opportunity. On a range of matters from the broader issues such as the business plan and future plans, to the finer detail such as property location, and employwment legislation the applicant did not demonstrate he had properly researched or continued to explore the issues himself rather relying on the Wolf Franchisors.

102. As set out in the Pre—Action Protocol response 'it is not irrational to assume an applicant, knowlingly investing £200,000 into a business, would have more concrete knowledge of their future plans for the business rather than display such a degree of uncertainty'.

103. The Entry Clearance Officer in the Decision stated that he was not satisfied on the balance of probabilities that the business plan or intentions were viable and credible and the conclusions in the refusal were rational for the reasons given. It should be underlined that the Decision emanates from an evaluative assessment of the application and the immigration rule, which is publicised, demands a prognostic

examination of the proposed business. The Entry Clearance Officer applied the relevant immigration rules, administered a procedurally fair interview and took into account relevant evidence. The Entry Clearance Officer was unarguably entitled to refuse the application under paragraph 245DB(f).

104. The application is refused. ~~~*0*~~~~

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

JR/202/2020

BETWEEN:-

THE QUEEN
(on the application of
FARHAN AHMAD FARID)

Applicants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ORDER

UPON hearing counsel (Ms M Gherman) for the applicant and counsel (Mr W Irwin) for respondent at the substantive hearing and having received no written submissions on consequential matters of costs and permission to appeal (neither party attended the hand down of the judgment)

IT IS ORDERED THAT:-

1. The application for judicial review is dismissed in accordance with the substantive judgment attached.
2. The tribunal does not make any order for relief.
3. The applicant is to pay the costs of the respondent such costs to be assessed if not agreed.
4. Permission to appeal is refused because I am not aware of any arguable error of law in the substantive decision.

Signed: *Helen Rimington*

Upper Tribunal Judge Rimington

Dated: **20th November 2020**

Applicant's solicitors:

Respondent's solicitors:

Home Office Ref:

Decision(s) sent to above parties on: 20 November 2020

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3.