

IN THE UPPER TRIBUNAL

R (on the application of Zia and Another) v Secretary of State for the Home Department
IJR [2015] UKUT 00191 (IAC)

Field House
London

1 April 2015

BEFORE

UPPER TRIBUNAL JUDGE SOUTHERN

Between

THE QUEEN ON THE APPLICATION OF

**WASEEM ZIA (1)
MUHAMMAD ZUBAIR(2)**

Applicants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

Mr P. Skinner of counsel, instructed by ATM Law

Mr Z. Malik of counsel, instructed by the Treasury Solicitor

JUDGMENT

1. The applicants, who are brothers, have been granted permission to bring a judicial review of the decision of the respondent to refuse to grant them leave to remain as Tier 1 Entrepreneurs. Although the original grounds set out various complaints about that decision, in granting permission Judge Peter Lane limited the scope of these proceedings to a single ground of challenge, that concerning an asserted legitimate expectation the applicants say had arisen that their applications would succeed, despite not being able to meet the precise requirements of the applicable

immigration rule, because of reassurance given during a telephone call to the respondent's telephone help line.

2. In order to qualify under the immigration rules for leave to remain as Entrepreneurs, the Immigration rules demand that the applicants must, amongst other things, score 75 points under Appendix A (Attributes) and provide the specified documents required by paragraph 41-SD of Appendix A. The applications were refused because the respondent concluded that they had not provided a specified document, that being a letter from the bank of the third party, who was the applicants' uncle, that met the requirements of 41-SD by including within it the names of the applicants.
3. Before examining the matters in issue between the parties in detail, it is helpful to set out the provisions of the immigration rules, as they were at the date of the respondent's decision on 29 May 2013, so far as they are relevant for present purposes: The rule concerning such applications for leave to remain in this capacity is 245DD:

245DD. Requirements for leave to remain

To qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

Requirements:

- (a) The applicant must not fall for refusal under the general grounds for refusal, except that paragraph 322(10) shall not apply, and must not be an illegal entrant.
- (b) The applicant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A.
- (c) The applicant must have a minimum of 10 points under paragraphs 1 to 15 of Appendix B.

(d) The applicant must have a minimum of 10 points under paragraphs 1 to 2 of Appendix C.

...

(i) the applicant genuinely:

(1) intends and is able to establish, take over or become a director of one or more businesses in the UK within the next six months, or

(2) has established, taken over or become a director of one or more businesses in the UK and continues to operate that business or businesses; and

(ii) the applicant genuinely intends to invest the money referred to in Table 4 of Appendix A in the business or businesses referred to in (i);

(iii) 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 by his business or businesses. 'Available to him' means that the funds are:

...

(3) available from the third party or parties named in the application under the terms of the declaration(s) referred to in paragraph 41-SD(b) of Appendix A;

And those requirements are further identified in Appendix A, at paragraph 41, which, again, I reproduce only so far as is relevant:

41. An applicant will only be considered to have access to funds if:

(a) The specified documents in paragraph 41-SD are provided to show cash money to the amount required (this must not be in the form of assets);

(b) The specified documents in paragraph 41-SD are provided to show that the applicant has permission to use the money to invest in a business in the UK;

...

41-SD:

41-SD. The specified documents in Table 4 and paragraph 41 are as follows:

(a) The specified documents to show evidence of the money available to invest are one or more of the following specified documents:

(i) A letter from each financial institution holding the funds, to confirm the amount of money available to the applicant (or the entrepreneurial team if applying under the provisions in paragraph 52 of this Appendix). Each letter must:

...

(6) state the applicant's name, and his team partner's name if the applicant is applying under the provisions in paragraph 52 of this Appendix,

4. Thus the applicants had to establish, by producing the appropriate specified documents, that they had available the sum mentioned in Table 4, which in their case was £200,000, and that it was genuinely available to them for the purpose of the enterprise they sought leave to undertake. As they did not have those funds themselves, in the application form they said that a third party, Mr Mumtaz, would provide that money from his bank account. To establish that those funds, which did not belong to the applicants and were not in an account in their name, was genuinely available to them, the rules require that a letter from the third party's bank is produced which states the applicants' names.
5. In the decision under challenge the respondent explained why no points had been awarded for Attributes:

"You have stated that you have access to funds of £200,000 being made available to you by Mr Nawaz Mumtaz. As evidence you have provided:

1. a bank letter from Natwest (inc. statement);
2. a declaration from Mr Nawaz Mumtaz;
3. a letter from Mr S. Sikandar Ali Shah.

However, the bank letter is not acceptable because it does not state your name and the name of your entrepreneurial team partner, and confirm the amount of money being available to you and your team partner from the third party's funds.

You have therefore not submitted the specified evidence as listed under paragraph 41-SD to establish that you have access to the funds that you are claiming."

6. The applicants' case is that they went to the bank where the third party who was funding their proposed enterprise had his funds and asked the bank to provide them with a letter in the form of the template provided by the respondent that would have ensured that all the required information was provided. The bank declined to do this. The bank would (and did) provide a letter confirming their customer had the requisite level of funds in his account but would not state within that letter the applicants' names nor any confirmation of their customer's intention that the funds would be used for the purpose of the applicant's proposed business venture.
7. This was a considerable setback for the applicants, because they knew very well that the rules demanded no less than a letter containing all that was set out in the template so that their application was not a promising one, to say the least, if they submitted the letter only in the form that the bank was prepared to issue.
8. The applicants have produced a copy of the letter that the bank was willing to produce, confirming only that the balance of the account stood at £253,683.23 as at 6 December 2012, which plainly established that the required sum of £200,000 was available to Mr Mumtaz, and enclosed with it was a copy of the bank statement relating to his account demonstrating that the sum of £250,000 had been paid in to his account a few days earlier. However, what that letter did not establish was that the money was available to the applicants, who were not named or otherwise referred to.

9. The applicants say that they had a legitimate expectation that their application would succeed, notwithstanding the absence of a bank letter containing their names and also confirmation on the part of the account holder that the funds were to be made available to them . That is because, when Mr Zia telephoned the respondent's help line before submitting the application, to seek advice on how to deal with the fact that the bank would not provide a letter in the form required, he was told by an employee of the respondent, identified as Wayne, that because the third party's name was on the application, there was no need for it also to be on the letter from the bank.

10. The respondent does not accept that any legitimate expectation that the application, which plainly did not comply with the specified documentation requirement of the rules, would be successful because, amongst other things, Mr Zia had made an earlier call to the respondent's help line and had been told by another employee of the respondent, identified as David, precisely the opposite, making clear that an application that did not comply with the specified document requirements would be considered by a caseworker but would probably not succeed.

11. It emerged during submissions that Mr Zia had not made just the two calls to the respondent's helpline, in respect of which transcripts are before the Tribunal, but five. Mr Skinner produced a handwritten note made by Mr Zia which provided details of those five calls:
 - a. On 27 November 2012 he spoke to "Rowse Phillip" who confirmed that the third party, presumably a reference to the person providing the funds, can be from the UK or from overseas, "and you should provide a letter from the bank";
 - b. On 28 November 2012 he spoke to "Steve" about the requirement to provide an English language test certificate, who suggested that he provide a covering letter explaining that the test certificate would follow later;

- c. On 4 December 2012 Mr Zia recorded that he called and spoke to a Mrs Brown who “transferred my call to the supervisor David”. Mr Zia’s note continued “David advised me to put a covering letter with your application explaining the ... situation that bank doesn’t provide any letter then it is for case worker to decide.”;
- d. On 6 December Mr Zia spoke to Wayne, and recorded “... he confirmed that the bank letter provided by NatWest in their own format is sufficient. He also advised to clarify the situation to case worker in a covering letter.”;
- e. Two calls were made on 12 December 2012 concerning the pragmatic arrangements for submitting the application.

12. Helpfully, the position of the parties has been distilled into six issues, in respect of which both advance submissions, although, as Mr Skinner pointed out, it may be more accurate to say that the respondent took six points against the applicants, which are set out in the summary grounds of defence, and in his skeleton argument he has responded to each of those.

13. First, the respondent submits that the immigration rules are made by the Secretary of State and approved by Parliament under s3(2) of the Immigration Act 1971. In the words of Lord Hope in *Odelola v SSHD* [2008] UKHL 25, these are statements of the respondent’s policy and practice. These are detailed statements by a minister of the Crown as to how the Crown proposes to exercise its executive power. Responding to a point taken by Mr Skinner in his oral submissions, that it must be remembered that the power to grant leave to remain is conferred not by the immigration rules but by statute, Mr Malik draws attention also to paragraph 35 of *Odelola* and to the observation of Lord Brown that the immigration rules are statements of administrative policy; an indication of how at any particular time the respondent will exercise her discretion with regard to the grant of leave to enter or remain. Mr Malik submits that the only legitimate expectation that the applicants could reasonably have had is that their application would be decided in line with

the Immigration rules in force at the date of the decision: *Odelola v SSHD* [2008] UKHL 25; *Alvi v SSHD* [2012] UKSC 33.

14. Developing that submission, Mr Malik points to s3(2) of the Immigration Act 1971 which requires the respondent to make immigration rules and to *dicta* of Lord Hope in *Alvi*, at para 33, where he rejected the argument that it was open to the respondent to control immigration in a way not covered by the rules in exercise of powers under the prerogative. He then points to the mandatory vocabulary of paragraph 245DD of the rules, that make clear that an application that does not meet its requirements is to be refused.
15. In support of that submission, Mr Malik relies upon *R (Thebo) v SSHD* [2013] EWHC 146 (Admin) that being a case concerned with the provisions of paragraph 320(7) of the immigration rules, which provides that entry clearance or leave to enter is to be refused where certain circumstances exist, including the making of false representations in the making of an application or a previous breach of conditions of leave. The point being made is that in respect of both para 320 and para 245DD the rule provides that leave is to be refused in the circumstances set out. That has to be reconciled with Mr Skinner's submission that the respondent always has residual discretion to grant leave outside the rules and it would be unlawful for that discretion to be fettered by a rule or policy.
16. Mr Skinner submits that Parliament has provided the respondent with discretionary powers which should be used where an application cannot meet the strict requirements of the rules, where that is necessary to give effect to a legitimate expectation. He draws attention, in particular, to *R (Munir) v SSHD* [2012] UKSC 32, at paragraph 44 *per* Lord Dyson:

“In my view, it is the 1971 Act itself which is the source of the Secretary of State's power to grant leave to enter or remain outside the immigration rules. The Secretary of State is given a wide discretion under sections 3, 3A, 3B and 3C to

control the grant and refusal of leave to enter or to remain: see paras 4 to 6 above. The language of these provisions, especially section 3(1)(b) and (c), could not be wider. They provide clearly and without qualification that, where a person is not a British citizen, he may be given leave to enter or limited or indefinite leave to remain in the United Kingdom. They authorise the Secretary of State to grant leave to enter or remain even where leave would not be given under the immigration rules.”

Thus, argues Mr Skinner, the apparently mandatory vocabulary of paragraph 245DD cannot properly be seen as any fetter or restraint upon the grant of leave to a person who fails to meet the requirements of the rule.

17. Second, according to the respondent, the transcripts of the two telephone conversations with Mr Zia, the first with David and the second with Wayne, must be considered together. When they are it can be seen that there is absent the “unambiguous representation, promise or assurance devoid of any relevant qualification” required before a legitimate expectation can arise: *Mehmood (legitimate expectation)* [2014] UKUT 00469 (IAC) *per* McCloskey P. Mr Malik submits that it can be seen from the transcripts of those telephone conversations that Mr Zia was aware of the mandatory requirement of the rules and there is nothing disclosed by the transcripts that could be regarded as a promise that leave would be granted. Mr Zia was told repeatedly that the decision making was for the case workers, and not for those operating the respondent’s telephone help line. It is notable also that, although Mr Zia seeks to rely upon what he was told by Wayne, he did not point out to Wayne that he had been told something different by David just two days earlier.

18. Mr Skinner’s submission on this point emphasises the importance of recognising that each of the telephone conversations were asking about different scenarios. The conversation with David was concerned with the outcome where the applicants did not submit a bank letter at all, in which case there could be no guarantee of success in their application. The conversation with Wayne was concerned with the outcome

if a “defective” letter was submitted, he providing reassurance that what they had done would be sufficient, provided the application was accompanied by a covering letter explaining the position. Thus the conversation with Wayne should be accepted as being plainly unambiguous and devoid of qualification such as to give rise to a legitimate expectation of success in the application, even though it had been disclosed that Mr Zia had been unable to secure a bank letter in the form required by the rules.

19. The third issue is the respondent’s submission that it is only the respondent and those she authorises to do so that can grant leave to remain. It cannot be said that the operators at the telephone helpline may, as a matter of law make promises that would bind the respondent in that respect, as David repeatedly made clear to Mr Zia during the course of the first of those telephone conversations.

20. It is submitted on the applicant’s behalf that such an approach is misconceived. There is no reason in law why an official such as Wayne could not have the power to make such representations. Officials within central government departments, such as the Home Office, may act in their minister’s name without any formal delegation of authority: *Carltona Ltd v Commissioner for Works* [1943] 2 All ER 560. Further, the respondent offers no evidence of a lack of authority for Wayne to have made those representations. In any event, even if the case be that Wayne had no such delegated authority, as a matter of law, officials without the power to make a representation will still give rise to actionable legitimate expectations if the official appears to have the power to make it. It is asserted that, here, Wayne did appear to have the power to tell Mr Zia that he would succeed in his application if his name did not appear on the letter from the bank.

21. Fourthly, the respondent submits that even if the telephone conversations did give rise to a legitimate expectation, which is not admitted, the respondent was still entitled to decide the application in line with the rules and so to refuse the applications because a public authority would not be acting unlawfully in

circumstances where to adhere to the relevant promise would be tantamount to acting inconsistently with its statutory and public law duty, which subject of course to her residual; discretion, is to act in accordance with the immigration rules.

22. In support, Mr Malik draws upon the recent decision of the Court of Appeal in *PF (Nigeria) v SSHD* [2015] EWCA Civ. *PF's* appeal to the First-tier Tribunal against the decision that he should be deported as a foreign criminal was allowed. Because of what Sir Stanley Burnton referred to as abject incompetence within the Home Office with the right hand wholly ignorant of the actions of the left hand, a letter was sent to *PF's* solicitors stating that in the light of the appeal being allowed, he would be granted leave to remain. However, the renewed application for permission to appeal was granted and the Upper Tribunal subsequently allowed the respondent's appeal and remitted the appeal to be determined afresh by the First-tier Tribunal. *PF's* submission that he had a legitimate expectation of being granted leave to remain, as promised by the letter sent to his solicitors, was rejected both by the Upper Tribunal and by the Court of Appeal, even though *PF* had been given a clear and unequivocal representation that he would be granted leave to remain. The reasons for that are summarised at paragraph 35 of the judgment:

- (a) The Secretary of State's representations were made entirely in error. Where the court is satisfied that a mistake was made, it should be slow to fix the public authority permanently with the consequences of the error: *R v Department for Education and Employment ex parte Begbie* [2000] 1 WLR 115 at 1127B-D.
- (b) The information that the Secretary of State wished to pursue her appeal must have disappointed the Appellant and his family. However, the expectation engendered by the representations cannot have lasted more than 9 days....
- (c) There was no evidence of detrimental reliance on the Secretary of State's representations.

(d) There is a strong public interest in the issue of the Appellant's deportation being decided on its merits.

23. In response Mr Skinner points out that as the Court of Appeal found that the Upper Tribunal should not have addressed the issue of legitimate expectation at all, all that the Court of Appeal went on to say about that is *obiter* and, in any event, the two cases are not analogous as *PF* was concerned with deportation of a foreign criminal which generates more cogent issues of public interest than does the grant of leave to two would be entrepreneurs.

24. The applicant disagrees with the respondent's analysis on the basis that the respondent has a *power* under the Immigration Act 19071 to grant leave but a *duty* to grant leave where the requirements of the rules are met. There is no *duty* to refuse leave where they are not.

25. Fifthly, the respondent submits that there was no unfairness in refusing the application in circumstances where the bank had declined to provide a letter in the form required. It is established by *Durrani (Entrepreneurs: bank letters; evidential flexibility)* [2014] UKUT 00295 that:

"There is no difficulty in the third party bank, with its customer's consent, expressing its understanding, based on the customer's instructions, that the use of specified funds in the customer's bank account/s is contemplated or proposed by the customer for the purpose of financing the applicant's proposed business venture. Accordingly, there is no substance in the argument that the relevant requirements contained in paragraph 41-SD(a)(i) produce an absurd result and must, therefore, be interpreted in some other manner."

26. On the other hand, the applicant's submission is that neither *Durrani* nor the subsequent view recently expressed by the Court of Appeal in *Iqbal v SSHD* [2015] EWCA Civ 169 establishes any principle of law that it is not open to the applicants to argue that it was simply not possible for them to comply with the rules, that

being a question of fact in each case. In this case there was evidence from the bank itself that they would not provide a letter in the format suggested by the respondent and would not include in their letter the information the respondent sought. Therefore it is unfair not to uphold and enforce the representation made.

27. Finally, the respondent points out that failure to provide a bank letter containing all the required information was not the only reason for refusal. The second appellant, Mr Zubair, has failed to provide the English language certificate. Although he stated in the application that he would submit the certificate, he has still not done so. Therefore, the application fell to be refused on that basis alone.

28. In response, the applicants point out that the effect of the respondent's own guidance is that the respondent should have waited for the result of the second applicant's test before refusing the application. As required by that policy guidance, the second applicant had informed the respondent of the date of his test and the respondent should not have determined the application until then. In any event, even if that remained a difficulty, it would mean only that the application of the second appellant would fall to be refused for that reason.

Analysis

29. Thus, what is in issue is whether the telephone conversation between Mr Zia and Wayne on the respondent's help line gave rise to a substantive legitimate expectation. The law relating to this is settled. There must be a representation or promise which is clear, unambiguous and devoid of relevant qualification (per Bingham LJ in *R v Inland Revenue Commissioners ex p MFK Underwriting Agents Limited* [1990] 1 WLR 1545 at 1569, approved by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] 1 AC 453. Where appropriate, as it certainly is in this case, the court must carry out what was described in *R (Coughlan) v North and East Devon Health Authority* [2001] QB 213 as:

“... a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.”

30. I shall address each of the six issues identified above. Before doing so it is necessary to examine the transcripts of the two of Mr Zia’s two telephone calls to the respondent’s helpline that we do have, the first with David and the second with Wayne.

31. Mr Zia called the helpline on 4 December 2012 and spoke to David. This was a relatively lengthy conversation with 21 exchanges between the parties to this conversation.

32. Two matters of significance might be noted at the outset. First, the conversation began with Mr Zia asking to whom he was speaking and David providing his name and telling Mr Zia that he was a Supervisor. Thus, it was made clear from the outset to Mr Zia that he was speaking with a person with experience and a level of authority over others providing the helpline service. Secondly, it appears that there had been an earlier call because, after Mr Zia explained that he was seeking advice about the refusal of the bank to provide a letter in the form required by the rules, David said:

“My colleague, I believe, told you that without that there is no guarantee that the application will be completed because that is one of the requirements on the form.”

He then suggested that if the applicant could put in a letter explaining why he could not provide a bank letter in the required form but added that:

... but it will be down to the caseworker whether they would accept that or not.”

As the telephone conversation continued, Mr Zia repeatedly observed that he was not able to provide what was required and repeatedly asked what he should do, this generating a consistent line of response from David, including the following:

“We don’t make the rules, Sir, we are only a telephone department. We only pass information on as it’s said on the website. On the website is the rules and they are made by a higher authority than us. If you cannot comply with the rules then there is no guarantee that the application will be taken or will be successful.”

“... All that we can do is advise you as to what the current details are on the website and that is all we can do...”

“ There is nothing we can do about that I do appreciate what you are saying but it is down to the bank if the bank won't provide it the only thing you can do is to put a letter in when you submit your application and it is down to the caseworker if they won't accept it because that is one of the standard requirements if the bank won't provide it then I cannot see what the caseworker will do it is down to them at the end of the day whether they will accept this or not.”

“... It would be down to the caseworker to decide if that is sufficient or not. We can't say what the caseworker will say it will be down to them they are the ones who make the final decision.”

“ I cannot say so we cannot say what the caseworker will decide we are not in a position on that one it is down to the caseworker if they decide that it falls to rejection then they will write out giving the reason why...”

At one point in the conversation Mr Zia asked David if there had been cases that had overcome such a problem. David replied:

“ Well I wouldn't know Sir because we are not caseworkers...”

Although by this point in the conversation, David had made unambiguously clear that no assurance at all could be given that Mr Zia's explanation for not submitting a rules-compliant bank letter would be acceptable, Mr Zia persisted in asking if he might succeed, saying:

"So what do you hope they would, I prepare this with my solicitor so do you hope its successful?"

To which David replied:

"I don't know Sir I cannot say it is the caseworker who makes the decision we do not make any decisions we cannot advise you as to what their decision may be it is for the caseworker the caseworker is the person who will decide we would not be in a position to give you any advice as to what they may or may not say."

33. And so it continued. It can be seen from the transcript of that telephone conversation that David said no less than 15 times that it was the caseworker who would decide the application and he said, repeatedly, that he could not predict the outcome because all he could do was to provide the information that was on the website.

34. The next telephone call to the help line was with Wayne, this being the one relied upon by the applicants, and was made two days later on 6 December 2012. This was a more brief conversation, as is indicated by the fact that the transcript runs to two pages, compared with the 5 page long transcript of the call to David. Mr Zia explained that the bank had refused to issue a letter concerning his uncle's account which contained the names of him and his entrepreneurial team member and he asked what he should do. Wayne said:

"... If your sponsor's name is on your application as third party then obviously you don't need."

35. Turning to the first of the issues identified by the parties as discussed above, the respondent submits that the only legitimate expectation that the applicants could have is that their applications be decided in line with the immigration rules in force at the time of the decision. On the other hand, the applicants rely upon the fact that while the respondent has a duty to grant an application that meets the requirements of the rules she has a power, or discretion, to allow one that does not and so no duty to refuse it. That, however takes no account of the mandatory vocabulary of the applicable rule which is 245DD which provides, with emphasis added:

“To qualify for leave to remain as a Tier 1 (Entrepreneur) Migrant under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.”

36. Thus the starting point is that the applicants have an expectation from the rule under which they are applying for leave that if they do not meet the requirements of the rule their application will be refused. There can be no doubt at all that the appellants were aware of that because it was the recognition that they could not provide what was required by the rule that gave rise to the decision that Mr Zia should call the helpline to discuss what if anything could be done to overcome the difficulty they had encountered.

37. Mr Zia’s telephone conversation with David left no room for doubt or ambiguity about the position or about the scope of the authority of those who could be spoken to on the helpline. It is of significance that Mr Zia’s call to the helpline was transferred to David by the member of staff he first spoke to because she thought he should speak to a supervisor. The first thing David did was to identify himself as a supervisor.

38. Thus, when Mr Zia spoke to Wayne two days later he was aware that those he spoke to on the helpline could not make decisions as that was a matter for the

caseworker. He had also been told in the clearest possible terms by David that a person dealing with an enquiry on the helpline could do no more than pass on information that was available on the website and could not predict the outcome of an application.

39. He knew also that he had been told those things by a supervisor.

40. When Mr Zia spoke to Wayne he had no reason at all to believe that Wayne had authority to depart from the role of the helpline staff as it had been so clearly described to him by the supervisor two days before. Nor did he have any reason to believe that the information provided by David no longer held good. Since it was immediately apparent that the information he was given by Wayne was wholly different from and irreconcilable with the information provided by David, it would be reasonable to expect, if Mr Zia wished to rely upon what Wayne was now saying, that he would have disclosed the gist, at least, of what he had previously been told. That would have provided an opportunity to clarify the position.

41. Put another way, an individual who seeks protection of a legitimate expectation must himself deal fairly with the public authority and that means making proper disclosure of any relevant matter, which in this context clearly includes the apparently contradictory information he had received.

42. Mr Skinner submits that the two conversations were wholly different because when Mr Zia spoke to David it was concerning an enquiry of the consequences of submitting no bank letter at all with his application but when he spoke with Wayne it was in relation to an enquiry about a bank letter that fell short of meeting all the requirements of the rule.

43. But that distinction, even if accepted, takes the applicants no further forward at all. It cannot sensibly be suggested that all David had said about the final decision being for the case worker to make and that a call to the helpline could not provide a

prediction of the outcome of an application applied only where an application was submitted unaccompanied by a specified document.

44. Thus, after the calls Mr Zia had conflicting information. He knew that the requirement to meet the conditions of the rules was mandatory and that the rule made clear that the application would be refused if he did not do so. He knew that David had made clear that it was the case worker who would decide the outcome and not the help line staff. On the other hand, Wayne had said something different. Mr Zia did not disclose that to Wayne. I do not accept those circumstances gave rise to any legitimate expectation that everything else must yield to the view expressed by Wayne. The appellants are intelligent and resourceful young men who proposed to invest a large sum of money in a new business enterprise. For them to believe that they could rely solely upon what Wayne had said means that they must have felt able to disregard everything else that had occurred. I do not accept they did so and nor it was not open to them to selectively seek to do so.

45. In any event, there is another route to the same conclusion. The information provided by Wayne was plainly incorrect. The applicants knew that was probably the case because of what David had said and that was confirmed when refusal of their application was notified not much later. There is no indication that there was any detrimental reliance upon the incorrect information provided by Wayne because the applicants had already established, unambiguously, that they would not be able to provide a bank letter in a qualifying form. Finally, there is a strong public interest in the outcome of such applications being decided in a consistent and predictable way, in line with the clear statement of policy as set out in the Immigration Rule applicable. That indicates that each of the matters identified in *PF* as providing an answer to the question posed where a legitimate expectation is asserted are present here also.

46. For these reasons I have no doubt at all that the applicants did not have a legitimate expectation that their application would be granted, such that the respondent was

bound to do so, notwithstanding their inability to meet the requirement of the rules. That may be sufficient to dispose of the application. But I will also address the other issues raised.

47. Mr Skinner is correct to say that the power to grant leave is conferred not by the rules but by primary legislation. But the obligation to make the rules arises also from primary legislation and the fact that the respondent retains an area of discretion to grant leave to those who do not meet the requirements of the rules is not in itself reason to depart from the mandatory vocabulary of this particular rule which, unlike some others tells the applicant that the application will be refused if all the requirements are not met. That does not mean that the determination of applications in accordance with those rules is a fetter upon the discretion of the respondent to grant leave in any particular case. The problem for these applicants was that there was no reason at all for the respondent to exercise such discretion outside the rules.

48. As I am satisfied that the applicants did not have a legitimate expectation that the information provided by Wayne would not only displace the information provided previously by a supervisor but would also, contrary to what Mr Zia had been told, bind the caseworker to grant the application, it matters not whether Wayne should be regarded as having any form of ostensible authority to do so, although in my judgement the only rational conclusion that could be reached, in the light of what David had said to Mr Zia, is that neither he nor anyone else to whom the applicants may have spoken to on the help line had any authority at all to give any assurance as to the outcome of an application.

49. As for what might be described as the *Durani* point, the fact that these applicants have produced a letter from their banks confirming refusal to issue a letter in the form requested does not assist the applicants in respect of the single ground upon which permission has been granted. In any event, it is not established that no applicant is able to provide such a letter, simply that these two applicants have

been unable to do so. If it were the universal practice of banks to decline such requests, whatever the circumstances of the account in question and the movement of funds into and out of them, then no applicant relying upon funding provided by third parties holding their funds in a United Kingdom Bank would ever be able to comply with the requirements of the rules and there is no evidence offered to that effect.

50. In the light of these conclusions, it is not necessary to decide whether the fact that Mr Zubair has still not provided an English language test certificate is fatal to one or both of the applications because both fall to be refused in any event because they did not meet the Specified Document requirements and there was no legitimate expectation that excused them from the need to do so.

Conclusion

51. The applications of both applicants for judicial review are refused.

Signed

Upper Tribunal Judge Southern