



R (on the application of Mushtaq) v Entry Clearance Officer of Islamabad, Pakistan (ECO – procedural fairness) IJR [2015] UKUT 00224 (IAC)

**Upper Tribunal
Immigration and Asylum Chamber**

Judicial Review Decision Notice

In the matter of an application for judicial review

The Queen on the application of

Adnan Mushtaq

Applicant

v

Entry Clearance Officer of Islamabad, Pakistan

Respondent

Before The Honourable Mr Justice McCloskey, President of the Upper Tribunal

Having considered all papers lodged by the parties and having heard Ms G Patel (of Counsel), instructed by Amjad Malik Solicitors, on behalf of the Applicant and Mr Najib (of Counsel), instructed by the Treasury Solicitor on behalf of the Respondent at a hearing at Manchester Civil Justice Centre on 18 March 2015

- (i) *The common law principles of procedural fairness apply to the decision making processes of Entry Clearance Officers (“ECOs”).*
- (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.*
- (iii) *A breach of the “Case Worker Guidance” may render the decision of an ECO unlawful. As a general rule, a challenge advanced on this basis will succeed only where Wednesbury irrationality or a material procedural irregularity is established.*

Judgment

Delivered on 21 March 2015

Introduction

- [1] The Applicant, a national of Pakistan aged 26 years, challenges a decision of the Entry Clearance Officer of Islamabad (hereinafter the “ECO”), dated 11 April 2014, whereby the Applicant’s application for a visa permitting him to enter the United Kingdom for the purpose of study was refused. By order of His Honour Judge Stephen Davies, sitting as a Judge of the Upper Tribunal, dated 22 September 2014, the Applicant’s application for permission to apply for judicial review was refused. The Applicant renewed his application and, following an *inter partes* hearing, by order dated 09 January 2015 I granted permission on two grounds, namely whether the impugned decision was compliant with the operative guidance and whether it was harmonious with the principles of procedural fairness. As appears from what follows, I consider that the public law misdemeanour of Wednesbury irrationality also features.

The Impugned Decision

- [2] The Applicant applied for entry clearance to the United Kingdom under the Tier 4 (General) Student regime of the Points Based System. He had successfully applied to study an accountancy course at an approved London educational establishment. The ECO, in refusing his application, purported to apply paragraph 245ZV of the Immigration Rules. This is one of the self-contained regimes arranged in Part 6A. The final provision of the moderately lengthy paragraph 245ZV is subparagraph (k) which provides:

“The Entry Clearance Officer must be satisfied that the applicant is a genuine student.”

Those who seek entry clearance under this route must secure a minimum of 30 points under Appendix A and 10 points under Appendix C, which relate to attributes and maintenance respectively.

- [3] The Applicant was awarded the requisite number of points, 40, by the ECO and, further, none of the general grounds for refusal was applied aversely to him. However, the ECO decided that the Applicant was not a genuine student and refused the application accordingly. This assessment was based on the answers which the Applicant made to certain questions during interview by the ECO
- [4] It is necessary to reproduce the relevant questions and answers. I shall divide these into appropriate groups.

“Why do you want to go to the UK to study?”

There is a better education there. This attracts most of the students. Because teachers there teach you well and when you have a degree from there, you get a good job in Pakistan.

What will you do when you return to Pakistan?

I have a cousin, he has done ACCA. He intends to establish an ACCT [viz accountancy] firm. And my mother and my brother wish me to start this firm with him.

How will this qualification help establish [the] firm?

ACCA holders are ext [viz external] accountants and CIMA holders are internal accounts. When they get together they complete firm.”

For completeness, during this phase of the interview, the Applicant was asked one further question:

“Why CIMA and not ACCA?”

He has done ACCA and he said I should do CIMA – it is a good course. It accounts for/related to production.”

In his decision, the ECO adverted to this discrete group of questions and answers, with the following commentary:

“It is evident from these answers that you have no idea how your qualification in isolation will help you to achieve your aim. In addition I do not find it credible that a prospective student would have no specific personal reason why they want to travel to and study in the UK given the commitment and financial costs associated with studying in the UK.”

[5] During the next section of the interview, the Applicant was questioned about his choice of college and course.

“How many colleges/universities did you research? Which

I looked at three. London School of Advanced Studies, European International College, LSBF.

Why did you choose this one [ie LSBF]?

Their teachers are well qualified and awarded. LSBF is renowned in field of accounts.

Tell me about the facilities available?

They will teach us 15 hours per week. And they showed me that if unfortunately I fail in a paper, they will let me take it

again without any additional fee. I haven't spoken to them about that yet in detail.

Please explain [difference] between external and internal?

Internal accounts are for managers, accountants and you have to show these ACCTS [sic] to your CEO and these are not meant for client. It includes the cost of labour, how much time is being spent and how much profit will be per day. [External] accounts are the ones that you can show to others like, what you show to Government in form of taxes and matters about bank, these are all external."

- [6] In his commentary, the ECO did not reproduce the last of these questions and answers. Rather, he focused exclusively on the "**facilities**" question, stating:

"These responses do not evidence any in-depth knowledge of your intended educational institute and this undermines your credibility as a genuine student."

While it would appear from the interview transcript that at some point during the Applicant's response to this question the interviewer interposed the observation "*Those aren't facilities*", thereby prompting the ECO to comment subsequently that the Applicant was "**pressed**" about this matter (a somewhat dubious claim), the point at which the interviewer made this statement is far from clear. The transcript is quite unsatisfactory in this respect.

- [7] The interviewer posed three further substantive interrelated questions.

"What research have you done into living in London?"

People are multicultural. You get international exposure there which will be good for my future and career.

[Accommodation?]

ACCOMM [sic] will be with my mother's close friend in Seven Kings.

[Stay with her all the time?]

I will stay with her on rental basis."

This was followed by two further substantive questions.

"What subjects did you study at Inter?"

It was in Arts subjects and that was Faculty of Arts.

Why change from Arts to Accounts?

Accountancy has more scope in Pakistan at the moment. I should chose [accountancy] field if I intend to brighten my future.”

In the next section of his commentary, the ECO highlighted only the first of the three questions in this discrete group, stating:

“The fact that you have demonstrated no concrete knowledge of London given that you intend to reside there throughout your studies undermines your credibility as a genuine student.”

[8] The next passage in the decision is couched in the following terms:

“Whilst this is not a prerequisite, I would expect a genuine student to have an indication of the proposed financial costs they will incur for a long term programme of study, particularly as they are reliant on financial sponsorship from other family members. You state that your mother will fund all of your study and that she receives a monthly income of PKR 100,000. You have had to evidence a total of £9,000 for maintenance and have already paid £2,180 in course fees, totalling £11,180 (PKR 1,812,590) which represents 18 times your mother’s total declared monthly income. Given the above, I am not satisfied that this level of expenditure or financial outlay is commensurate with your family’s personal and financial circumstances in Pakistan.”

This was followed by the omnibus conclusionary statement:

“In view of all the above, I am not satisfied as to your intentions in wishing to travel to the UK now. I am therefore not satisfied that you are a genuine student.”

Consideration and Analysis

[9] It has been held in previous decisions of the Upper Tribunal that the common law principles of procedural fairness apply to the decision making process of ECOs. See T (Entry Clearance) Jamaica [2011] UKUT 483 (IAC) and, more emphatically, Miah (Interviewer’s Comments: Disclosure: Fairness) [2014] UKUT 515 (IAC). In the latter decision, I made reference to the *locus classicus*, namely the speech of Lord Mustill in R v Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531. As I observed, there is a particular emphasis on context in Lord Mustill’s seminal formulation. Bearing in mind the nature of the present challenge, I consider that the fifth and sixth of the six general principles enunciated are of particular significance. The fifth principle articulates the general requirement that the person who is the subject of the forthcoming decision will have an opportunity to make representations in advance with a view to producing a favourable result. The sixth principle gives expression to the general requirement that the person concerned is informed of “*the gist of the*

case which he has to answer". In the present case, the application of these principles was not contested by Mr Najib on behalf of the Secretary of State, correctly in my view.

- [10] As appears above, the ECO, in making the impugned decision, identified a total of five factors which he considered adverse to the genuineness of the Applicant's entry clearance application. I shall consider these *seriatim*. The first was that the Applicant's answers did not disclose any "*real idea how your qualification in isolation will help you to achieve your aim*". This is a blunt, unreasoned and unparticularised statement. The Applicant was in possession of a "Confirmation of Acceptance of Studies" certificate authorising him to pursue a CIMA course at the London School of Business and Finance. In response to an earlier question, he stated that he has a brother in the United Kingdom who has been running a shop for four years. His last studies had been completed the previous year, following which he had concentrated on his Tier 4 application. Furthermore, he outlined what his post-study aspirations were. Given all of these considerations, I consider the ECO's bare, unreasoned statement to be unsustainable, irrational in the Wednesbury sense. This plainly undermines the decision as a whole.
- [11] The second factor considered adverse to the genuine nature of the Applicant's application was his asserted failure to articulate a "*specific personal reason*" for his plans. This phrase is undefined and unexplained in both the impugned decision and the related guidance (*infra*). Having regard to the answers provided by the Applicant, during both this phase of the interview and generally, I readily conclude that this assessment also is irrational in the Wednesbury sense. It flies in the teeth of the information provided by the Applicant in response to questions. The alternative public law analysis is that it is in breach of the principles of procedural fairness since the Applicant was not informed that it was incumbent on him to demonstrate a "*specific personal reason*" for his study plans and was not given a reasonable opportunity to do so.
- [12] The third factor considered adverse to the Applicant's genuineness was his response to the "facilities" question. In his answer he focused on the teaching which would be provided and the second chance opportunity provided in the event of failing an examination. The context within which this discrete question and answer unfolded concerned the educational establishment where he had been accepted for study. "Facilities" is a very general word. It is unsurprising that, in his reply, the Applicant concentrated on the educational facilities of the establishment. If the interviewer was desirous of testing the Applicant's knowledge of other "*facilities*" available at the college, I consider that fairness required that he make clear that he was not enquiring about its educational and teaching services and attributes. The upshot is that the Applicant was not, in my estimation, given a fair opportunity to deal with this discrete issue.
- [13] The fourth factor considered adverse to the Applicant's genuineness was the interviewer's assessment that he had "*demonstrated no*

concrete knowledge of London". This invites the immediate riposte that the questions posed did not seek to test the Applicant's general knowledge of London. The exclusive focus of the three sequential questions concerned was the Applicant's residential and accommodation plans in London. He was not asked about anything else. Nor was he probed about, or invited to develop, the first of his three answers. The conclusion that he was not afforded a fair opportunity to disclose whether he possessed any general knowledge about London follows inexorably. This too was procedurally unfair.

[14] The fifth, and final, factor reckoned to be adverse to the genuine nature of the Applicant's application was the proposed financing of his studies in London. The ECO expressed an expectation that a genuine student would have "an indication of the proposed financial costs they will incur for a long term programme of study". The Applicant was not asked any question to this effect. In the first phase of the interview, he confirmed that his mother was financing him, that her income was some PKR 100,000 per month and that this was earned from the rental of a family owned property. He was not asked any question about "the proposed financial costs [he would] incur for a long term programme of study". Furthermore, none of the questions posed, indirectly, raised this issue. In addition, it is uncontested that the Applicant satisfied the maintenance requirements fully. Since he was not afforded the opportunity to address this discrete issue, I consider that the adverse assessment which followed was procedurally unfair. Precisely the same assessment applies to the second element of this fifth adverse factor, namely the ECO's assessment that the proven payments of some £11,000 for maintenance and course fees were not commensurate with the family's evident financial status. This issue was not raised at all, directly or indirectly, during the Applicant's interview and a further element of procedural unfairness occurred in consequence.

[15] It follows from the analysis above that the decision making process culminating in the refusal of the Applicant's application was manifestly unfair. I consider that there were serial breaches of the hallowed maxim *audi alteram partem*. Furthermore, the decision is tainted by irrationality in the respects which I have diagnosed. The impugned decision of the ECO cannot be sustained in consequence.

The Guidance Ground of Challenge

[16] The further ground on which permission to apply for judicial review was granted is that the impugned decision of the ECO was arguably vitiated on the further basis that it was not compatible with the "Case Worker Guidance" (hereinafter the "*guidance*") relating to "Tier 4 interviews and genuine student rule", published on 04 December 2013. Paragraph 2 of the guidance states:

"An application should not be refused under paragraph 245ZV(k) unless the applicant has had the chance to respond to questions at interview (a credibility or genuineness interview) unless one of the following circumstances apply"

The “following circumstances” are of no application to this case. Given my analysis and conclusions in [9] – [15] above, it follows inexorably that this provision of the guidance was breached, based on the fundamental mismatch between the questions put to the Applicant during interview and the adverse factors condemnation which followed.

- [17] The guidance also enjoins ECOs to consider each application “*in the round*”, to take into account the issue of the “CAS” and to have regard to matters such as the person’s post-study plans, their financial circumstances and whether the applicant has a credible income source to finance the entirety of the course fees and maintenance. The ECO is also specifically required to take into account that the applicant has satisfied the maintenance requirements and “will be prepared to make considerable investment in gaining a qualification from the UK”. Finally, the guidance stipulates that any adverse genuineness assessment must be based on the balance of probabilities.
- [18] On balance, I conclude that the ECO did not fail to comply with any of the further aspects of the guidance outlined in [17] above. I prefer the submissions of Mr Najib on this issue. I consider that, as a general rule, a challenge advanced on this basis will succeed only if the exacting threshold of demonstrating irrationality in the Wednesbury sense is overcome or a material procedural irregularity is demonstrated.

General

- [19] I make one concluding observation. The choice of questions and words in ECO interviews requires care and planning. Ambiguous words and phrases are to be avoided. Furthermore, fairness will often require that the interviewer invite the subject to clarify or expand an answer or probe a response. These simple mechanisms will also illuminate the court’s assessment of whether any ensuing adverse decision was preordained. The nationals of impoverished and deprived countries who have invested large sums of money and whose admission to the United Kingdom is lawful if they satisfy the requirements of the relevant legal rules are deserving of no less.

Conclusion and Order

- [20] I make an order quashing the impugned decision of the ECO. Further, subject to any representations to the contrary on the part of the Respondent:

(a) the Applicant is entitled to his costs in full; and

(b) permission to appeal to the Court of Appeal is not appropriate, as

I consider this a fact specific case entailing the application of well established principles to its particular matrix.

Signed:

Bernard McCloskey.

The Honourable Mr Justice McCloskey
President of the Upper Tribunal, Immigration and Asylum Chamber

Dated: **21 March 2015**