R (on the application of Anjum) v Entry Clearance Officer, Islamabad (entrepreneur – business expansion – fairness generally) [2017] UKUT 00406 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of NADEEM AHMAD ANJUM

Applicant

v

Entry Clearance Officer, Islamabad

Respondent

Before The Honourable Mr Justice McCloskey, President and
Upper Tribunal Judge Dawson

Application for judicial review: substantive decision

[given orally on 11 July 2017 and edited]

Having considered all papers lodged, together with the submissions of Ms N Braganza, of counsel, instructed by Latitude Law Solicitors, on behalf of the Applicant and Mr S Karim QC, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Manchester Civil Justice Centre on 11 July 2017

(i) *A proposal by a Tier 1 Entrepreneur applicant who operates an existing business to use part of the prescribed minimum finance of £200,000 to purchase a second business for the purpose of developing and expanding the existing enterprise is compatible with paragraph 245 of the Immigration Rules.*

(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.*

McCLOSKEY P

The Applicant's Challenge

1. The Applicant, a national of Pakistan now aged 39 years, challenges primarily a decision of the Entry Clearance Officer of Islamabad (hereinafter the "ECO"), 18 May 2015, refusing his application for a Tier 1 (Entrepreneur) Visa to enable him to enter the United Kingdom. There is also a challenge to the ensuing administrative review decision of the Entry Clearance Manager ("ECM") dated 17 September 2015 affirming the primary decision. These refusals were maintained by the response dated 06 November 2015 to the pre-action protocol letter.

2. There is a relevant history in what has regrettably become something of a saga. The impugned refusal was preceded by an earlier refusal dated 15 February 2015 and the withdrawal thereof on the basis of a concession that there has been an unlawful failure to apply the Respondent's *soi-disant* "evidential flexibility" policy. This concession entailed the withdrawal of the original decision in its entirety. This withdrawal, dated 27 April 2015, was the impetus for the main impugned decision. There followed a fresh decision making process giving rise to the successive refusal decisions now challenged in these proceedings. The main impugned decision (as noted above) was made on 18 May 2015, in the immediate aftermath of an interview of the Applicant by the ECO conducted on the same date.

3. The initial order of the Upper Tribunal was one refusing permission to apply for judicial review on the papers. This was reversed by a later order, dated 09 January 2017, in the wake of an oral permission hearing. As a result the Applicant's challenge proceeds on two central grounds, namely procedural unfairness and misconstruction/misapplication of the relevant provisions of the Immigration Rules (the "Rules").

4. It is appropriate to acknowledge the care with which the Applicant's case has been prepared and presented. This is reflected particularly in the formulation of the "*Amended Grounds and Reply*" in response to the Respondent's detailed grounds of defence. This step, rarely taken, is expressly permitted by the Upper Tribunal's standard case management directions which issue when permission is granted. It is a most useful device in certain cases and I would strongly recommend greater resort to it. In this context I refer to the guidance contained in R (Mahmood) v Secretary of State for the Home Department (Candour/Reassessment Duties; ETS; Alternative Remedy) IJR [2014] UKUT 439 (IAC).

The Rules

5. The moderately dense code enshrined in paragraphs 245 D & DB of the Immigration Rules (the "Rules") is, for convenience, reproduced in the Appendix to this judgment.

The Main Impugned Decision

6. In refusing the application, the ECO, having referred to the threefold requirement prescribed by the Rules that the applicant have access to a minimum of £200,000 which is held in one of the "*regulated financial institutions*" and is "*disposable in the United Kingdom*" concluded that none of these stipulations was satisfied. This conclusion as based upon the responses made by the Applicant during an interview held on 18 May 2015. In brief compass, the ECO reasoned as follows:

   (a) While documentary evidence of funds of no less than £200,000 had been provided, the source of this money was not considered "*viable or credible*" on account of inconsistent responses made by the Applicant when interviewed.

   (b) Given the Applicant's stated intention to purchase an existing eBay shop for £50,000, "*….. you only have a balance available to invest of £150,732. Given this, the £200,000 you hold will not remain available to you until such time as it is spent for the purposes of your business or businesses as required by paragraph 245 DB(f)(iii).*"

   (c) "*During the interview you confirmed that you were aware of the contents of your business plan. However when asked initial questions regarding the business plan you were looking through it for the information.*"

   (d) "*Once it was put aside, you were asked your projected turnover for 2016. You gave an answer which did not match the figures in the business plan. When asked to explain you stated that the business plan was based on projection and that you were now giving your 'own idea through experience' and that the business plan was a minimum and that you anticipated to earn more. It is reasonable to expect that a genuine entrepreneur would have a good grasp of his finances and these answers suggest that your market research detailed in your plan and the reality are two different things as far as you are concerned. This suggestions that any research is either not believed or that you have not undertaken this research as claimed. These are not the answers or actions I would expect of an entrepreneur looking to expand his business further.*"

7. The decision of the ECO encompasses the following omnibus conclusion:

   "*Given all of this, I am not satisfied that the funds you hold are genuinely available to you, that you genuinely intend to invest the money in a business or businesses in the UK or that you genuinely intend to establish or take over a business or businesses in the UK.*"

   Both the speed and depth of the initial challenge to the ECO's decision are worthy of note. Just two days later the Applicant's solicitors formulated a detailed challenge in a letter dated 20 May 2015. Sequentially, the next document is a letter from the British High Commission of Islamabad, dated 17 September 2015. This adverts to the receipt of the Applicant's request for administrative review on 03 June 2015 and

affirms the decision of the ECO. Carefully analysed, this repeats, albeit in slightly different language, the first and fourth of the reasons summarised above, viz (a) and (d). The above mentioned pre-action protocol ("PAP") letter followed, on 23 October 2015.

8. Notably, in response to the latter, the ECM abandoned the first of the four refusal reasons viz (a). The terms of this concession are worthy of note. The ECM, having referred to the interview questions and answers relating to the availability to the Applicant of the requisite minimum fund of £200,000, identified two defects in the interview. First, the ECO "… *did not challenge you further on this point …* " (concerning the source of availability of the requisite funds). Second he had "… *inaccurately interpreted your response in the refusal notice*" (being the Applicant's response on this discrete issue). The second reason viz (b) was maintained, in these terms:

> "*It is clear from* [the Rules] *that the not less than £200,000 you must hold must be genuinely available to you and remain available to you until such time as it is spent for the purpose of your business or businesses and* ***buying a business from a previous owner****, where the money goes to that previous owner rather than into the business, is excluded from the definition of 'spent'.*"

Maintaining the fourth of the aforementioned refusal reasons viz (d), the Respondent drew attention to the projected turnover of £2,489,643 in the Business Plan and the projection of £300,350 given by the Applicant in interview, continuing:

> "*As you will note, your proposed turnover is significantly less than the amount detailed in your business plan for your forecasted turnover in 2016 and therefore this undermines your overall credibility and your justifications for the varying forecasts given by you and contained within your business plan. Such a significant difference in a financial forecast between you and your business plan is not indicative of a genuine entrepreneur with a viable and credible business plan.*"

Finally, the ECM rejected the Applicant's assertions that the interviewing officer had been "*confrontational and rude*" and that some of the answers given had been misinterpreted.

9. Pausing briefly, by this stage the distance separating the parties had narrowed considerably. The refusal of the Applicant's Tier 1 application was being maintained on the sole ground that (a) he was planning to spend £50,000 of the requisite minimum fund of £200,000 in a certain way which (b) is not permitted by the Rules. We observe that the foundation of this refusal consists of two inter-related exercises in interpretation. First, the interpretation of certain questions and answers during the interview. Second, the manner in which the ECO and ECM had interpreted certain provisions of the Rules.

The Applicant's Case

10. Paragraph 245D(c) of the Rules stipulates that the minimum funds - £200,000 – remain available to the applicant "*until such time as it is spent for the purposes of his business or businesses*". There follows a definition of "*available*" which is not germane in the present context. This in turn is followed by a provision which explains what "*invested*" or "*spent*" excludes. There are four excluded types of expenditure:

    (i) The applicant's own remuneration.

    (ii) Buying the business from a previous owner, where the money goes to that previous owner rather than into the business.

    (iii) Investing in businesses other than those which the applicant is running as self employed or as a director.

    (iv) Any spending which is not directly for the purpose of establishing or running the applicant's own business or businesses.

    Each of these prohibited forms of expenditure is disjunctive.

11. Ms Braganza developed the procedural unfairness ground of challenge succinctly. Fundamentally, the terms in which the Applicant's responses to certain important questions were recorded are, she submitted, manifestly incomplete, unclear or unintelligible. Elementary fairness required the ECO to follow up on certain answers for the purpose of clarification, explanation and elimination. There was a failure to do so. The interview record was, on its face, manifestly unreliable. These shortcomings were of obvious materiality since the interview record was of pivotal importance in the successive refusal decisions. Finally, Ms Braganza highlighted that successive failures to respond affirmatively to requests to disclose the interview record were in breach of the relevant guidance.

12. At this juncture it is appropriate to focus on certain aspects of the Applicant's interview record. In response to question 17, he stated that during the previous five years –

    "*… I have been working for eBay and I established a business there as well.*"

    He was then asked "*What type of business?*", replying:

    "*I have online shop through eBay.*"

    Next, he explained the goods which he sold via this business. Question 20 asked:

    "*What do you plan to do if you are granted entry clearance as a T1 Entrepreneur?*"

    The Applicant responded:

"*I will promote* ***the same business*** *by generating my own website and I will promote it through eBay who have 20,000 positive feedback. They want me to invest £50,000 ….*

[Our emphasis]

21. Who wants you to invest that? ….

It is my own business plan I desire to invest this money."

["invest" is verbatim]

In response to question 24, the Applicant reiterated his intention to invest £200,000 in his business. There followed these questions and answers:

"26. Can you tell me the breakdown of how you will invest the* [£200,000]*?

In online business sale is directly proportional to listing.

27. I want to know how you will invest the £200,000. What will you spend it on?

It depends on the number of orders. The more orders I get online, the more items I will export from Pakistan, China and India.

28. But you have not told me how you need to invest £200,000. You already have a business and are already trading.

According to the business plan, £80,000 will be required to decorate my office. I am doing a business deal with a company who need £50,000 which I will have to pay.

29. What kind of deal is that, what will you get from it?

It is an established shop through eBay company and I intend to take over it. Their yearly sale is about [£320,000]. *I will need to import the material in containers. One container will cost about £40,000 including 10 more selling items which are currently popular in the market.*"

30. So £50,000 of your money will be to buy this existing business?

Yes, I will ***take over****.*"

[Our emphasis]

13. At this juncture we interpose the following analysis. The Applicant made clear that all of the funds would be invested in his business. The key fact is that he has an existing business. He was not proposing to engage in the prohibited activity of

purchasing "**the**" business from someone else. Rather he was proposing to acquire another online retail entity which would be added to and amalgamated with his existing online business. This would entail investment in and expansion of his extant business. None of this can in our view be gainsaid.

14. We remind ourselves of the well-established principle that the construction of any document is a question of law. In the absence of any witness statement evidence from the Respondent, we analyse the interview record in the following way.

15. Those in attendance were the Applicant, the ECO (interviewer) and an interpreter. The ECO evidently asked the questions in English, these were then translated into Urdu, the Applicant replied in Urdu and the interpreter then translated his replies into English. The ECO was typing both the questions and the answers as the interview progressed. There was no audio recording.

16. At the outset of the interview the Applicant confirmed that the ECO was speaking audibly. The initial questions were evidently of the routine, pro-forma variety. Some of the ensuing questions were evidently prepared in advance. Others were plainly reactive to the Applicant's replies. At the conclusion of the interview the questions and answers were not read to the Applicant. Nor was he given the opportunity of reading the document. He was not invited to comment upon, correct or amplify any of the responses recorded. Notably there was no attempt to explore or clarify the two manifestly incoherent responses (as recorded) noted above viz to questions 21 and 26. It is also clear that around the middle of the interview the Applicant was reproached by the ECO for "*flicking through*" a copy of his Business Plan and desisted as a result. This is suggestive of an approach which was unfriendly and an atmosphere of discomfort.

17. One striking feature of the interview record is that the Applicant was not asked any questions about the content of his Business Plan. Nor did the interviewing ECO attempt to correlate any of the Applicant's replies to the latter. Furthermore, this exercise was not attempted in the ensuing refusal decision, the subsequent affirmation thereof or the response to the PAP letter. There was at no time any exploration of the link clearly made in the Business Plan between the Applicant's existing business ("UK Bargain Outlet") and his proposed future business ("Xeon Traders Limited"). In the Business Plan it is stated:

> "*This business plan for Xeon Traders Limited, an already established eBay top ranking bedding retailer with the name of UK Bargain Outlet, has been written to ascertain feasibility of the current business* ***and future expansion plans****. The plan details UK and Europe bedding industry structure, trends, future potential and outlines* ***the future strategic course of action of Xeon Traders Limited***."

None of this was either explored with the Applicant in interview or addressed in the successive decisions and reviews which materialised.

18. A brief perusal of the Business Plan makes abundantly clear that the Applicant was proposing to enlarge and develop his existing business. For example:

> "*Started in early 2013 Xeon Traders Limited ('the company') blue print lies in the growing online market for homeware and bedding in Europe, especially the United Kingdom. A business which started as a part time activity is one of the top ranked and* ***fastest growing*** *bedding shops on eBay ….*
>
> *As a part of its growth plan Xeon Traders Limited intends* ***to increase*** *its web presence by launching its own website* ***and start a new wholesale business****.*"

The above passage is contained in the "*Company Summary*" section. The direct nexus between the existing business and the proposed future expansion is also clear from the "*Management Summary*" section. The following extract from the "*Financial Plan*" is also of significance:

> "*Xeon Traders Limited financial plan has all the required ingredients required for providing* ***expansion of the business****, paving the way for* ***new investments*** *and providing enough fiscal room to change the way in which the company conducts business in changing business environment.*"

[Our emphasis.]

In the "*Projected Profit and Loss*" section, it was represented that the net income of the business would rise to £267,331 by 2017. In the "*Projected Balance Sheet*" total assets of £1,166,717 by 2017 were forecast. None of the foregoing was probed, explored or highlighted in the questions posed by the ECO.

19. We consider, based on what they have written and taking into account the interview record, that neither the ECO nor the ECM correctly appreciated those features of the Applicant's business proposal addressed above. This misunderstanding is rooted in, *inter alia*, the procedural unfairness of the interview and engages the further public law misdemeanours of irrationality and mistake of fact. Linked to this is the negative assessment of the Applicant's response to the *"projective turnover"* (sic) question 36:

> *Q. "What is your projective* [sic] *turnover for 2016?*
>
> *A. £300,350 from one shop which I am currently running".*

This invites the following brief analysis:

(a) The question was both unfair and confusing as the relevant section of the Business Plan did not employ the language of "turnover" and this was neither defined nor clarified by the interviewer.

(b) There was a manifest failure by both the ECO and the ECM to appreciate that the Applicant's response related to his <u>existing</u> business, rather than his planned <u>enlarged</u> future business.

(c) Neither the ECO nor the ECM took cognisance of the figure of just under £300,000 (£286,354) in respect of "*earning before interest and taxes*" for the year 2016 in the Business Plan.

(d) The possibility of evolving circumstances and plans was ignored.

Once again this (viz the response to question 36) is a paradigm illustration of an answer crying out for further probing, exploration and clarification: there was none.

20. At this juncture we turn to examine the governing legal principles. This Tribunal had occasion recently to review the doctrine of procedural fairness in R (AM) v Secretary of State for the Home Department [2017] UKUT 262 (IAC), at [76] particularly:

> *"While the decision of the House of Lords in R v SSHD, ex parte Doody and Others [1994] 1 AC 531 involved a very different context, namely the release of prisoners sentenced to life imprisonment, I consider that the terms in which Lord Mustill devised his celebrated code of procedural fairness makes clear that it is of general application. Furthermore, its association with the EU and ECHR legal rules and principles outlined above is unmistakable. The passage in question (at page 560D) is not susceptible to cherry picking and demands reproduction in full:*
>
> > *'My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (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, 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.'"*

In the same decision, this Tribunal took cognisance of what was stated concerning interviews of immigrants in R (Mapah) v Secretary of State for the Home Department [2003] EWHC 306 (Admin) at [62]:

"*(1) Problems of interpretation can and do occur;*

(2) Questions, translated into the applicant's language and replies given in that language, are not recorded as such but in the English translation;

(3) Records cannot always, despite exhortation, be literally verbatim;

(4) The reversal of the requirement for read back removed a measure of protection against unremarked mistakes in recording by the interviewer;

(5) An applicant does not necessarily have the benefit of representation or his own interpreter. Such an applicant will be at a disadvantage in identifying errors of translation;

(6) Immigration officials and Tribunals of Appeal frequently judge credibility against a criterion of consistency;

(7) *Tape recording of an interview by the applicant or by the Secretary of State would do much to alleviate these problems if and when they occur."*

21. In R (Dirshe) v Secretary of State for the Home Department [2005] EWCA Civ 421, the Court of Appeal, having cited the above passage with approval, said the following of asylum interviews, at [14]:

> "*The interview is a critical part of the procedure for determining asylum decisions. It provides the applicant with an opportunity to expand on or explain his written account and for the respondent, through the interviewing officer, to test that account and explore any apparent inconsistencies in that account. The interview could well be critical to any determination by either the respondent or appellate authorities as to the credibility of the applicant. The record of the interview is created by the interviewing officer, who is acting on behalf of the respondent. It follows that fairness requires that the procedure should give to the applicant an adequate opportunity to challenge its reliability or adequacy."*

Latham LJ continued, at [16]:

> "*So long as the Secretary of State continues with the practice of relying upon a written record of the interview in its present form, the applicant must have an adequate means of ensuring that the record is, as we have said, both accurate and reliable.*"

Notably, the Court then highlighted the variably factors of the skills and qualifications of the interpreter and the quality of the transcription by the interviewing officer, together with the issue of digest (or summary). The Court emphasised the vital importance of providing a tape recording of such interviews. While we are alert to the differing context which prevailed in Dirshe, the general tenor of the judgment and the procedural concerns which it identifies apply with a

degree of modification and clearly resonate in the present litigation context.

22. We conclude without hesitation that the Applicant's procedural unfairness challenge is made out. This conclusion is based on the analysis and reasons set out above. The single enduring reason for the refusal of the Applicant's Tier 1 application was based on a series of interview answers which on any reasonable and fair showing demanded further probing and clarification, together with a linkage to the Business Plan, in particular those passages highlighted above. Furthermore structurally, for the reasons given above, there was an inherent risk that the interview would give rise to a procedurally unfair substantive decision. This risk duly materialised in the present case.

23. We turn to consider the second ground of challenge. In succinct terms the Secretary of State's case is that the impugned decisions are sustainable because, on the basis of certain replies made by the Applicant during interview, he was proposing to expend £50,000 of the minimum fund of £200,000 for a purpose prohibited by the Rules. Assuming that this contention is based on a correct construction of the Rules, we consider that it must fail for the reasons given above. In short the significant procedural deficiencies in the interview have the effect that the factual foundation necessary for this assessment was plainly lacking. This assessment was not lawfully open to the ECO or ECM by reason of the procedural deficiencies which we have diagnosed.

24. Independently, we consider that this assessment is unsustainable in law on the further basis that it entails a misconstruction and/or misapplication of the Rules. We begin by reminding ourselves of the correct approach to every exercise of construction of the Immigration Rules. In Mahad v Entry Clearance Officer [2009] UKSC 16, Lord Brown stated at [10]:

> "*The Rules are not to be construed with the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the word used, recognising that they are statements of the Secretary of State's administrative policy.*"

In Odelola v Secretary of State for the Home Department [2009] 1 WLR 1230, Lord Hoffman stated at [4] that construction "*… depends upon the language of the rule, construed against the relevant background*".

25. Paragraph 245D(a) is the dominant, umbrella provision. It states:

> *"This route is for migrants who wish to establish, join* ***or take over*** *one or more businesses in the UK*"

[Our emphasis]

There is no suggestion that the Tier 1 Entrepreneur requirements enshrined in

paragraph 245 *et seq* of the Rules exclude an existing business. The Applicant's application was not refused on this basis. We take this as our starting point. Nor has this argument been canvassed on behalf of the Respondent. The key provision of the Rules in the present context is paragraph 245D(ii)(2). We consider that there is no complexity or sophistication in either the language employed or the clear intent of the words. This provision of the Rules prohibits the purchase of the business concerned from a previous owner where the applicant intends to draw the purchase monies from the minimum fund of £200,000. The rule states clearly that the expenditure of any part of the funds for this purpose is prohibited. Stated succinctly, that is not this case.

26. Furthermore, this provision of the paragraph 245 régime is not to be considered in isolation. Rather it must be evaluated in conjunction with all that precedes and follows it in this discrete compartment of the Rules. *Inter alia*, there is no prohibition against taking over an existing business. Indeed this is expressly permitted. One asks, rhetorically, how a takeover could realistically be effected in the real world of commerce in the absence of financial or other valuable consideration. Furthermore, the use of the definite article ("*the business*") is, in our judgement, of some importance. The phraseology of this section of the Rules also includes "*business or businesses*", "*one or more businesses*", "*proposed business activities*" and "*his business*". Fundamentally, the minimum fund of £200,000 must be invested in the existing or proposed business or businesses. This is stated emphatically in paragraph 245D(c): the whole of the minimum fund of £200,000 must be "*spent for the purposes of* [the applicant's] *business or businesses*".

27. Having considered these assorted provisions as a whole and in their full context, we are satisfied that where a Tier 1 applicant operates an existing business, the Rules do not prohibit the use of part of the minimum fund to purchase a second business for the purpose of developing and expanding the existing enterprise. This represents, *par excellence,* investment in the Tier 1 business. It does not fall foul of the mischief of a smokescreen application which will involve investment of some or all of the minimum fund in something else. Nor does it encroach upon the related mischief of successive non-British business owners engaging in chain sales of the same business. On the contrary it is clearly harmonious with two of the identifiable underlying purposes of the Tier 1 scheme namely the promotion of the United Kingdom economy and the maintenance of properly regulated immigration control.

28. We consider it clear from the Applicant's responses during the interview that this permitted activity, namely utilisation of part of the funds to purchase a second business for the purpose of expanding and developing an existing enterprise, is precisely what he was proposing to do with a portion - £50,000 – of his £200,000 fund. This is clear from his replies to the questions considered as a whole, in particular questions 17, 20, 21 and 28 – 30. Thus this aspect of the Applicant's business proposal was permitted by the Rules. From this it follows that the ECO and ECM misinterpreted, or misapplied, the Rules provisions in question. We therefore reject the centrepiece of Mr Karim's argument. The Applicant's second ground of challenge succeeds accordingly.

Omnibus Conclusion and Remedy

29. On the grounds and for the reasons elaborated above the Applicant's challenge succeeds. The appropriate remedy is an order quashing the impugned decisions. The effect of this order is that the Respondent must remake the impugned decisions duly guided by this judgment and, in particular, giving full effect to the principles of procedural fairness.

Costs

30. The Respondent will pay the Applicant's costs, to be assessed summarily.

Permission to Appeal

31. …….

Signed: 

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Dated: 12 July 2017

[Given orally on 11 July 2017]

Appendix

245D. Purpose of this route and meaning of business

1. (a) This route is for migrants who wish to establish, join or take over one or more businesses in the UK.
2. (b) For the purpose of paragraphs 245D to 245DF and paragraphs 35 to 53 of Appendix A 'business' means an enterprise as:
    1. (i) a sole trader,
    2. (ii) a partnership, or
    3. (iii) a company registered in the UK.
3. (c) Where paragraphs 245D to 245DF and paragraphs 35 to 53 of Appendix A, refer to money remaining available to the applicant until such time as it is spent for the purposes of his business or businesses:
    1. (i) 'Available' means that the funds are:
        1. (1) in the applicant's own possession,
        2. (2) in the financial accounts of a UK business which he is running as a member of a partnership or as a director, or
        3. (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.
    2. (ii) 'Invested' means that the funds have been invested into a business or businesses which the applicant is running as self-employed or as a director or member of a partnership. 'Invested' or 'spent' excludes spending on:
        1. (1) the applicant's own remuneration,
        2. (2) buying the business from a previous owner, where the money ultimately goes to that previous owner (irrespective of whether it is received or held directly or indirectly by that previous owner) rather than into the business being purchased (This applies regardless of whether the money is channelled through the business en route to the previous owner, for example by means of the applicant or business purchasing 'goodwill' or other assets which were previously part of the business.),
        3. (3) investing in businesses, other than those which the applicant is

running as self-employed or as a director, and

4. (4) any spending which is not directly for the purpose of establishing or running the applicant's own business or businesses.

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:

(a) The applicant must not fall for refusal under the general grounds for refusal.

(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 paragraph 1 to 15 of Appendix B.

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

(e) An applicant who has, or was last granted, leave as a Student or a Postgraduate Doctor or Dentist, a Student Nurse, a Student Writing-Up a Thesis, a Student Re-Sitting an Examination or as a Tier 4 Migrant and:

(i) is currently being sponsored by a government or international scholarship agency, or

(ii) was being sponsored by a government or international scholarship agency, and that sponsorship came to an end 12 months ago or less,

must provide the unconditional written consent of the sponsoring Government or agency to the application and must provide the specified documents as set out in paragraph 245A above, to show that this requirement has been met.

(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) 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 Plan 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.

(i) Where the applicant has had entry clearance, leave to enter or leave to remain as a Tier 1 (Entrepreneur) Migrant, a Businessperson or an Innovator in the 12 months immediately before the date of application, and is being assessed under Table 5 of Appendix A, the Entry Clearance Officer must be satisfied that:

(i) the applicant has established, taken over or become a director of one or more genuine businesses in the UK, and has genuinely operated that business or businesses while he had leave as a Tier 1 (Entrepreneur) Migrant, a Businessperson or an Innovator; and

(ii) the applicant has genuinely invested the money referred to in Table 5 of Appendix A into one or more genuine businesses in the UK to be spent for the purpose of that business or businesses; and

(iii) the applicant genuinely intends to continue operating one or more businesses in the UK; and

(iv) the applicant does not intend to take employment in the United Kingdom other than under the terms of paragraph 245DE.

(j) In making the assessment in (i), 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 5 of Appendix A;
(iii) the credibility of the financial accounts of the business or businesses;
(iv) the credibility of the applicant's business activity in the UK, including when he had leave as a Tier 1 (Entrepreneur) Migrant, a Businessperson or an Innovator;
(v) the credibility of the job creation for which the applicant is claiming points in Table 5 of Appendix A;
(vii) if the nature of the business requires mandatory accreditation, registration and/or insurance, whether that accreditation, registration and/or insurance has been obtained; and
(viii) any other relevant information.

(k) The Entry Clearance Officer reserves the right to request additional information and evidence to support the assessment in (f) or (i), and to refuse the application if the information or evidence is not provided. Any requested documents must be received by the Entry Clearance Officer at the address specified in the request within 28 calendar days of the date of the request.

(l) If the Entry Clearance Officer is not satisfied with the genuineness of the application in relation to a points-scoring requirement in Appendix A, those points will not be awarded.

(m) The Entry Clearance Officer may decide not to carry out the assessment in (f) or (i) if the application already falls for refusal on other grounds, but reserves the right to carry out this assessment in any reconsideration of the decision.

(n) The applicant must, unless he provides a reasonable explanation, comply with any request made by the Entry Clearance Officer to attend for interview.

(o) The applicant must be at least 16 years old.

(p) Where the applicant is under 18 years of age, the application must be supported by the applicant's parents or legal guardian or by one parent if that parent has sole legal responsibility for the child.

(q) Where the applicant is under 18 years of age, the applicant's parents or legal guardian, or one parent if that parent has sole legal responsibility for the child, must confirm that they consent to the arrangements for the applicant's care in the UK.