



OUTER HOUSE, COURT OF SESSION

[2017] CSOH 130

P1263/16

OPINION OF LADY CARMICHAEL

In the cause

RUSSELL FELBER & ANOTHER

Petitioners

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Petitioners: Caskie; Drummond Miller LLP**  
**Respondents: Pirie; Office of the Advocate General**

19 October 2017

**Introduction**

[1] The petitioners seek judicial review of a decision to refuse them leave to remain in the United Kingdom. They are citizens of the United States of America. They entered the United Kingdom lawfully on 17 March 2011. The first petitioner was in receipt of a Tier 1 (Entrepreneur) visa, with the second petitioner entering as his spouse. Their visas were to expire on 1 March 2014. They set up a bed and breakfast business in Inverness. They applied for an extension of their visas, and were granted extensions of two years. On 25 February 2016 they applied for indefinite leave to remain (“ILR”). Entry on a Tier 1 (Entrepreneur) visa is a route to settlement, and providing that an individual complied with

the terms of such a visa over a five year period, he would normally have an expectation that an application for ILR would be granted. The respondent refused the application for ILR on 25 August 2016 (6/2). The first petitioner applied for reconsideration of that decision by way of administrative review on 8 September 2016. By letter dated 5 October 2016 the respondent refused that application and adhered to the decision of 25 August 2016.

[2] At all material times paragraph 245DC of the Immigration Rules (“the rules”) provided that entry clearance would be for three years and four months. Paragraph 245DE(a)(i) provided that leave to remain would be granted for a period of two years to an applicant who had, or was last granted, leave as a Tier 1 (Entrepreneur) Migrant.

[3] The respondent indicates that the first petitioner only was the applicant in the application the refusal of which has led to the decision to remove the petitioners, but does not challenge the standing of the second petitioner. I refer throughout this Opinion variously to the first petitioner and to the petitioners as the context requires, although I accept that it was the first petitioner who made the application.

[4] In order to obtain ILR, an applicant must achieve a total of 75 points. Fulfilment of particular conditions results in awards of points. The condition that has given rise to difficulty in this case is the one which imposes a requirement as to the jobs that must be created and maintained by the applicant’s business (“the employment condition”). The conditions and the points awarded for fulfilling the conditions are the subject of provision in the rules. It is not in dispute that the first petitioner has complied with all other relevant conditions, including one that he invest not less than £200,000 in the business (“the investment condition”).

[5] The respondent accepts that the first petitioner created two new full time posts in the business during the first three years of his stay. His application for ILR has been refused

because he has not provided two full time posts (or part-time equivalents) during the subsequent two years.

### **The rules**

[6] The current version of paragraph 245DF of the rules (requirements for indefinite leave to remain) includes a requirement for a minimum of 75 points under paragraphs 35 to 53 of Appendix A. The previous version of that paragraph contained an identical points requirement. The change is said to have been effected to Appendix A, and in particular to Table 6. At all material times satisfaction of the employment condition gave rise to an award of 20 points.

[7] Until 6 November 2014 the employment condition was in these terms:

“The applicant has ... established a new UK business or businesses that has or have created the equivalent of [at least two] new full time jobs for persons settled in the UK ...

Where the applicant’s last grant of entry clearance or leave to enter or remain was as a Tier 1 (Entrepreneur) Migrant, the jobs must have existed for at least 12 months of the period for which the previous leave was granted.”

On 6 November 2014, paragraph 125 of Statement of Changes in the Immigration Rules, 16 October 2014 (HC 693) took effect. It affected an amendment which meant that the employment condition read:

“The applicant has ... established a new UK business or businesses that has or have created the equivalent of [at least two] new full time jobs for persons settled in the UK...

Where the applicant’s last grant of entry clearance or leave to enter or remain was as a Tier 1 (Entrepreneur) Migrant, the jobs must have existed for at least 12 months during that last grant of leave.”

### **Summary of Arguments**

[8] The petitioners argue first that the terms of the rule both before and after amendment

require that the jobs have existed only during the first period of leave. “The period for which the previous leave was granted” and “that last grant of leave” both refer only to the initial period of leave, not the most recent period of leave (the extension period). The petitioners say that the terms of the SET (O) forms (“the application forms”) on which applications for ILR required to be made support that proposition. The only purported change, on the petitioners’ analysis, came with the issue of version 04/2016 of the Tier 1 (Entrepreneur) of the Points Based System – Policy Guidance (“the guidance”) (7/4). The guidance states on its face that it is to be used for applications made on or after 6 April 2016. In tandem with the issue of the guidance came a revised form, also designated version 04/2016. According to the petitioners, the terms of the guidance reflected a change on the part of the respondent as to the correct interpretation of the rules, so as to require that two jobs exist both in the initial period of leave and the extension period.

[9] Counsel developed the argument as to the construction of the rules by reference to section 4 of the Immigration Act 1971. Provision is made there for leave to enter to be dealt with by immigration officers, but for leave to remain to be the subject of decision by the Secretary of State. This indicated that decisions about leave to enter and leave to remain were significantly different from each other. He placed emphasis on the use of the words “the previous” in the rule before it was amended. That represented a clear reference back to the period of leave before that immediately preceding the application. The “last grant of leave” meant the most recent category in which leave had been granted, and not the chronologically most recent grant of leave.

[10] Counsel submitted that leave might be granted for less than two years. The chronologically most recent grant of leave might be for a period of only a year, so it could not be correct that the employment condition applied during such a period.

[11] The guidance contained what the petitioners described as a concession, or transitional provision, in relation to those who entered the route to settlement before 6 April 2014. They referred to paragraph 215 of the guidance. If a change was made in April 2016, the petitioners argued, it was right that there should be a concession or transitional provision. That provision ought to have been applied in their favour.

[12] The petition and the petitioners' Note of Arguments anticipated an argument from the respondent that the amendment of the rules in November 2014 effected a change. That was not, however, an argument made by the respondent. She maintained that the amendment in November 2014 was made for the sake of clarity, as was the alteration in the guidance and the application forms in April 2016. The respondent argued that reference to the rule before amendment is irrelevant, but also that the meaning of the rule did not change by virtue of the amendment. The respondent applied the rule in force at the time that she determined the application, and the correct construction of that rule was that the jobs required to exist during the extension period.

[13] If the arguments about the construction of the rules and the transitional provision in the guidance were not correct, then the respondent ought to have exercised her discretion to grant leave notwithstanding that the petitioner's application did not satisfy the requirements of the rules. She should have done so recognising the lack of clarity in the rules, her published guidance, and the terms of the forms prescribed for applications of this sort.

[14] In developing the arguments for the petitioner, counsel relied on the content of the guidance and the application forms. He referred to *R (Forrester) v Secretary of State for the Home Department* [2008] EWHC 2307 (Admin) as an example of a case where a decision was taken in accordance with the Secretary of State's policy, but quashed by the court because the policy was applied in an unreasonable, disproportionate and inflexible manner, and the

court was critical of the Secretary of State's failure to exercise her discretion in the claimant's favour.

[15] Counsel for the respondent submitted that the respondent required to apply the rules in force at the time of her decision. The proper construction of the rule in force at the time was that the jobs must have existed for 12 months during both the initial period of leave and the extension period. In any event, the amendment in November 2014 had not effected a change, but had been intended only to improve the clarity of the rule. It was not legitimate to construe the rule by reference to the guidance or the forms. Reference to those did not assist the petitioner. The guidance contained a specific transitional provision in relation to how the jobs might be constituted. It did not support the petitioner's proposed construction. Both the guidance and the forms contained references to the need to consult the rules.

[16] The first petitioner had not asked the respondent to exercise her discretion, and accordingly there could be no question of her having failed unlawfully to do so: *R(B) v Secretary of State for the Home Department* [2014] 1 WLR 4188 at paragraph 35; *Sultana and others (rules: waiver/further enquiry; discretion)* [2014] UKUT 450 (IAC) at paragraph 20.

### **The Guidance**

[17] The cover page and paragraph 2 of the guidance refer to the need to read it together with the relevant paragraphs of the rules. The guidance came into force on 6 April 2016.

The relevant portions of the guidance are these:

"158. If you have established new businesses, those businesses must have, between them, created the equivalent of 2 extra full-time jobs for at least 2 people who are settled in the UK and those jobs must have existed for at least 12 months each.

...

### Post April 2014

167. If you successfully applied for entry clearance or switched into the route from 6 April 2014, the employment must

- be for at least 2 separate jobs
- exist for at least full 12 months each

### Examples

The following can be considered as acceptable employment

- the hours of workers in 2 part-time jobs can be combined to add up to 30 hours a week or more and form the equivalent of one full-time job, **as long as the two part-time jobs exist for 12 months ...**

### Further leave

168. If your last grant of leave before the current grant was as a Tier 1 (Entrepreneur) (for instance, you are applying for a second extension):

- You do not need to demonstrate that you have created 2 more full-time paid jobs, in addition to the 2 jobs you created during the initial period of leave (which you evidenced for your extension application), if the 2 full-time positions created in the initial period of leave were maintained for at least 12 months during your last grant of leave;
- if the jobs from the initial leave no longer exist, you must show they have created 2 new jobs which have existed for at least 12 months during your last grant of leave.

...

### Pre 6 April 2014 transitional arrangement

169. If you successfully applied to enter the route before 6 April 2014, and you are making an extension application or a 5 year settlement application, you may continue to employ:

- one worker for 24 months
- one worker for 6 months and one for 18 months
- 4 workers for 6 months each

and score points for job creation.

### Further leave

170. If your last grant of leave before the current grant was as a Tier 1 (Entrepreneur) (for instance, you are applying for a second extension):

- You do not need to demonstrate job creation in addition to the employment created during the initial period of leave if the employment created in the initial period of leave was maintained for 12 months or in line with the transitional arrangement during your last grant of leave;

- if the jobs from the initial leave no longer exist, you must show they have created 2 new jobs which have existed for at least 12 months or in line with the transitional arrangement during your last grant of leave.

...

### **Tier 1 (Entrepreneur) settlement (Indefinite Leave to Remain) applications**

...

#### **Specific Tier 1 (Entrepreneur) Criteria – settlement**

215. In addition to the above, you must meet the following criteria:

...

3) You have ... established a new UK business or businesses that has or have created the equivalent of 2 ... new full-time jobs for persons settled in the UK ... The jobs must have existed for at least 12 months during your last grant of leave unless you entered the route before 6 April 2014. More details on the requirements for employing settled workers can be found in the previous section on extension applications.”

[18] The policy guidance documents issued on 6 April 2011 and version 11/2015 (7/13 and 7/9 respectively) did not contain information relating particularly to applications for ILR, but directed applicants to a web page said to contain the relevant information. They did, however, contain information about what would be regarded as constituting the required two jobs. The two jobs could be constituted in the way described in paragraph 169, quoted above: see paragraph 104 of 7/13, paragraph 205 of 7/9.

### **The Application Forms**

[19] Mr Caskie drew attention also to the terms of the prescribed application forms (known as SET(O) forms) which required to be used by persons making applications for ILR in the Tier 1 (Entrepreneur) category. Versions 4/2013 and 4/2014 contain the following, under the heading “Job Creation”:

**“You have created a new UK business or businesses ... and created at least two full time equivalent posts (20 points available)**



During your period of leave as an Entrepreneur you must have ... established a new business or businesses in the UK ...

You must also have created an aggregate of at least 2 new full time posts for 2 people for at least 12 months each across your business."

Version 11/15 is identical, other than that it uses the word "two" rather than the figure "2" in the final paragraph.

[20] Version 04/2016 is different. Under a heading "Part C – Created two full time equivalent posts", it reads:

"During your period of leave as an [sic] Tier 1 (Entrepreneur), you must have created 2 full time jobs across your business(es). If you created 2 jobs in your initial application, you may use these jobs to claim points for settlement, if they were maintained for at least 12 months during your extension period of leave. Alternatively, if the jobs you created during your initial period of leave no longer exist, you create 2 more in your extension period of leave, and claim points for them – if they exist for at least 12 months."

[21] The form used to make the application for ILR in this case was version 11/15. At page 41 it contained the following:

"Applicants should refer to paragraph 245DF of the Rules and chapter 6A (Tier 1 Settlement) of the immigration directorate instructions for further guidance on the points requirement for Tier 1 (Entrepreneur) migrants."

[22] Chapter 6A is produced as 7/6. So far as ILR is concerned, it did not provide any information for an applicant, but instead directed the applicant to a web address. The content to be found at that web address is produced as 7/7. The document bears to be Guidance: Tier 1 (Entrepreneur) – version 15.0, Published for Home Office staff on 15 December 2015. Pages 79 and 80 contain information that is in substance very similar to that in paragraphs 167-170 of the guidance, although expressed in the third, rather than the second, person. In particular, it contains the following:

"If the applicant's last grant of leave before the current grant was as a Tier 1 (Entrepreneur) (for instance, they are applying for a second extension):

- they do not need to demonstrate job creation in addition to the employment created during the initial period of leave if the employment created in the initial period of leave was maintained for 12 months or in line with the transitional arrangement during their last grant of leave;
- if the jobs from the initial leave no longer exist, you must show they have created 2 new jobs which have existed for at least 12 months or in line with the transitional arrangement during their last grant of leave.

This arrangement is also applicable for ILR applications. However the employment will be in relation to the extension period of leave, rather than the initial period of leave.”

### **Pre-Action Letter and Grounds for Administrative Review**

[23] The petitioner’s solicitor sent a combined pre-action protocol letter and application for administrative review on 8 September 2016. In the grounds for administrative review attached to the letter, he made particular reference to paragraph 215 of the guidance, and submitted that that paragraph made it clear that the jobs did not have to exist for 12 months during the extension period.

### **Discussion**

#### *Decision Under the Rules*

[24] The rules are not law, but a statement of the respondent’s administrative practice.

Section 1(4) of the Immigration Act 1971 provides:

“The rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode shall include provision for admitting (in such cases and subject to such restrictions as may be provided by the rules, and subject or not to conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom.”

Section 3(2) of the same Act provides:

“The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances ...”

The statements so laid before Parliament may be disapproved under the negative resolution procedure.

[25] The task of interpreting a policy of the respondent, including the rules, is one for the court, and not for the respondent: *Mandalia v Secretary of State for the Home Department* [2015] 1 WLR 4546, paragraph 31. The construction of a rule depends on the language of the rule, construed against the relevant background, including a consideration of the rules as a whole, and the function which they serve in the administration of immigration policy: *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230, paragraph 4. The rules are not to be construed with all the strictness application to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the respondent’s administrative policy. The intention of the respondent is relevant, but is to be discerned objectively from the language used, rather than supposed policy considerations or the instructions given to guide immigration officers: *Mahad v Entry Clearance Officer* [2010] 1 WLR 48, paragraph 10. Policies in the form of immigration directorate instructions are hierarchically inferior to the rules and cannot inform the meaning of the rules: *Sultana*, paragraphs 27-28.

[26] The guidance in this case is, unlike immigration directorate instructions, entirely outward facing, in that it is expressly described as policy guidance for entrepreneurs – that is, those who are making the applications. Immigration directorate instructions, however,

while directed to case workers and decision workers, are publicly available, and serve to inform those who are making applications and their advisers. The observations made by the Court in *Mahad* and the Upper Tribunal in *Sultana* are in my view equally applicable to the guidance which I am asked to consider.

[27] The respondent required to apply the rule in force at the time she was determining the application: *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230, paragraphs 7, 34, 39. Where the plain meaning of a change is that the new rule is to apply immediately, even resulting unfairness will not rebut that plain meaning, at least where the unfairness is only slight: Lord Neuberger of Abbotsbury, with whom Lord Hope of Craighead agreed, at paragraphs 55, 57, 62.

[28] In the present case, the respondent correctly applied the rule and determined that the first petitioner was not entitled to ILR because the jobs had not existed for 12 months during the extension period. The correct construction of the rule is that the jobs required to exist during the period of leave chronologically most recent. The use of the word “last” makes the point plain. The last grant of leave is just that – the one which is chronologically most recent.

[29] The plain meaning of the expression is such that it follows that I cannot accept the petitioners’ contention that it should be interpreted as meaning “the most recent category in which leave has been granted”. As the respondent submitted, the use of the word “grant” further militates against that construction, as there may be more than one grant in a particular category of leave.

[30] The petitioners argued that a grant of leave to remain might be for less than two years, and sought to draw support from that for the proposition that the jobs required to exist only during the initial period. Paragraph 245DE(a)(i) provides that leave to remain **will be granted**

for a period of two years, which does not seem obviously to leave scope for a less generous grant. As the respondent points out, if it were correct that the grant of leave to remain might be less than two years, it is not obvious why, similarly, the grant of entry clearance might be for less than the two years and four months prescribed in paragraph 245DC(a). If that were so there could be no logic in attaching the requirement that the jobs exist for 12 months to the initial period.

[31] The respondent also pointed to the absurdity of imposing a requirement specifically for ILR if that requirement could be met simply by having satisfied the requirements for grant of leave to remain by way of the extension period. In that connection counsel drew attention to the contrast between table 5 of Appendix A, which related to leave to remain, and table 6, which related to ILR, in the rules after amendment in November 2014. The former contains a requirement to invest a particular sum in one or more businesses in the UK. The latter indicates that the applicant will not need to provide evidence of that investment if he was awarded points for it in his previous grant of entry clearance or leave to remain. By contrast the employment condition appears in both of tables 5 and 6. There is no provision that it need not be evidenced in an application for ILR if it has been the subject of an award of points in an earlier application. Before the amendment in November 2014, the investment condition appeared in table 5 and simply did not appear at all in table 6, whereas the employment requirement appeared in both tables.

[32] I note that in the tables as they were prior to amendment, both used the expression "the period for which the previous leave was granted". After amendment, table 5 continued to use that expression, but table 6 used the expression "during that last grant of leave". Tables 5 and 6 read together both before and after amendment in each case appear consistent with my interpretation of the expression used in table 6 from November 2014.

The employment condition appears in both tables and is a requirement that must be fulfilled during the most recent period of leave. The investment condition is either absent from table 6 or expressly qualified where there has already been an award of points in relation to it, because it is a one-off requirement. It is not entirely obvious why table 5 was not amended along with table 6, although it might have been thought that the need for clarification arose particularly in the context of ILR, where there would likely have been more than one previous grant of leave.

[33] For the avoidance of doubt, in my view both the pre and post-November 2014 rules fall to be construed in the same way. There is no difference in meaning between “the period for which the previous leave was granted” and “that last grant of leave”. If there was any lack of clarity in the unamended rule, it has been removed by the amendment made in November 2014.

[34] Version 04/2016 of the guidance does not affect or purport to effect changes to the requirements for ILR in relation to the period during which the jobs must have existed. The content of the guidance is consistent with my construction of the rules. Version 04/2016 contains information as to what will be regarded as constituting the necessary jobs, and also contains a transitional provision in relation to that particular aspect of the employment condition. The transitional provision in paragraph 169 of the guidance concerns only the question of what will be regarded as constituting the two necessary jobs, and not with the period during which the jobs must have existed. Paragraph 215 might suggest otherwise, but only if read in isolation. Read in context it is intended to refer back to paragraph 169. Paragraph 169, by virtue of its reference to “a 5 year settlement application” is consistent with the notion that the employment must exist during the extension period.

[35] The publication of version 04/2016 of the guidance does not appear to be the first publication of the material which appears at paragraphs 167-170 of it as to what constitutes the necessary jobs. That material also appears in the document produced as 7/7 and dated 15 December 2015.

[36] Paragraph 215 does not assist the petitioners. The nature of the transitional provision, on a proper reading of the guidance, is that it is not one which benefits the petitioners in relation to the period during which the jobs must have existed. It follows that the respondent has not failed to apply to the petitioners any policy expressed in paragraph 215 of the guidance.

#### **Failure to Exercise Discretion**

[37] The petitioners argued that there was a lack of clarity in the rules, the guidance and the application forms. The argument was to some extent predicated on the notion that the amendment in November 2014 had effected a change, and that the application forms did not reflect that change. It was at odds to some extent with the petitioners' principal contention, namely that they satisfied the employment condition whether by reference to the pre or post-November 2014 rules. The underlying contention, however, was that there was a lack of clarity as to whether the requirement for two jobs in the business was one which applied in the extension period.

[38] Mr Caskie submitted that the information available to applicants was so unsatisfactory, unclear, and contradictory that the respondent ought to have exercised her discretion to grant ILR notwithstanding that he did not meet the requirements for ILR within the rules. He referred to the comments made by Jackson LJ in *Pokhriyal v Secretary of State for the Home Department* [2014] INLR 291 about the Byzantine character of the rules.

Those comments are quoted by Lord Wilson, delivering the judgment of the Supreme Court in *Mandalia*, at paragraph 2. Lord Wilson went on to say:

“On any view, and contrary to a forecast in [the White Paper A Points-Based System: Making Migration Work for Britain], it is difficult for applicants, for many of whom English is not even their first language, to navigate their way around the requirements. It may be, however, that, as intended, the system is not difficult for caseworkers to administer. Certainly they have to a substantial extent been relieved of the obligation to consider whether to exercise discretions in their processing of applications. The sharp edges of the rules have cut out hard cases which have found their way to the courts and which have inevitably attracted at any rate the sympathy of the judges and sometimes – I speak for myself – nascent reservations about the suitability of the system which have not been easy to suppress. But suppressed they must be. For the management of this type of immigration, in principle highly valuable for the UK, is a profound social challenge, of which the complexities are beyond the understanding of the courts; and, by not exercising its right to disapprove Part 6A of the rules, Parliament has indorsed the Secretary of State's considered opinion that a points-based system is the optimum mechanism for achieving management of it.”

[39] Mr Pirie submitted that the respondent did not require to exercise a discretion where she had not been asked to do so, and that the material available to the first petitioner was not confusing. Generally speaking I accept that the respondent cannot be expected to take into account factors which have not been drawn to her attention: see, for example *R(B)* at paragraph 35. I do not take the passage in the decision of the Upper Tribunal in *Sultana* at paragraph 20 as indicating that it will always be necessary specifically to request that a discretion be exercised. The particular context of the passage in question is that of powers expressed in a provision of the rules (paragraph [D] of Appendix FM-SE) to treat applications exceptionally and to dispense on a discretionary basis with particular requirements. The context is not one of the general residual discretion of the respondent to deal with applications outside the rules. It is not hard to see why the Upper Tribunal encouraged advisers expressly to include in an application a request for the exercise of the discretion and to state the basis for the request.



[40] There may be situations in which the respondent is fully aware of all the relevant circumstances and of the inevitable consequences of her decision, and in which those may be so compelling as to persuade a court that a failure to exercise discretion has been unlawful. That appears to have been the basis for the decision of the court in *Forrester*, where an application to remain as a spouse was made timeously, but the cheque accompanying the application was not honoured by the bank. When resubmitted with a further cheque the application was out of time. The consequence would be removal of the applicant to Jamaica at public expense. She could apply from Jamaica, and it seemed likely that she would receive entrance clearance if she did so. It was against this background that Sullivan J asked what possible reason there could have been for the Secretary of State not to exercise her discretion in favour of the claimant (paragraph 7). The facts in that case were such as to demonstrate to the court that a failure to exercise discretion was unlawful, even in the absence of an express request that it be exercised.

[41] As I have already indicated, the versions of the guidance before version 04/2016 were silent in relation to how the employment condition applied in applications for ILR, referring the reader instead to web addresses. The note of arguments, which Mr Caskie adopted, contains an assertion that the only document an applicant had to read and comply with in making an application was the mandatory application form issued by the respondent. I do not accept that as correct. The rules are, as the Upper Tribunal indicated in *Sultana*, hierarchically superior to statements of policy in immigration directorate instructions. The content of prescribed application forms likewise cannot override or modify the statements of policy in the rules.

[42] The application forms before Version 04/2016 did not fully and accurately reflect the employment condition in the rules. If they were the only sources consulted, it is not difficult

to see why an applicant might conclude that the jobs required to exist for 12 months during the whole period of leave, rather than for 12 months during each of the initial period of leave and the extension period. The phrase used was “during your period of leave as an Entrepreneur”. The period is not qualified by reference to a particular grant of leave. The words used are not necessarily inconsistent with a requirement that the jobs exist for 12 months in the extension period, but they do not make that requirement patent. One reasonable reading of the words used in versions 4/2013, 4/2014 and 11/15 is, however, that the requirement is one that required to be fulfilled at some point, for twelve months, during the whole period of leave. That they should reflect quite so imperfectly the requirements of the rules is unsatisfactory, particularly as the respondent requires that applications be made on particular forms (the rules, paragraph 34 – formerly paragraph A34). In assessing whether the material available to the applicant was confusing, however, I do require to look at the form as a whole, and to the material to which the applicant was directed by the content of page 41 of the form.

[43] Page 41 of version 11/15 of the application form specifically directed an applicant to the rules and the relevant chapter of the immigration directorate instructions. An applicant following that direction would not find the information he needed in the immigration directorate instructions, but have then to follow a further direction to look at a web-page. That is not a particularly convenient or user-friendly system, but the content to be found at the web-page (7/7) cannot be criticised for any lack of clarity. The information at page 80 of 7/7 about the employment condition is unequivocal in stating that, in the context of ILR applications, the employment must be in relation to the extension period of leave. It is not misleading or confusing.

[44] Some stress was placed in oral submission on the circumstance that the petitioners' solicitor appears to have misunderstood paragraph 215 of the guidance, the terms of which added a further layer of potentially confusing information. That does not assist the petitioners. The guidance in question post-dated the application for ILR. It is in any event difficult to understand why a qualified adviser would not refer directly to the rules and to the material to which an applicant was directed by the terms of the application form in use at the material time.

[45] The petitioners have never asked the respondent to exercise her discretion outwith the rules. Although the pre-action protocol letter refers to Article 8 ECHR, the basis of the challenge and application for administrative review is simply that the rules have been misconstrued, and applied incorrectly. I am now asked to find that the respondent erred by not exercising her discretion to grant leave outside the rules.

[46] The court's function will usually be limited to reducing a decision that has been taken where a discretion has been found to have been exercised in an unlawful manner. It is normally outwith the proper scope of judicial review for the court to tell a public authority how it should exercise its discretion. While there may be cases where there could only be one possible outcome in the lawful exercise of a discretion – and that situation seems to underlie the approach taken in *Forrester* – this is not such a case. I do not know in what terms the petitioners might seek to invoke the exercise of the respondent's discretion, or what factors they might be able to pray in aid beyond those referred to in submissions in support of this petition. Despite what I accept are inadequacies in the forms, I do not consider that the information available to the first petitioner was so confusing that a failure on the part of the respondent to exercise discretion and grant ILR, in the absence of any invitation to do so, was unlawful.

[47] In the course of his oral submissions Mr Caskie went further, and asked me to infer that the first petitioner had relied on the terms of the form. The petition for judicial review does not proceed on the basis that the petitioner actually relied on the content of the form, and I am not prepared to entertain that submission in those circumstances. It follows from what I have said about the content of the form, taking into account the information to which an applicant was directed through it, that I do not consider that he would have been entitled simply to rely on the form without consulting the other material to which he was directed. I observe that the petitioner in this case appears to have had advice from a solicitor. It was a solicitor who completed the application form. I do not know what advice the solicitor may have tendered, or the extent of the first petitioner's reliance on advice from him. When making submissions in support of the application for administrative review the solicitor put forward a position based on what I have held is a misreading of paragraph 215 of the guidance, apparently looked at in isolation from the rest of the guidance, and in isolation from the rules themselves.

### **Disposal**

[48] I therefore sustain the second plea in law for the respondent, repel the first and second pleas in law for the petitioners, and dismiss the petition.