



Neutral Citation Number: [2019] EWCA Civ 2293

Case No: C6/2018/2812

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL IMMIGRATION
AND ASYLUM CHAMBER
HHJ EYRE QC (sitting as a judge of the Upper Tribunal)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2019

Before:

LORD JUSTICE DAVIS
and
LORD JUSTICE SIMON

Between:

R (on the application of Muhammad Jalal Junied)

Appellant

- and -

Secretary of State for the Home Department

Respondent

Mr Richard Singer (instructed by **Sabz Solicitors LLP**) for the **Appellant**
Mr Zane Malik (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 10 December 2019

**Judgment Approved by the court
for handing down**

Lord Justice Davis:

Introduction

1. This case involves consideration of aspects of the Points-Based System (“PBS”) relating to applications for leave to remain as Tier 1 (Entrepreneur) Migrants. In essence, what is said is that a particular requirement of the scheme, as contained in paragraph 41-SD(c) of Appendix A to the Immigration Rules, has proved impossible of fulfilment by the applicant; that in consequence the decision-making process on the part of the respondent Secretary of State was unfair and unreasonable; and that the decision of the Secretary of State to refuse the applicant further leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant should accordingly be quashed. In the alternative, it is sought to be argued, by a ground of appeal added by amendment, that the relevant requirement of the PBS is ultra vires.
2. The application for permission to appeal was directed by McCombe LJ on 28 May 2019 to be adjourned to an oral hearing, with the appeal to follow forthwith if permission was granted. The application came before us on that basis. We invited full argument from Mr Richard Singer, appearing for the applicant, and from Mr Zane Malik, appearing for the respondent: and I would like to acknowledge their careful and thorough submissions, both written and oral, presented to us.
3. I would formally grant permission to appeal. But, for consistency, I will continue to refer to “the applicant”.

The Points-Based System

4. In order to make sense of the course of events and of the competing arguments, I think that it is convenient first to outline the relevant parts of the PBS relating to Tier 1 (Entrepreneur) Migrants.
5. Section 3(2) of the Immigration Act 1971 empowers the Secretary of State to lay before Parliament rules restricting the entry into and stay in the United Kingdom of persons required to have leave.
6. As part of the (highly complex) Immigration Rules that have been made and amended from time to time, paragraph 245DD sets out requirements for those seeking leave to remain as Tier 1 (Entrepreneur) Migrants. That paragraph states at the outset that in order to qualify:

“... an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.

It is to be noted that the language is entirely prescriptive.

7. Of the listed requirements, one is that an applicant “must have” a minimum of 75 points under paragraphs 35 to 53 of Appendix A (see paragraph (b)). Paragraph 35 of Appendix A stipulates that an applicant must score 75 points for Attributes. By paragraph 36, the available points are shown in Table 4. Table 4 includes, among other things, a score of 25

points if the applicant “has access to not less than £200,000”; and further points are scored if other Attributes are met.

8. Paragraph 41(a) of Appendix A stipulates, in the relevant respects, that an applicant will only be considered to have access to funds if the documents specified in paragraph 41-SD are provided.
9. Central to this appeal are the requirements of paragraph 41-SD of Appendix A, and in particular, for present purposes, paragraph 41-SD(c). That, in the relevant respects, provides as follows:

“(c) The specified documents to show evidence of the funding available to invest, whether from the applicant’s own funds or from one or more third parties, are one or more of the following specified documents:

- (i) A letter from each financial institution holding the funds, to confirm the amount of money available. Each letter must:
 - (1) be an original document and not a copy,
 - (2) be on the institution’s headed paper,
 - (3) have been issued by an authorised official of that institution,
 - (4) have been produced within the 31 days immediately before the date of application,
 - (5) confirm that the institution is regulated by the appropriate body,
 - (6) state the applicant’s name, and his team partner’s name where relevant,
 - (7) show the account number and,
 - (8) state the date of the document,
 - (9) confirm the minimum balance available from the applicant’s own funds (if applicable) that has been held in that institution during a consecutive 90-day period of time, ending on the date of the letter,
 - (10) for money being held by a third party at the time of the application and not in the possession of the applicant, confirm that the third party has informed the institution of the amount of money that the third party intends to make available, and that the institution is not aware of the third party having promised to make that money available to any other person,
 - (11) confirm the name of each third party and their contact details, including their full address including postal code, telephone contact number and any email address; and
 - (12) confirm that if the money is not in an institution regulated by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA), the money can be transferred into the UK ...”

There are also other detailed requirements but I need not set them out for present purposes. In fact the focus in the present appeal has been on the requirement set out in (c)(i)(10): although, as will be appreciated, there are other requirements as well.

10. The rationale underpinning paragraph 41-SD(c) is plain enough. The presence within the United Kingdom of appropriately qualified migrants with sufficient funding for their

planned business activities is in general, as Parliament has decided, to be encouraged. But experience also teaches that there is a risk of abuse. One selected method of mitigating such a risk – plainly a rational method – is to ensure the provision of confirmation of the availability of the required amount in specified terms: and such confirmation is required to be from a financial institution which is a regulated body and in the form of an original letter emanating from an authorised official of that body.

11. Various aspects of the PBS contained within the Immigration Rules have been the subject of court decisions over the years. The prescriptive and inflexible nature of the PBS has been the subject of much judicial discussion and comment (indeed it has been the prescriptive and inflexible nature of the scheme in question in any given case which has usually given rise to the particular litigation in the first place).
12. As noted by Lord Hope in paragraph 42 of his judgment in *R (on the application of Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 1 WLR 2228:

“... The introduction of the points-based system has created an entirely different means of immigration control. The emphasis now is on certainty in place of discretion, on detail rather than broad guidance. There is much in this change of approach that is to be commended ...”

At paragraph 2 of his judgment in *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546, Lord Wilson noted that Parliament had decided that a points-based system was the optimum mechanism for achieving management of immigration control: notwithstanding his own stated reservations about the harsh results that could sometime occur in particular cases. As further noted by Underhill LJ at paragraph 56 of his judgment in *Mudiyanselage v Secretary of State for the Home Department* [2018] EWCA Civ 65, [2018] 4 WLR 55, after he had reviewed a number of the authorities:

“... The clear message of those authorities, including *Mandalia*, is that occasional harsh outcomes are a price that has to be paid for the perceived advantages of the PBS process ...”

13. Thus the whole tenor of the many authorities (and I do not need to refer to all of them) is that the PBS is designed to achieved predictability, consistency, administrative simplicity and certainty and does so by being prescriptive, at the expect of discretion.
14. This rigour of approach has also been consistently followed, in the context of the PBS, with regard to any stipulated requirements imposed on an applicant in obtaining and providing documents in the specified form. For example, in the case of *Alam v Secretary of State for the Home Department* [2012] EWCA Civ 966, (a case involving Student Migrants), it was stated by Sullivan LJ at paragraph 35, after he had referred to the relevant rules and policy guidance:

“... all made it clear that submission of the specified documents with the application was mandatory: if the specified documents were not produced with the application it would be refused. ... [Counsel] referred to the draconian consequences of a failure to supply a specified document but that is an inherent

feature of the PBS which puts a premium on predictability and certainty at the expense of discretion.”

15. In the Upper Tribunal case of *Durrani v Secretary of State for the Home Department* [2014] UKUT 00295 (IAC) the main issue was whether the applicant had produced requisite bank letters to show that he had access to the then required sum of £50,000 for the purposes of a Tier 1 (Entrepreneur) Migrant application, under the provisions of paragraph 41-SD(a). At paragraph 12 of its decision the Upper Tribunal said this:

“All of the requirements listed in paragraph 41-SD(a)(i) of the Rules are to be construed reasonably and sensibly, in their full context. Approached in this way, we consider it clear that the letters required from banks or other financial institutions are not designed to provide, and do not commit them to, any form of guarantee or assurance to any party. Rather, the function of the prescribed letters is to attest to the state of the relevant bank account on the date when they are written and to provide certain other items of information designed to confirm the authenticity of the application for entrepreneurial migrant status and its economic viability. The letters do not commit either of the banks, whether the applicant’s own bank or that of the third party, to releasing a specified sum of money in order to finance the proposed business venture. Furthermore, we consider that there can be no conceivable difficulty in the third party bank, with its customer’s consent, expressing its understanding, based on the customer’s instructions, that the use of specified funds in the customer’s bank account/s is contemplated or proposed by the customer for the purpose of financing the applicant’s proposed business venture. A simple statement to this effect, based on the customer’s instruction to the bank, is less onerous and intrusive than the disclosure of the customer’s name, account number and account balance. We consider that subparagraphs (6) and (9) are to be construed in this uncomplicated, reasonable and sensible fashion.”

16. That conclusion was expressly affirmed by the Court of Appeal in *Iqbal v Secretary of State for the Home Department* [2015] EWCA Civ 169. That case too involved consideration, for the purposes of paragraph 41-SD(a)(i), of the bank documents specified to be required. One argument raised in that case was that to produce such documents was not a practical possibility for the applicant. The court rejected that argument. In doing so, it cited at length from the Upper Tribunal decision in *Durrani*, including paragraph 12, and approved the conclusions there reached as “manifestly correct”: see paragraph 16 of the judgment of Sullivan LJ. Vos LJ, at paragraph 32, further stated that he considered it not to be an admissible approach to ignore the words actually used in the Rule by arguing that no bank could actually comply with the requirements of the Rule.

Background facts

17. That legal outline sets the scene for the issues arising in this case.
18. The applicant is a citizen of Pakistan, born on 3 January 1988.
19. He arrived in the United Kingdom on 15 February 2011, with entry clearance as a student valid until 12 April 2014.

20. He might have been expected to leave at the conclusion of that period. However, on 9 April 2014 he applied for further leave to remain on the basis of family and private life: subsequently varied to an application for further leave to remain as a Tier 2 (General) Migrant. He was granted further leave to remain until 28 June 2017: although this subsequently was curtailed so as to expire on 10 May 2017. An application for further leave to remain on the basis of family and private life was then refused by the Secretary of State on 22 November 2017.
21. On 20 November 2017 the applicant, through his solicitors, then made an application for leave to remain as a Tier 1 (Entrepreneur) Migrant. A similar application was made by his brother, Mr Talha, who is in Pakistan. Each application was supported by their brother Mr Babar, who is a practising solicitor and has indefinite leave to remain in the United Kingdom. Mr Babar made a Declaration dated 15 November 2017, identifying that he held £200,000 in an identified bank account with the Halifax Bank. He confirmed that that sum was available to his brothers and that he supported their proposal of establishing a gym franchise business in the United Kingdom.
22. Also produced was a bank statement from the Halifax Bank, in the name of Mr Babar. That showed very sizeable payments, all in round figures, variously made into that account in the period between 14 August 2017 and 9 October 2017, and giving rise at that latter date to a net total balance of just over £200,000.
23. Further provided with the application was a letter from the Halifax Bank itself, signed by the Manager of the Chorlton-cum-Hardy branch. It was dated 9 November 2017. It read as follows:

“Dear Mr Babar,

I refer to our conversation today and am writing to confirm that I am unable to provide you with the letter to the Home Office regarding Confirmation of Availability of Funds to a 3rd Party for the purposes of Tier 1 Entrepreneur Points Based System request.

At present the Halifax does not provide this confirmation in the format required by the Home Office as per the immigration rules Appendix A: Attributes Tier 1 Entrepreneur 41-SD (c)(i)(10).

I know we have discussed making available a bank statement and that you have already facilitated this.

I apologise if this causes you any inconvenience and, if I am able to assist in any other way, please let me know.”

24. Also accompanying the application was a lengthy letter dated 20 November 2017 from the applicant’s solicitors (in which firm Mr Babar is a partner). That letter referred to the requirements of the Rules in detail. As to the requirements of paragraph 41-SD(c)(i), it was stated that Halifax Bank had refused to issue a letter in the required form “due to their policy”; and requested that the application should not be refused on this ground “as clearly the requirement cannot be met due to the bank refusing to issue such a letter. The sponsor has clearly tried his best to convince the bank to give him such a letter but in vain”.

25. The application was rejected by the Secretary of State by a decision letter of 20 February 2018. No points under Appendix A were awarded in respect of Attributes. Express reference was made in the decision letter to paragraph 41-SD(c)(i). It was, among other things, said: “The bank letter you supplied for the account under Mr Babar’s name fails to state your name ... or confirm the availability of funds to yourself as stipulated in 41-SD(c)(i) (6), (9) and (10) of Appendix A of the Immigration Rules”. It was also indicated that if the applicant wished to apply for leave to remain in another capacity he must do so on the appropriate application form and with the appropriate fee.
26. The applicant’s solicitors requested administrative review. It was complained that no attention had been paid to the letter from the Halifax Bank to the effect that it does not provide a confirmation letter in the required format. Reference was also made to principles of fairness and to the authority of the House of Lords’ decision in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531. The decision to reject, however, was maintained on behalf of the Secretary of State by letter of 28 March 2018. It was among other things said: “While it is unfortunate that the Halifax Bank were unwilling to provide the specific confirmation document, it remains your responsibility to ensure that the evidence provided to demonstrate your investment meets with the requirements of the published rules”. It was denied that principles of fairness had not been followed or that the case of *Doody* was relevant in the present context.
27. Following further correspondence, a claim for judicial review of the decision was issued in the Upper Tribunal on 25 April 2018.

The proceedings in the Upper Tribunal

28. In the course of the proceedings, two witness statements were put in on behalf of the applicant: one from Mr Babar and one from his colleague Mr Ikram Malik, the head of his firm’s Immigration Department. They described attending in person at the relevant branch of the Halifax Bank on 9 November 2018 and speaking to the Branch Manager, Mr Faulkner. According to these statements, the Manager had explained to them that he had never issued a letter in such a format. It was further described in the statements that the Manager had studied the relevant Immigration Rules on his computer and also had made telephone enquiries of certain personnel. The Manager then, as it is said, stated that he was not able to issue the letter in the required format “as he was not aware of any precedent and/or an example where the bank had issued the letter in the requested format”. The Manager then, on their request, provided them with the letter of 9 November 2017. Mr Babar also stated that he himself had previously attempted to obtain such a letter in the specified form from Head Office, without success.
29. In the Acknowledgment of Service, which resisted the claim, the respondent among other things exhibited two letters from two separate branches of HSBC Bank respectively dated 10 February 2016 and 2 March 2016 and involving entirely unrelated applications: which, it was said, illustrated that there were regulated banks which were prepared to issue letters in the required format.
30. Upper Tribunal Judge Coker refused permission on the papers, by decision of 25 July 2018. He held that the decision of the Secretary of State was reasonable: “the applicant failed to produce the documentation required”.

31. The applicant then renewed to an oral hearing. At that hearing, he sought, and was permitted, to put in further evidence in the form of letters from three banks: Barclays, Lloyds and Natwest.
32. The first, dated 21 June 2018, is addressed to Mr Babar. It has a typed signature “Your Barclays Team”. It refers to letters from Mr Babar (which were not in evidence) said to request “a status letter” and says:
- “I can confirm that the only confirmation of funds letter we issue is your bank statement, this details the cleared funds that you have in your account and the length of time the funds have been there. I am unable to confirm your intentions for this money.”
33. The second letter is signed on behalf of Lloyds Bank. It too is addressed to Mr Babar. It is dated 13 August 2018 and refers to a telephone conversation earlier that day (which is not further evidenced). It is perhaps a point of comment that that letter itself is in most respects almost identical in its wording to that sent by the Halifax Bank on 9 November 2017.
34. The third letter, dated 27 June 2018, is from Natwest Bank to Mr Ikram Malik. It refers to a “recent request for a status letter” (which request also was not in evidence) and goes on:
- “I confirm that the only confirmation of funds letter we provide is by way of a bank statement. This details the cleared funds that you have in your account on a given day. I am unable to confirm your intentions for this money.”
35. At the oral hearing, Upper Tribunal Judge Eyre QC again refused permission. He noted the argument by counsel then appearing on behalf of the applicant that meeting the requirement of the Rules was impossible or nearly impossible of fulfilment and that that was unfair. He rejected that. He ruled that it was not shown that there was some impossibility, rather than a serious difficulty, in supplying the required details. It was not shown, he decided, that no reputable financial institution was prepared to supply such details: and a sponsor could always go elsewhere.

Discussion and Disposal of the Appeal

36. Given the express wording of the Rules, given the consistent approach which the courts have taken as to the need for precise compliance with the specified requirements under the Rules as to documents for the purposes of the PBS and given the background facts of this case it seems to me that the proper outcome for this appeal is clear: and that is that it must fail.

(1) First Ground

37. Mr Singer made plain in his oral argument that he was pursuing no point on this appeal as to “near miss” or “evidential flexibility”, as such. Given the circumstances and given the clear requirements of the Rules, he was right not to do so. He also in the circumstances, understandably, did not seek to place any reliance on paragraph 245AA of the Immigration Rules, which contains some general provisions as to the production of specified documents

with applications. His essential point was that the decision-making here was unfair and unreasonable and has given rise to an unfair and unreasonable result.

38. Mr Singer much pressed upon us the refusal of Halifax Bank to provide the required letter, seemingly (as he said) as a matter of its policy or practice rather than on any basis individual to Mr Babar. He submitted that that approach was likewise reflected in the letters from Barclays, Lloyds and Natwest. Thus the applicant through no fault of his own, he said, could not comply: and in any event an applicant is not in reality in a position to require a sponsor to move his funds to some other banking institution which might be able to comply. In summary, the Secretary of State here was demanding the impossible: which, he says, cannot be reasonable or fair. Overall, he said, the Rules in this respect have operated in an arbitrary and unjust way.
39. These arguments, with respect, cannot prevail. Although Mr Singer advanced a number of suggestions as to how the Rules could be much better and more fairly drafted – by way of example only, in listing or scheduling approved institutions who in principle are prepared to issue letters in the required format – as it seems to me, this was plainly a matter for Parliament. The Rules were laid before Parliament and were not disapproved: and it is not for the applicant here to say how the Rules should have been drafted or could be better or more fairly drafted.
40. The underpinning rationale for the current requirements of the PBS under the Rules is, as I have said, clear. These requirements have been, in a context such as the present, expressly approved as workable and fair in cases such as *Durrani* and *Iqbal* (cited above). There is no reason not to apply the reasoning in those cases to paragraph 41-SD(c)(i) of Appendix A and to this particular case, and every reason for doing so. The rules here are specific in their requirements; and the applicant in this case failed to meet those requirements. As paragraph 245DD of the Immigration Rules stipulates, in such circumstances the application will be refused. That, put shortly, is the end of the matter, as I see it.
41. Mr Singer, in his oral argument, was inclined to acknowledge the difficulty which the actual language of the Rules, applied to the circumstances of this case, posed for his argument. But he maintained that considerations of fairness meant that the Secretary of State had a residual discretion, within the PBS, to waive strict compliance with the Rules in an appropriate case: and this, he said, was pre-eminently such a case.
42. If the argument were right, it would drive a Heavy Goods Vehicle through the whole scheme: which is designed to achieve certainty, consistency, predictability and ease of administration, even if at the expense of flexibility. It would also run counter to the approach of all the decided authorities in this field and to the uniform acceptance that harsh outcomes in some individual cases is a price that has to be paid for the advantages (as perceived by the Rules) of a PBS. Moreover, where the Rules sanction some modification of the prescriptive requirements for documents, for example, that is in terms provided: see paragraph 245AA. The notion of a general “residual discretion” applicable to the PBS itself, albeit unexpressed in any Rule, is thus an effective negation of its intended purpose and effect. Indeed, if Mr Singer were right, it might even mean that unscrupulous applicants in Tier 1 (Entrepreneur) Migrant applications (I stress that I am talking generally, not about this particular case) might be well advised to put forward an institution such as the Halifax Bank as their proposed relevant financial institution, if there are perceived difficulties in

otherwise obtaining the requisite confirmations in accordance with the Rules. Certainly the position here is wholly different from that appertaining in a case such as *ex parte Doody*.

43. Mr Malik, for his part, did not dispute that there might be available the general residual discretion available to be exercised in immigration cases by the Secretary of State outside the Rules in appropriate exceptional circumstances. But his point was that there was not a residual discretion under the PBS itself. As will be gathered, I agree with him. Consequently, if an applicant wishes to invoke that wider discretion he must, as Mr Malik submitted, make a separate application for that purpose: as, indeed, the decision letter in this case so indicated. The position therefore remains that there is no residual discretion, by reference to asserted “fairness” available to the Secretary of State under the PBS to disapply the specific requirements of paragraph 41-SD(c)(i). That, I note, was also the approach and conclusion of Martin Spencer J in *R (on the application of Khajuria) v Secretary of State for the Home Department* [2019] EWHC 1226 (Admin), a case involving paragraph 46-SD(h)(i) of Appendix A. I consider that he was correct on that.
44. I should in any event make clear that I was wholly unpersuaded on the evidence that there was an impossibility of compliance here. It may be that the evidence (including the two witness statements) indicates that the Halifax Bank itself does not, as a matter of its practice, currently choose to provide letters in the required format. But that does not mean at all that it is impossible for the Halifax Bank to do so. Nor does it preclude an applicant or sponsor from going to some other regulated financial institution which does not have such a practice. As to the letters obtained from Barclays, Lloyds and Natwest in this case, the precise circumstances in which those letters were obtained are inadequately evidenced; nor are those letters altogether free from ambiguity, taken on their own, in any event. Besides, the respondent had put in the two letters of HSBC (admittedly dating back to 2016) to contrary effect. It seems to me, at all events, that the conclusion of Upper Tribunal Judge Eyre QC was a proper one, on the evidence: namely, that it was not shown in this case that compliance with the requirements of paragraph 41-SD(c)(i)(10) was impossible to achieve. I can, overall, see no error of law in this conclusion. I also add that, based on his immediate instructions, Mr Malik told us that he was not aware of any flood of claims or complaints of the present kind: which, if Mr Singer’s arguments were well-founded, one might otherwise have expected.
45. Accordingly this ground fails.

(2) Second Ground

46. I can take this ground, raised by amendment with leave previously given on the papers by Hickinbottom LJ, more shortly still. What is said is that paragraph 41-SD(c)(i)(10) is ultra vires.
47. The first point is that what is sought is, in my opinion, procedurally objectionable. A right of appeal to this court in this context is available on any point of law arising from a decision made by the Upper Tribunal: see s.13 of the Tribunals, Courts and Enforcement Act 2007. But in this case the argument that this part of the PBS was ultra vires was never advanced in the Upper Tribunal. Indeed, as Mr Singer frankly acknowledged, it could not have been: if such a point was to be run, it was required to be raised by judicial review proceedings issued in the High Court. This did not happen. It would in my judgment be

wrong for this point now substantively to be entertained, for the first time, in the Court of Appeal: and I would decline to entertain it.

48. In any event, the point could not, in my judgment, succeed even on substantive grounds. It is true that there are limited circumstances whereby Rules can be declared to be ultra vires: see, for example, *Kruse v Johnson* [1898] 2 QB 91; *R v Immigration Appeal Tribunal, ex parte Manshoora Begum* [1998] Imm. A.R. 385. But the present case, in my opinion, does not begin to fall within such a category. The Rules in this regard are rational and policy based; they are, though strict, not arbitrary or incapable in all cases of achievement; and they are, and are designed to be, of certain application, applying equally and without discrimination to all applicants. That it may be difficult for some applicants in some cases to comply, or even in some cases that some individual applicants may be actually unable to comply, cannot of itself make this requirement of the Rules invalid or ultra vires.
49. So this ground fails too.

Conclusion

50. I would dismiss this appeal on both grounds advanced.

Lord Justice Simon

51. I agree.