



UTIJR6

JR/3818/2019

**Upper Tribunal
Immigration and Asylum Chamber
Judicial Review Decision Notice**

The Queen (on the application of Saleh Ahmed)

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Keith

Having considered all documents lodged and having heard *Mr P Saini*, instructed by City Heights Solicitors, on behalf of the applicant and *Mr R Evans*, instructed by the Government Legal Department on behalf of the respondent at a hearing at Field House, London on 25 November 2019

It is ordered that

- (1) The judicial review application is dismissed in accordance with the judgment attached.
- (2) I order, therefore, that the judicial review application be dismissed.

Permission to appeal to the Court of Appeal

- (3) There was no application for permission to appeal to the Court of Appeal. In any event, I have considered, and refuse, permission to appeal to the Court of

Appeal for the same reasons that I have refused the orders sought for judicial review.

Costs

- (4) By consent of the parties, the applicant shall pay the respondent's reasonable costs, which the parties agree should be summarily assessed as £7,377.

Signed:

Upper Tribunal Judge Keith

Dated: 10 December 2019

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal on a question of law only. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an applicant's notice with the Civil Appeals Office of the Court of Appeal within 28 days of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

**Upper Tribunal
Immigration and Asylum Chamber**

JR/ 3818/2019

Field House,
Breems Buildings
London
EC4A 1WR

Heard on: 25 November 2019

BEFORE

UPPER TRIBUNAL JUDGE KEITH

Between

The Queen (on the application of Saleh Ahmed)

Applicant

v

Secretary of State for the Home Department

Respondent

Mr P Saini, instructed by City Heights Solicitors, appeared on behalf of the Applicant.

Mr R Evans, instructed by the Government Legal Department appeared on behalf of the Respondent.

**APPLICATION FOR JUDICIAL REVIEW
JUDGMENT**

The application

- (1) The applicant applied on 17 July 2019 for judicial review of the respondent's decisions of 29 March 2019 (the 'Decision') and the subsequent administrative review decision dated 2 May 2019, to refuse the applicant's application on 7 June 2018 for leave to remain as a Tier 1 (Entrepreneur) Migrant. The respondent refused the applicant's application on the basis that he did not meet the requirements of paragraph 41(a)(ii)(5) of the Immigration Rules, as

he had not provided correspondence from the venture capital firm, which he claimed had agreed to invest in his business, which confirmed that the venture capital firm was registered with the Financial Conduct Authority and its entry in the register included a permission to arrange, deal in or manage investments, or to manage alternative investment funds. Whilst the correspondence provided by the applicant stated that Active Capital BVBA ('Active Capital') claimed that it was listed on the FCA's public register with permission to arrange investments in venture capital, in fact the FCA's register indicated, at the time of the Decision, that Active Capital's FCA authorisation did not include permission to arrange, deal in or manage investments.

- (2) The applicant requested an administrative review of the Decision on 11 April 2019, asserting that the correspondence provided the required confirmation and that the language of the Immigration Rules ("the Rules") did not require the applicant to provide any further evidence of the FCA's grant of permission to Active Capital. The applicant further asserted that his application should not have been refused before the respondent's assertion about Active Capital's lack of permission for relevant activities had been put to him, to allow him the chance to respond. The respondent's assertion that any further enquiries would not change the outcome of the decision was speculative.
- (3) The respondent maintained the Decision in its administrative review decision, reiterating that Active Capital's permission did not extend to venture capital activities, as confirmed on the public FCA register and instead, it was only authorised to conduct re-insurance business. The correspondence from Active Capital, claiming to have permission previously, up to September 2018, was unsupported by any other independent evidence. It was the applicant's responsibility to ensure that his application met the requirements of the Immigration Rules,
- (4) The applicant raised six grounds in seeking permission for judicial review:
 - a. Ground (1) the Decision was irrational/Wednesbury unreasonable. The applicant had provided ample evidence of Active Capital's entry on the FCA register of its permission to arrange investment funds. In this case, the applicant relied upon the correspondence from Active Capital of its claimed prior permission. The respondent had imported an additional requirement, not included in the Rules, of independent confirmation from the FCA. All that was required was a letter from Active Capital which was correspondence confirming

- registration. This was consistent with the respondent's own policy guidance;
- b. Ground (2) - the respondent made a mistake of fact, through her failure to have regard to material factors and evidence, in particular the correspondence from Active Capital;
 - c. Ground (3) the respondent failed to consider the Rules and the fact that the correspondence from Active Capital met the requirements of those rules;
 - d. Ground (4) - the respondent failed to act consistently with a duty of common law fairness, in particular failing to give the applicant the opportunity to meet the respondent's concerns prior to refusing his application;
 - e. Ground (5) - the respondent failed to give anxious scrutiny to the applicant's application, in particular, Active Capital's business model, under which it had structured its investment through syndication to sub-investors in Southeast Asia, who had yet to provide any investment to the applicant;
 - f. Ground (6) - the respondent failed to exercise her residual discretion in favour of the applicant.
- (5) On 29 August 2019, Upper Tribunal Judge Kamara granted the application for permission to proceed to judicial review, on the basis that it was at least arguable that the respondent had acted in an irrational manner, failing to have regard to all of the evidence or to act fairly.

The basis of the respondent's resistance to the application

- (6) In the Acknowledgement of Service, the respondent asserted that the Rules require not only the provision of a letter by the relevant venture capital company; but that it be shown on the FCA register as having the relevant permission. A mere assertion in correspondence from Active Capital was not sufficient, bearing in mind that paragraph 41(a)(ii)(5) of the Rules required confirmation, not merely a statement of the necessary information. Active Capital was only permitted to conduct re-insurance business; correspondence from Active Capital to the contrary could not remedy that absence of authorisation.
- (7) Prior to filing detailed grounds of defence, on 9 October 2019, the respondent applied for permission to disclose an email from the FCA in respect of another judicial review application, R (on behalf of Vijay Mistry) v SSHD - JR/812/2019. Principal Resident Judge O'Connor granted permission for disclosure but made clear that its

admissibility was a matter for this Tribunal hearing the substantive judicial review application.

- (8) Following the grant of permission, the respondent filed detailed grounds of defence as well as a witness statement of Danyaal Mushtaq, one of the respondent's litigation caseworkers in respect of the Mistry application, which also involved claimed investment by Active Capital. The email from the FCA suggested that Active Capital did not have permission for venture capital activities, which led the FCA to believe the parties may have been dealing with a 'clone firm scam'.
- (9) The detailed grounds of defence reiterated:
 - a. the purpose behind the Tier 1 (Entrepreneur) rules, namely that an applicant must demonstrate £50,000 having been invested in the business; or that such an investment is available to be invested by the venture capital firm. Active Capital was not permitted to make such money available, and correspondence from it could not give 'confirmation' of such permission, if it no longer existed;
 - b. as a consequence, the Decision was not irrational;
 - c. the exercise of the respondent's powers of refusal were not dependent on a precedent fact, so that the Decision could only be impugned on public law grounds;
 - d. the respondent had considered the Rules, with anxious scrutiny;
 - e. there was no requirement on the respondent to put her concerns to the applicant prior to making the decision. The price of consistency and predictability in a points-based system might be 'hard' decisions, in some cases, as endorsed by the Court of Appeal in Alam v SSHD [2012] EWCA Civ 2012.
 - f. Finally, even if this Tribunal were to conclude that the respondent's decision was unreasonable, on the basis of the additional evidence provided from the FCA, it was highly likely that the outcome for the applicant would not have been substantially different and so relief should not be granted pursuant to section 31 of the Senior Courts Act 1981 and section 15(5A) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').

The respondent's application to amend the grounds and the admissibility of the 'Mistry' evidence

- (10) The applicant asserted that the evidence from the FCA should not be admitted. The email from the FCA, which existed at the time of the

respondent's pre-action response, had not been referred to or disclosed earlier. The respondent had not complied with her duty of candour as per R (on the application of Saha) v SSHD (Secretary of State's duty of candour) [2017] UKUT 17 (IAC).

- (11) In addition, if this Tribunal were to admit further evidence, it would encourage 'rolling reviews', which had been discouraged in the case of R on the application of FT) v SSHD ('rolling review'; challenging leave granted) [2017] UKUT 00331 (IAC); and in R (on the application of Spahiu) v SSHD [2018] EWCA Civ 2604.
- (12) In addition, if the evidence were admitted, that would amount to procedural unfairness as the evidence from the FCA and the issues it raised were not raised as part of the Decision. The applicant would be denied a proper opportunity to deal with the evidence, noting the authority of Balajigari v SSHD [2019] EWCA Civ 673. The applicant was innocent of any wrongdoing and was a victim, which made the respondent's refusal substantially unfair, as per the authority of R v SSHD ex p Doody [1994] 1 AC 531.
- (13) In any event, the evidence did not suggest that Active Capital did not have the required permission at the time of the applicant's application, but only many months later on 22 May 2019, the date of the FCA's email.
- (14) In his reply, the applicant reiterated that the requirements of the Rules included only that the applicant provide relevant correspondence; the requirement of confirmation mirrored a similar requirement under paragraph 41(a)(ii)(1) that the correspondence must confirm the amount of money available to the applicant. The respondent was not seeking to suggest that there must be independent third-party evidence of the availability of that money, and similarly could not expect independent evidence of FCA permission. Instead, the requirement was for 'specified documents' and the respondent's interpretation would otherwise create a whole new requirement for specified evidence. Any ambiguity could not be resolved in the respondent's favour. The respondent could not 'toughen up' the rules except by way of amendment to them, (see Pokhriyal v SSHD [2013] EWCA Civ 1568).
- (15) As a final point, although not referred to in the grounds, on 29 March 2019, paragraph 41(a)(ii) of the Rules may have already been amended and replaced with the provisions of paragraph 41-SD.

Hearing - scope of issues and admissibility of new evidence

- (16) At the beginning of the hearing, I agreed with Mr Saini and Mr Evans how I should proceed with the admissibility of 'Mistry'

evidence and also the scope of the challenges before me. Both agreed that I was not being asked to determine the issue of whether Active Capital was registered by the FCA as a precedent fact; and specifically, there were no allegations of deception or misrepresentation against the applicant. In the circumstances, the additional evidence relied upon by the respondent, particularly correspondence from the FCA in relation to the separate case of Mistry, needed only to be dealt with at the stage of relief, i.e. whether, if I were to find that the respondent's decisions were both substantively and/or procedurally unreasonable/ unfair, and whether section 31 of the Senior Courts Act and section 15(5A) TCEA applied

- (17) I also agreed with Mr Saini that despite the reference in the reply to a different version of the Rules applying, in fact there had been some confusion about what version the Rules had been contained on the respondent's archive, as opposed to what was in force at the date of the Decision. He was specifically content to proceed based on the Rules relied on by the respondent in the Decision and not a subsequent version of them which according to a Statement of Changes had taken effect the day after the respondent's decision, i.e. on 30 March 2019. The applicable version of the Rules was the one in force at the date the Decision, 29 March 2019 (see: Odelola (FC) v SSHD [2009] UKHL 25).
- (18) Mr Saini and Mr Evans also agreed that I should proceed, when considering the application, on the basis that Active Capital's permission to conduct venture capital activities ceased on an unspecified day in September 2018. What this meant was that taking the applicant's case at its highest, when he applied on 7 June 2018 for leave to remain, I was asked to assume that Active Capital had the required permission; but by the time of the Decision on 29 March 2019, that permission had ceased some months earlier. That was consistent with the correspondence from Active Capital dated 4 April 2019, at page [138] of the applicant's main bundle ("AB"), which stated:
- "... we had the permission in venture capital business in September 2018. ... The FCA permits the following from January 2018 to September 2018:*
1. *Exempt MIFID (Article 2)*
 2. *Venture capital business only*
 3. *Insurance products and services.'*
- (19) Based on the above assumptions, I was asked to consider whether the respondent had been entitled to reject the applicant's application.

On the one hand, Mr Saini argued that the requirements of the Rules could be satisfied by Active Capital's correspondence, which necessarily could only be a snapshot at a particular time, and the applicant need only meet the Rules at the date of his application on 7 June 2018.

- (20) In contrast, Mr Evans submitted that the applicant needed to meet the Rules at the date of the Decision on 29 March 2019. In simple terms, if, taking the applicant's case at its highest, Active Capital no longer had permission to manage or invest in venture capital business by the date of the Decision (when such permission had ceased the previous October), the Decision could not be impugned on public law grounds; the procedure which the respondent had adopted in reaching the Decision was the only appropriate one; and even if I were to find some sort of procedural irregularity or unfairness, the applicant should not be granted relief, as Active Capital did not have the required permission any longer and so could not manage any investment in the applicant's business, which was the very purpose of his Tier 1 (Entrepreneur) application.

The law

- (21) I agreed with Mr Saini and Mr Evans the version of the relevant Rules which applied, i.e. those at the date of the Decision, relevant excerpts of which are set out below.

"Attributes for Tier 1 (Entrepreneur) Migrants

35. *An applicant applying for entry clearance, leave to remain or indefinite leave to remain as a Tier 1 (Entrepreneur) Migrant must score 75 points for attributes.*
- 36(a) *Subject to paragraph 37, available points for initial applications for entry clearance or leave to remain are as shown in Table 4, read in conjunction with the Notes.*

Table 4: Initial applications as referred to in paragraph 36

- 1(b) *At least £50,000 is available to the applicant or their business or has been invested in their business due to an activity, from:*
- (i) *one or more venture capital firms regulated by the Financial Conduct Authority ('FCA')."*

- (22) Paragraph 41 of the Immigration Rules continues:

"41(a) If all or part of the money has not yet been invested in the applicant's business, the applicant must provide all of the specified documents set out in the relevant row of Table 4A below. If the applicant is claiming points for available money

from more than one source, the applicant must provide the specified documents for each row which applies."

Table 4A states:

"Money available from a venture capital firm, as set out in Table 4

Specified documents

(ii) A letter from a director, partner or fund manager of the venture capital firm, which includes:

- (1) confirmation of the amount of money available to the applicant, the entrepreneurial team or the applicant's business from the organisation,*
- (2) a statement providing detailed information on the strategy, structure and financial exposure of the fund,*
- (3) a statement detailing the rationale for the investment, providing specific information about the circumstances to which led to the investment decision,*
- (4) a statement confirming that the business/proposed business is a genuine and credible proposition, and*
- (5) confirmation that the venture capital firm is registered with the Financial Conduct Authority (FCA) and its entry in the register includes a permission to arrange, deal in or manage investments, or to manage alternative investment funds. ',*

Discussion and conclusions

Challenge to the substantive decision

- (23) Mr Saini said that while previous Counsel who had settled the grounds had identified 6 bases of challenge to the Decision and the subsequent administrative review, in reality, these could be focussed in two areas, the substance of the Decision itself; and the procedure by which the Decision was reached. In further submissions following the hearing, he focussed particularly on procedural unfairness, submitting that the applicant did not rely on 'substantive unfairness', and as a consequence, Pathan & Anor v. Secretary of State for the Home Department [2018] EWCA Civ 2103, referred to by the respondent was of no relevance, particularly as the Court of Appeal in Pathan sought to criticise the earlier Upper Tribunal decision of Patel (revocation of sponsor licence - fairness) India [2011] UKUT 211 (IAC) and recharacterize it as relating to substantive unfairness. Mr Saini, having referred to Tier 4 cases, such as where Confirmations of Acceptance for Studies or 'CAS' had been revoked, did not rely to any material extent on such cases, which were only relevant as they had echoed the unreasonableness

of expecting applicants to keep checking public registers, in this case, the FCA register, to see if Active Capital's permission had lapsed.

- (24) Taking first the substance of the Decision, I reject Mr Saini's primary submission that the provision of paragraph 41(ii)(5) of the Rules, as properly read in its context, requires no more than correspondence from the venture capital firm at the date of the applicant's application confirming relevant FCA permission, even if that permission ends prior to the respondent reaching her decision. Mr Evans' reference to paragraphs 35 and 36 of the Rules, which emphasise that points are scored where the relevant £50,000 'is' available, is not, as Mr Saini asserts, a supplemental reason or decision of the kind criticised in Caroopen & Myrie v. SSHD [2016] EWCA Civ 1307; rather, it is the context in which paragraph 41 must be read, namely that the permission of which the correspondence from the venture capital firm is confirmation, must be current not only at the date on which the venture capital firm correspondence was written, but on the date of a decision by the respondent. I gained fortification for that interpretation not only because of the context of paragraph 36 and the whole purpose of applications where investments have yet to be made, but also the Court of Appeal in Iqbal v SSHD [2015] EWCA Civ 169 where Lord Justice Vos, when considering the interpretation of paragraph 41-SD of Appendix A of the Immigration Rules, confirmed what was said by the Supreme Court in Mahad v Entry Clearance Officer [2009] UKSC 16, and at paragraph [33] stated:

"[33] As Lord Brown explained, the court should properly have regard to the Secretary of State's purpose and intention as discerned objectively from the words used. The court will also lean against an absurd construction, where the words in question can bear the preferred alternative meaning (see Jacob LJ in Lewis v Eliades [2004] 1 WLR 692 at paragraphs 58-61). But the court cannot and should not construe the Secretary of State's Rules to mean something different from what, on a fair objective reading, they actually say. In this case, the two main construction points advanced respectively by Mr Iqbal and Mr Macdonald urged that result."

- (25) To interpret paragraph 41 of the Rules to mean that provided there is correspondence from the venture capital firm at the date of the application, the requirements of the Rules would be met, even when by the date of the respondent's decision, the correspondence no longer reflected the applicant's current circumstances, would be to take paragraph 41 out of the context of the general requirement at Table 4, as referred to by paragraph 36(a), that at least £50,000 "is" available ([my emphasis]), and the further context to paragraph

46(a) that the investment has yet to be made. Were the interpretation advanced by Mr Saini to be correct, the absurd situation would arise, as in the applicant's case at its highest, that the respondent would be bound to grant Tier 1 entrepreneur leave, as a result of a specific proposed investment by a named venture capital firm, even where she knew that by the time of her decision, permission by the FCA for the venture capital firm to manage that investment had ceased. This would not be the case that funds had been made available to the applicant, who could nevertheless utilise those funds. In this case, what was being posited was a scenario where no funds had been advanced, financial permission to invest those funds had ceased and yet Mr Saini asserted that the respondent was nevertheless obliged to grant leave to remain for the purposes of effecting that investment.

- (26) Instead, I accept Mr Evans' submission that the specified document must confirm facts which remain accurate at the date of the respondent's decision. Whilst that may be a harsh outcome because there will naturally be circumstances when there have been a withdrawal or cessation of permission between the date of the application and the eventual decision, nevertheless to decide otherwise would result in absurd outcomes.
- (27) I also reject Mr Saini's submission that the Decision imported an additional requirement, not included in paragraph 41 of the Rules, of further corroborative evidence from the FCA about Active Capital's FCA permission. The Decision stated, on 29 March 2019, that Active Capital's entry on the FCA register: "*does not include permission to arrange, deal in or management investments.*" That was the sole basis on which points were not awarded, and to reiterate, taking the applicant's case at its highest, at the date of the Decision, that statement was correct. The subsequent reference in the administrative review response to independent evidence from the FCA was in response to the applicant's request for administrative review, which had specifically adduced further correspondence from Active Capital, which post-dated the Decision, and in reliance on which the applicant asserted that '*[Active Capital] are still on the register and do not have any exclusions*' ([125] AB). The respondent's reference to corroboration was in response to the applicant's apparent insinuation (although not so clearly put) that Active Capital had permission for venture capital activities, when the evidence from the FCA register was directly to the contrary, by the date of the Decision; the applicant now no longer puts his case that high, and merely asserts that Active Capital previously had permission.

- (28) In summary, I do not regard the respondent's reference to corroborative evidence as imposing an impermissible requirement, when it was faced with an apparent assertion about current FCA permission which was contradicted by the official record, the FCA's register. The reference to corroboration did not form part of the Decision and so does not undermine it; and the reference was only made in response to post Decision correspondence. I do not accept Mr Saini's alternative submission that reference to corroboration in the administrative review response meant that the Decision itself was implicitly based on the premise that correspondence which remained accurate at the date of application, rather than date of the Decision, was sufficient. Neither the challenge in the administrative review request, nor the response to it have direct bearing on the point that Active Capital no longer had relevant FCA permission for venture capital activities at the date of the Decision.
- (29) Instead, the Decision could not have been clearer as to the reasons why the respondent had refused the application ([133]):
- "You have provided a letter from the Fund Manager which states that Active Capital BVBA "is listed on the public register of FCA with permission to arrange investments in venture capital". However, Active Capital BVBA's entry on the FCA register does not include permission to arrange, deal in or manage investments, or to manage alternative investment funds. Therefore we have been unable to award points for access to funds."*
- (30) The Decision did not ask for further corroborative evidence and did not refer to Active Capital's previous FCA permission from January and September 2018. It simply stated that at the date of the Decision, the FCA register did not record Active Capital as having relevant permission, which it did not.

Procedural unfairness

- (31) In relation to the other grounds, which Mr Saini helpfully combined together to relate to the procedure by which the respondent reached the Decision, he submitted that even if the Rules required Active Capital to have relevant FCA permission at the date of the Decision, the respondent should have given the applicant the opportunity to counter or address the concerns raised by the respondent. The fact that the respondent raised the corroborative requirement in the administrative review response, after the Decision, reflected the respondent's error in attempting to resolve new issues in the administrative review process, as outlined in Balajigari, to which I have already referred. The respondent had failed to allow the applicant to respond to concerns prior to reaching the Decision and had raised the corroboration issue at the last minute.

- (32) I agree with Mr Evans' submission that, while the applicant purported to challenge the respondent on grounds of procedural fairness, in reality, these were challenges to the substance of the Decision.
- (33) By way of example, one of the procedural grounds related to the respondent's reliance on paragraph 245AA of the Rules, which includes a provision that where documents have not been submitted with an application, the decision maker may seek further documents, but will not do so where he or she thinks that submission of correct or missing documents will not lead to a grant of permission. In this case, all the applicant would have been able to do, taking his case at its highest, would have been to produce a record of the FCA register as at the date of his application in June 2018. The current FCA register record was already public and available (and is that on which the respondent reached the Decision) on 29 March 2019, which confirmed that Active Capital's permission had already ceased. A copy of the June 2018 register would not be relevant, when the venture capital firm needs to maintain its FCA permission at the date of the respondent's decision. A challenge to that, is a challenge to the substance of the Decision.
- (34) The applicant also says that he should have been allowed to understand the gist of the respondent's concerns, in order to respond to them (see Doody above). However, this is not, as Mr Saini raised and initially accepted, a case analogous to Tier 4 student visas, where a 'CAS' ceases to be valid because of the loss of sponsoring college's licence and where the respondent has a published policy allowing a 'grace' period during which someone can attempt to obtain an alternative CAS. Later in his oral submissions, when asked to identify what the benefit would be of warning the applicant that Active Capital's permission had ceased and that the respondent was minded to refuse his application, Mr Saini advanced precisely that proposition, namely that the applicant should have been notified, so that he could vary his application and seek an alternative venture capital firm's investment. Mr Saini identified no other option or possible 'challenge' to the Decision, in circumstances where it was based on Active Capital having current FCA permission. In reality, the challenge based on an opportunity to respond or 'understand the gist' ultimately boiled down to a challenge that the respondent should have imported a 'grace period' or 'minded to refuse' stage into the Tier 1 (Entrepreneur) application process, to allow an alternative investor to be sought.
- (35) Once again, in the applicant's circumstances, I conclude that what are put as 'procedural' challenges are ultimately challenges to the substance of the Decision. In contrast to Balajigari, the respondent

did not claim, in reaching the Decision, that the applicant had engaged in deception. As Mr Evans identified, in common with EK (Ivory Coast) v SSHD [2014] EWCA Civ 1517, and as referred to by the Court of Appeal in Pathan, the respondent had not changed her position, such as revoking a sponsoring college's licence; and practically speaking, while only the respondent knew when she would reach a decision on a Tier 1 application, there was no reason to think she would have any more prior knowledge than the applicant of when Active Capital would cease to have FCA permission, or the circumstances of such permission ceasing. In contrast to sponsoring educational colleges with perhaps hundreds of students, the applicant had individually negotiated with Active Capital the terms of its investment in his business and could reasonably be expected to have an ongoing dialogue with them in the context of their business relationship, particularly where the investment had yet to be made, so that all parties would be in a position to progress those investments. While the applicant could not be expected to check the FCA register daily during the period when the respondent was considering his application, there was no positive obligation on the respondent to notify him of a change in a public register, which it was open to him to check at his convenience, but more importantly, in the context of a regular dialogue between the applicant and his investor, in his business. Their business relationship was more analogous to the Tier 2 employment relationships considered in Pathan than the Tier 4 student applications considered in Patel. The fact that the respondent has not introduced a 'grace' period equivalent to Tier 4 (student) applications, does not render the process by which the respondent reached the Decision procedurally unfair.

- (36) In the circumstances, the Decision was one that was unquestionably open to the respondent on the evidence before her at the time, because Active Capital no longer had permission to engage in venture capital activities, and to construe a requirement that the respondent grant Tier 1 (Entrepreneur) leave in circumstances where she knew that permission had ceased would produce an absurd result. There was no procedural flaw or irregularity, on public law grounds, in the applicant not having been granted an opportunity to meet those concerns, or in reality what was sought, to obtain an alternative investor prior to his application being rejected. The applicant has not lost the benefit of lawful leave to remain, as he was an overstayer at the date of his Tier 1 application, albeit for a sufficiently brief period that it might have been disregarded in the event of a successful application. I reject Mr Saini's assertion that the fact of his overstaying, which might result in any out-of-country application for entry clearance being refused, adds weight to the assertion of procedural unfairness. The applicant's real challenge is

that he did not meet the requirement of the Rules at the date of the Decision through no fault of his own. However, that situation arose for reasons for which the respondent cannot be criticised, and in circumstances where there was no policy (and consequently no possible expectation) of a 'grace' period. While the applicant asserts procedural unfairness, the Decision reflects that he does not meet the Rules and did not meet them some months prior to the Decision.

- (37) For those reasons, I conclude that the Decision is a lawful and rational one.
- (38) In the circumstances, it is unnecessary for me to consider the question of whether relief should have been refused by reference to section 31 of the Senior Courts Act 1981 or section 15(5A) of TCEA. It was also unnecessary for me to consider the further evidence from the FCA of 2019, or the witness statement of Mr Mushtaq.
- (39) For the above reasons, the application for judicial review is refused.

Signed:

Upper Tribunal Judge Keith

Dated:

10 December 2019