



Neutral Citation Number: [2019] EWCA Civ 1019

Case No: C6/2017/3348

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION APPEALS
CHAMBER)

Upper Tribunal Judge Kopieczek
JR/3968/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/06/2019

Before:

LORD JUSTICE UNDERHILL
Vice President of the Court of Appeal (Civil Division)

and

LORD JUSTICE IRWIN

Between:

The Queen on the Application of
RAHMAN SUNY

Appellant

- and -

THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Respondent

Shahadoth Karim (instructed by **Shahid Rahman Solicitors**) for the **Appellant**
Jack Holborn (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date: 17 May 2019

Approved Judgment

Lord Justice Irwin:

Background

1. The Appellant is a national of Bangladesh, born in 1986. He was granted leave to enter the United Kingdom on a student visa in December 2007. He was granted extensions of his leave to remain as a student in April 2011 and April 2013. His leave to remain as a student was curtailed in July 2014 so as to expire on 2 February 2015. On 2 April 2015, he applied for further leave to remain on family or private life grounds, an application which was refused on 30 July 2015. On 12 August 2015, he made a combined application for further leave to remain as a Tier 2 migrant and applied for a biometric resident's permit.
2. Applications under the Tier 2 (General) category of the Points-Based System ["PB system"] include, in a case such as that of the Appellant, being awarded 50 points under "Appendix A: Attributes". The relevant point here was whether there existed a genuine vacancy in employment.
3. The application was based on a Certificate of Sponsorship ["CoS"] from Zamir Telecom Ltd, an approved sponsor. The Appellant had been offered a position of "sales accounts and business development manager". This post fell within a Standard Occupational Classification ["SOC"], coded 3545.
4. The "summary of job description" supplied by the sponsor read as follows:

"Migrant's employment

Job title: 3545

Job type: 3545 Sales accounts and business development managers

Summary of job description: Liaising with other staff to understand the product line and strategies for sale and business development with the view to reporting and offering recommendations to senior management. Assisting with creating sales strategies and targets. Surveying and understanding customer behaviour to products. Responsible for compliance and analysis of sales figures, preparing proposals for marketing campaigns and promotional activities and undertaking market research. Handle customers accounts. Recruiting and training junior sales staff. Keeping up to date with products and competitors. Identifying the relevant marketing collateral for products. Working in partnership with members of sales, marketing, and customer service and accounts teams to manage the product. Developing the process and implementing product launch process to ensure products are released to market successfully.

Gross salary in pound sterling including any allowances and guaranteed bonuses: 26500.00

For each: Year

Have you met the resident labour market test?: Y

Give details of the resident labour market test including where and when the post was advertised and reference number(s) for mandatory advertising: Exempt from RLMT as the candidate is switching from a Tier 4.

Tick to confirm that the post is at the appropriate skill level as set out in the sponsor guidance: Y

Tick to confirm the sponsor certifies maintenance for the migrant: Y”

5. Part of the reasoning of the Respondent in his subsequent Administrative Review was that this text was so close to the text set down in the relevant Code of Practice for Skilled Workers Version 04/15, current at the time this application was made, that it was suspicious and lent support to the subsequent refusal. For convenience of comparison, the text in the Code of Guidance reads:

“3545 Sales accounts and business development managers

Example job tasks:

- Liaises with other senior staff to determine the range of goods or services to be sold, contributes to the development of sales strategies and setting of sales targets;
- Discusses employer’s or client’s requirements, carries out surveys and analyses customers’ reactions to product, packaging, price, etc.;
- Compiles and analyses sales figures, prepares proposals for marketing campaigns and promotional activities and undertakes market research;
- Handles customer accounts;
- Recruits and trains junior sales staff;
- Produces reports and recommendations concerning marketing and sales strategies for senior management;
- Keeps up to date with products and competitors.”

6. The application was made on 12 August 2015. It was supported by a degree certificate in respect of the Applicant’s Master of Arts in Marketing and Innovation from Anglia Ruskin University, a *curriculum vitae* and a reference from a short period of previous employment in Bangladesh. As a student, in Britain from 2007 onward, the Appellant was precluded from full-time work.

7. It is a noteworthy feature of this case that the Appellant paid a fee for a “Tier 2 Priority Service Application”. In the Respondent’s letter of acknowledgement of 13 August 2015, the writer noted that, subject to “reasons beyond our control”, the application would lead to a decision within ten working days. As we shall see, the decision was sent in a letter of 6 February 2017, very nearly 18 months later, despite repeated prompting from the Appellant’s solicitors.
8. During the period when the application was under consideration, the Secretary of State requested from the sponsor a full employment history of the Appellant, both in the UK and overseas, and requested full details and “[to] confirm whether the roles were full or part time”.
9. There has never been disclosure of the correspondence between the Respondent and the sponsor. The case has proceeded on the basis of the summary of their communications in the Decision Letter.
10. It seems clear that neither the sponsor, nor the Appellant, were alerted to the suggestion that the vacancy was not genuine.
11. The application was refused in a decision letter of 6 February 2017. The Appellant was awarded zero points in respect of the sponsorship aspect of “Appendix A: Attributes: Under the PBS”. It is helpful to quote fully from the letter:

“Sponsorship

Points claimed	Points awarded
30	0

You have applied for leave to remain in the Tier 2 (General) category.

In assessing your application, we have considered whether the role stated on your Certificate of Sponsorship is a genuine vacancy, as per paragraph 245HD(f) with reference to Appendix A paragraph 77H of the Immigration Rules.

Under Part 6A and Appendix A of the Immigration Rules, a “genuine vacancy” is a vacancy which exists in practice (or would exist in practice were it not filled by the applicant) for a position which;

- Requires the jobholder to undertake the specific duties and responsibilities, for the weekly hours and length of the period of engagement, described by the Sponsor in the Certificate of Sponsorship relating to the applicant; and

- Does not include dissimilar and/or unequally skilled duties such that the Standard Occupational Classification (SOC) code used by the Sponsor as stated in the Certificate of Sponsorship relating to the applicant is inappropriate.

In making the assessment above the following factors have been considered.

- Whether the duties included in the job description on the Certificate of Sponsorship are matched and at an equal skill level to the SOC code listed on the Certificate of Sponsorship, as outlined in the published codes of practice;
- Whether you have the relevant qualifications or professional registration to do the role;
- Whether you will undertake the role for the weekly hours and length of the period of engagement, described by the Sponsor in the Certificate of Sponsorship;
- Whether the role has been advertised as described on the Certificate of Sponsorship;
- Whether the requirements of the job are inappropriate or have been tailored to exclude resident workers from being recruited; and
- Any other relevant information.

We requested further information in order to complete the above assessment, which your sponsor provided.

Zamir Telecom Limited was asked to provide your employment history, both in the UK and overseas, and to provide full details and confirm whether the roles were full or part time.

In response to this the Zamir Telecom Limited referred to your CV.

Under the header 'work experience' your CV shows you worked for a company called 'Naz Knit Wear Ltd' in Bangladesh from January 2006 to June 2006:

'My duties and responsibilities as a Bookkeeper and Marketing Assistant included keeping record of financial transactions on a daily basis and drafting financial reports as required, helping preparation of accounts, conducting market research, arranging promotional events, hosting presentations, attending customers, visiting customers/external agencies, adopting strategies for

business promotion, assessing results of marketing campaigns, preparing reports for the manager etc.’

This is only 6 months experience, over 10 years ago and was based in Bangladesh, this therefore wouldn’t be deemed sufficient as recent employment experience.

There is then another header on your CV which states ‘Other Experience’:

‘I worked in retail for some years when I had the opportunity to directly deal with customers and thereby to gain good communication skills and in-depth knowledge on how to work part as part of a team, handle complaints efficiently and use new ideas for the growth of the business.’

Your sponsor was explicitly asked to provide full details and confirm whether the roles were full or part time, which they failed to do.

In addition, Zamir Telecom Limited was also asked to provide employment references for you, to which they responded:

‘Abdur Rahman Suny does not have any relevant experience and therefore none was requested from his previous employers.’

The covering letter from Zamir Telecom also goes on to state:

‘In the interview, Abdur Rahman Suny demonstrated very good IQ level and eagerness to learn. Although he has no previous experience in this type of role, he shall be fully trained through our internal processes.’

When asked how you were recruited for the role, Zamir Telecom Limited stated:

‘Abdur Rahman Suny was interviewed and found to be a good fit to be trained up for the position of sales accounts and business development manager.’

It is clear from the response provided from Zamir Telecom Limited that you do not hold the relevant experience to undertake this role. Zamir Telecom Limited have failed to provide sufficient justification as to why they deemed you the most suitable candidate for the role. If the role is one that required training Zamir Telecom have failed to explain why a resident worker couldn’t have been trained to undertake this. [Emphasis added]

Part of the duties stated on the Certificate Of Sponsorship states ‘Recruiting and training junior sales staff’. **If Zamir Telecom intended to employ an individual to recruit and train junior**

staff then it would be logical to employ someone who already had experience in the relevant field.

Whilst it is acknowledged certain factors of the degree you are in possession of for a Master of Arts in Marketing and innovation may be deemed relevant, the fact that Zamir Telecom Ltd has stated you would require training indicates a relevant qualification alone would not be sufficient to undertake this role. [Emphasis added]

The Secretary of State is therefore refusing your application because there are reasonable grounds to believe the job described on your Certificate of Sponsorship is not a genuine vacancy, when assessing, on the balance of probabilities, paragraph 245HD(f) with reference to Appendix A paragraph 77H and the additional information or evidence requested under paragraph 245HD(f) with reference to Appendix A paragraph 77J of the Immigration Rules.”

12. Despite the passages emphasised above, it has all along been clear that this was not a decision that the Appellant was not a suitably qualified applicant for the vacancy. Further, despite the reference to a lack of explanation from the sponsor as to why a resident worker was not being recruited, it is agreed that this was not a vacancy subject to the Resident Labour Market Test [“RLMT”]. Moreover, there is no indication that the question of employing a resident worker was ever raised with the sponsor.
13. The Appellant sought administrative review of that decision. In the course of the letter of 31 March 2017, pursuant to the Pre Action Protocol, the Appellant’s solicitor made, *inter alia*, the following points:
 - “21. Indeed Zamir Telecom are a reputable business and they would not employ someone non-genuine (In both 2011 and 2012 Zamir Telecom appeared in The Sunday Times newspaper, Tech Track 100, positioning 13th and 21st respectively.) This is important information to take into account.
 22. The SSHD states that if the vacancy was genuine it would be logical to have someone with experience. It is submitted that the rules do not require a person to have relevant experience and therefore the rules themselves acknowledge that individuals without the relevant experience can be employed. However, in this case, the applicant did have some experience, albeit 10 years ago and, therefore, the SSHD’s conclusion that there is no relevant experience is erroneous. The applicant also has experience obtained through his academic qualification, which is an important factor to be taken into account, even under the SSHD’s own guidance and rules.”
14. The review was refused on 23 March 2017. The relevant passages from the decision read as follows:

“You claim that the job description in your Certificate of Sponsorship (CoS) matches the SOC codes at an equal level. You claim that you will undertake the employment as per the requirements advertised and for the period advertised. However, as the job role described appears to be only worded slightly different to the Codes of Practice and this brings into doubt the genuineness of the job described. The original caseworker therefore requested further evidence to assess your case in depth. However, your sponsor only provided some of the information required but not all.

....

You further claim that most employers train new staff and this is commonplace. Although you have the relevant qualifications which is a Masters Degree, you claim that the rules do not require a person to have the relevant experience and you claim that according to Appendix J, the Secretary of State of Home Department (SSHD) is not meant to take control of the employers’ recruitment procedures. However, it is questionable why the sponsor would need to employ someone with only 6 months experience despite the job role requiring someone to recruit and train junior sales staff. Therefore, it is more logical that your sponsor would recruit someone who already had the relevant experience to fulfil the job description adequately. Although you appear to have the relevant academic qualifications, there is no evidence that you have the employment skills and experience to undertake the role. Your sponsor has also failed to explain why they deem you the most suitable candidate for the role and the details supplied regarding the role and recruitment process were not logical. In addition, the policy guidance states clearly that in making the above assessment, we will base our decision on the balance of probabilities and may take into account your knowledge of the role; relevant experience relative to skills required to do the role; knowledge of the Sponsor in the UK; explanation of how you were recruited; and any other relevant information. Therefore, the original caseworker assessed your case correctly and we have maintained the original decision.

Additionally, you claim that you never had the right to pursue full time work in the UK due to your status as a student. However, your sponsor was asked to provide information about your employment history both in the UK and overseas in order to assess and confirm whether your job roles were full time or part time. Your sponsor failed to supply adequate documentation regarding your employment history instead they submitted your CV which is not classed as sufficient evidence. Therefore, we are satisfied that the original caseworker assessed

your application correctly and we have maintained the original decision.”

15. There is no indication in the Review Letter of the terms of the request to the sponsor for further information.
16. On 5 December 2017, following a hearing in the Upper Tribunal, UTJ Kopieczek refused permission to apply for judicial review. He found that the thrust of the grounds advanced was “a simple disagreement with the Respondent’s decision” and although there were some legal arguments, none “had any arguable merit”. The Respondent’s decision was clear that “the vacancy on the Certificate of Sponsorship was not a genuine vacancy”. The Respondent was entitled to seek further information from the sponsor and the response received was insufficient to allay concern as to the genuineness of the vacancy. Judge Kopieczek continued as follows:

“5. ... The question of relevant experience for example, was a factor that told against the genuineness of the vacancy, as did the issue of why the applicant was recruited for a role that would require him to train others when the applicant himself required training and in respect of a role that the respondent rationally concluded the applicant did not himself have relevant experience for.

6. Furthermore, the respondent was entitled to conclude that the sponsor had failed to explain why the applicant was regarded as the most suitable candidate and had failed to explain adequately the process of the applicant’s recruitment, aside from the interview.

7. The contention in the grounds that the rejection of the application on the basis of the genuineness of the vacancy is tantamount to an allegation of deception, seeks to elevate the reasons for rejection of the application to a pitch that is unwarranted. The Rules provide for the refusal of an application on the basis that it was refused in this case, without any requirement to establish or even consider a threshold of deception.”

The Ground of Appeal

17. The single ground of appeal reads as follows:

“Ground 1: The UT erred in concluding that the respondent was unarguably rational in concluding that the vacancy was not a genuine vacancy for reasons given in the respondent’s decision.”

The Points-Based System: Relevant Rules

18. Under paragraph 245HD, a relevant applicant for leave to remain as a Tier 2 (General) migrant:

“(f) If applying as a Tier-2 (General) migrant the applicant must have a minimum of 50 points under paragraphs 76 – 79D of Appendix A.”

19. The award of points is governed, in part, by paragraph 77H of Appendix A which reads in part as follows:

“77H. No points will be awarded for a Certificate of Sponsorship if the Entry Clearance Officer or the Secretary of State has reasonable grounds to believe, notwithstanding that the applicant has provided the evidence required under the relevant provisions of Appendix A, that:

(a) the job as recorded by the Certificate of Sponsorship Checking Service is not a genuine vacancy,

(b) the applicant is not appropriately qualified or registered to do the job in question (or will not be, by the time they begin the job), or

...

77J. To support the assessment in paragraph 77H(a)-(c), the Entry Clearance Officer or the Secretary of State may request additional information and evidence from the applicant or the Sponsor, and refuse the application if the information or evidence is not provided.”

20. In paragraph 6 of the Rules, the definition of genuine vacancy is laid down as follows:

“Under Part 6A and Appendix A of these Rules, a “**genuine vacancy**” is a vacancy which exists in practice (or would exist in practice were it not filled by the applicant) for a position which:

(a) requires the jobholder to undertake the specific duties and responsibilities, for the weekly hours and length of the period of engagement, described by the Sponsor in the Certificate of Sponsorship relating to the applicant; and

(b) does not include dissimilar and/or unequally skilled duties such that the Standard Occupational Classification (SOC) code used by the Sponsor as stated in the Certificate of Sponsorship relating to the applicant is inappropriate.”

The Submissions of the Appellant

21. The Appellant identifies the Respondent’s key reasoning as containing four propositions: (i) the Appellant did not have sufficient experience for the role entailed; (ii) the employer would have to train the Appellant which “makes little sense” given that the role itself entailed training junior staff; (iii) the potential employer failed to

provide sufficient information as to why the Appellant was the most suitable candidate; and (iv) the employer failed properly to explain the process of recruitment followed.

22. The central argument of the Appellant is that even if those conclusions were rational on the basis of the evidence, it was not rational to conclude as a consequence that the vacancy was not genuine. At least on the facts of this case, none of the points relied on touch upon the matters in the definition of a genuine vacancy. There is no evidence to suggest that the Appellant would not be required to “undertake the specific duties and responsibilities for the weekly hours and length of the period of engagement”, or that the vacancy includes “dissimilar and/or unequally skilled duties” undermining the standard occupational classification code.
23. It is also submitted that this post did not require particular experience. It was illogical to conclude the vacancy was not genuine on the grounds of lack of experience, or the need for training. Many genuine vacancies are similar, and the Code of Guidance specifically provides for entrants to occupations of this kind.
24. Moreover, the repeated references to resident workers, in relation to this vacancy, is likely to mean the Respondent misdirected himself.
25. In addition, the Appellant notes that the Respondent has not spelled out how the matters relied on bite on the definition of “genuine vacancy” as laid down in paragraph 6. The extent of training necessary to qualify the Appellant for the post cannot be brought within the relevant definition. In any event, the initial refusal did not raise this concern and nor did the administrative review decision. The suggestion that the Appellant required extensive training, and lacked significant experience, took no account of his Masters degree in marketing and innovation. The Respondent also overlooked some of the content of the Appellant’s *curriculum vitae*, which described “a great deal of knowledge and experience in IT, marketing and accountancy”. The Respondent failed to take relevant evidence into account.
26. It was further irrational to conclude that the vacancy was not genuine on the ground that the sponsor used similar language in describing the vacancy to the wording of the job role as set down in the standard occupational classification. The description is generic and designed to cover many possible job roles. Moreover, this point represents an oblique attack on the credibility of the employer. This was oblique, had not been set down clearly and should be held unsustainable in the face of the size and status of Zamir Telecom. Evidence was provided of the scale and longevity of the sponsor.
27. Sponsors are exposed and in a difficult position. They may be criticised if they seek to sponsor individuals where it is subsequently said the job description did not match the text in the Code of Guidance.
28. As to the process of recruitment, there was a proper interview and selection process. The rules as such that a “degree of deference” must be shown by the Respondent to employers who are best placed to assess the best candidates for vacancies. There was no basis here for the suggestion that the vacancy involved tasks at a lower level than implied by the SOC code. For those reasons the decision was unsustainable.

The Respondent's Submissions

29. Mr Holborn for the Respondent accepts the Appellant's summary of the four key ingredients of the decision. However, he submits that those factors cannot be considered in isolation. Those were factual matters that led the Respondent to its conclusion but they were not themselves to be equated with statutory tests. Taken together, they supported the conclusion that the vacancy was not genuine. It was not necessary in the course of such a PBS decision to specify which parts of the relevant criteria were not fulfilled.
30. The Appellant's lack of experience and the degree of need for further training did indeed suggest that "the Appellant may not, in fact, be fulfilling a role at the requisite skill level, whatever the information stated on the certification of sponsorship". The lack of any information from the sponsor as to why the Appellant was the most suitable candidate, and as to the recruitment process, did not assist. Rather, the lack of such response was rationally capable of suggesting that fuller information "may, in fact, show that the vacancy was not as described on the CoS".
31. Mr Holborn also suggests that it was rational to be concerned as to the genuineness of the vacancy where the description of the job closely matched the language of the Code. Because of the variety of tasks and jobs covered by this part of the Code it was "unlikely that particular job titles and tasks will always precisely match up with the wording of descriptions within the Code". Where the wording of the Code has been used this does suggest that:

"the job description has... been tailored to the SoC Code, rather than the correct Code being applied to the accurate job description. The obvious reason for a sponsor to do this is to ensure the job description meets a particular Code, either at a high enough skill level, to ensure they are able to sponsor a particular worker, or to ensure that the application for leave is granted".

Assertions as to the reputation of the particular sponsor were not before the decision-maker and in any event were not material.

32. Mr Holborn accepts that the role in question was not subject to the Resident Labour Market Test. However, that does not mean that the fact a job could have been conducted by a resident worker is irrelevant to the decision in this case. Mr Holborn quotes the Appellant's own written submissions in giving an example of a role that will not be a genuine vacancy as being "a job or role that does not exist in order to enable a migrant to come to, or stay in, the UK". The point in this case set down in the decision letter is expressed in the Respondent's submissions as follows:

"If A could be trained for the role without the necessary experience that suggests resident workers could also be trained. The question logically arises as to why A was chosen: was he a suitable candidate for such a high-skilled role, notwithstanding his lack of experience, or was the role, in fact, created (and then the skill requirements exaggerated) in order to allow A to remain in the UK?"

33. Mr Holborn emphasises that such a challenge as this is not arguable unless it may satisfy the irrationality threshold, described by Lord Bingham as “notoriously high” in *R v Lord Chancellor (ex parte Maxwell)* [1997] 1 WLR 104 at page 109. The Upper Tribunal was correct in refusing permission to apply for judicial review.

Analysis and Conclusions

34. I accept that a job offer to an individual who is manifestly unqualified for the relevant position may properly found an inference that the job vacancy is not genuine, as well of course as founding a decision that the individual is unqualified for the post under paragraph 77H(b). However, in my view that inference could properly be drawn, at least as the sole basis for an adverse conclusion under 77H(a), only where the facts were much more stark: where the job applicant lacked an essential qualification, or essential experience, or was otherwise evidently unsuitable. Mr Holborn was frank, in the course of argument, in his concession that a finding against this Appellant under paragraph 77H(b) might be problematic. In this kind of job vacancy, there are few stark lines.
35. Mr Karim emphasises that the relevant Code of Practice for “3545 Sales Accounts and Business Development Managers” explicitly anticipates “new entrants”, since a lower salary rate is indicated expressly for that category. I find that a persuasive point.
36. As the material demonstrates, the sponsor was clear that the Appellant had material qualifications, including his recent degree, but “no relevant experience”, and he would therefore require training. A great deal of emphasis was laid on this aspect of the Appellant as indicating that the vacancy was not genuine. It is not clear why. It is also hard to see a rational basis for the conclusion in the Decision Letter that “you do not hold the relevant experience to undertake this role”. Neither the Appellant nor the sponsor had ever claimed there was relevant direct experience. Common sense, as well as the content of the Code, suggests that an inexperienced but otherwise suitable applicant may be cheaper.
37. I also have a concern about the Respondent’s approach to the Resident Labour issue. Since this vacancy was not subject to the RLMT, there would seem no obvious reason for the sponsor to volunteer an explanation as to why they were seeking to recruit a non-resident. They were not expressly asked for an explanation or further information on this point. I see no substance to this point as the facts are in this case. I agree that there is a concern that the relevant official took an irrelevant matter into account.
38. I turn to the question of the job description. There can be no doubt that whoever drafted the job description on behalf of the sponsor must have had the Code of Practice text to hand. Much of the content and language, and the structure, of the job description, echoes the text in the Code of Practice. Mr Holborn argues that this may rationally be the basis of suspicion about the genuineness of the job vacancy, although here too he conceded it would be hard to defend this as a sole basis for a rational adverse conclusion.
39. The first point to make on this argument is that it appears to have formed no part of the original decision: there is no mention of the point in the letter of February 2017. The point was first expressed in the course of the Administrative Review.

40. I accept that most employers will have job descriptions for their employees and vacancies which are drafted for jobs without reference to the Codes of Practice. The task will then be to check such a job description against that laid down. I accept that drafting in the way the matter was done here may rationally give rise to some concern. However, it also seems to me that Mr Karim is correct as to the likely pressures on sponsors, who are not lawyers, and will not usually employ lawyers for purposes such as this, and who are anxious to ensure that the proper processes are followed. Without more, this degree of “mirroring” of text from the Code of Practice cannot, in my view, properly found a conclusion that the vacancy is not genuine.
41. A further point in the decision letter is the suggestion that the sponsor failed to supply relevant information requested and, in particular, whether the Appellant’s previous employment “roles were full or part time”. The only previous employment advanced was the employment ten years previously in Bangladesh. This was not said to be relevant to this vacancy in any direct sense. I accept that no further information was given on the point.
42. Drawing those strands together, in my view not one of the points relied on by the Respondent could found a rational conclusion that this vacancy was not a genuine one. Each point of concern is to some degree problematic. The question is whether a rational conclusion can be reached that the vacancy was not genuine, taking all the matters together. In approaching the matter in that way, I accept the observation of UTJ Kopieczek in his decision of 1 December 2017 that the Rules carry no “requirement to establish or even consider a threshold of deception”.
43. I remind myself that judicial review in such a case represents a rationality challenge. But such a challenge arises in the context of the Points Based System which, for the sake of predictability, and thus simplicity and brevity at the expense of flexibility, is justified in order to meet the demands of and upon the system. As the classic observations of Lord Walker JSC in *Alvi v SSHD* [2012] UKSC 33 have it:

“111. This appeal is an unusually stark illustration of the tension, in public law decision-making, between flexibility in the decision-making process and predictability of its outcome. Both are desirable objectives. But the more there is of one, the less room there is for the other, and getting the balance right is often difficult. In recent decades there has been a marked tendency of government to favour predictability over flexibility. The points-based system for controlling immigration for purposes of employment is a paradigm example. Other examples that come to mind are the statutory rules as to child tax credit, recently considered by this Court in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18 [2012] 1WLR 1545 and the old system of child support, considered by the House of Lords in *Smith v Smith* [2006] UKHL 35 [2006] 1 WLR 2024.

112. As Lord Hope says in his judgment (para 42), there is much in this tendency that is to be commended. The pressure under which the system of immigration control now operates makes it desirable that outcomes of decision-making should be as predictable as possible, and the need for detailed consideration

of individual cases reduced. But this comes at a considerable price in terms of rigidity and complexity.”

44. Mr Karim emphasises that the purpose of the Points-Based System is that it should be predictable, clear and consistent, as the Respondent has repeatedly argued in other cases: see *Alvi*. If the obligations of clarity and certainty apply to Appellants, so they do to the Secretary of State. If the Respondent is permitted to raise concerns beyond the “parameters set out in the rules” (here essentially the definition of genuine vacancy), then this will prejudice the predictability and clarity of the Points-Based System.
45. It appears to me that in this case the protracted and complex process of the Respondent departed from the simple, brief and predictable approach called for by the PBS. The Secretary of State engaged in a long process of consideration, yet did not take simple steps of requesting information before reaching a conclusion.
46. Fundamentally, the conclusion reached rested on three or four concerns, none of which could individually found the conclusion, and each of which could relatively easily have been explored to achieve clarity. None of these concerns arose directly from the matters contained in the definition of a ‘genuine vacancy in Rule 6. In the context of the PBS, can it be rational (and thus lawful) for a decision adverse to the Appellant to be reached in such a way? This was a protracted investigation and decision-making process, which the Respondent described as “particularly complex”. The Respondent’s successive officials never alerted the sponsor or the Appellant to their concerns, but at the same time permitted the process to extend. The decision was then reached on a concatenation of points, none of which was straightforward, none of which would have sustained the decision on their own and, in respect of the Appellant’s inexperience and non-resident status, were highly problematic.
47. In my judgment this decision cannot be defended. I would therefore remit the matter to the Upper Tribunal, so that judicial review proceedings may proceed, in the expectation that the decision will be quashed.

Lord Justice Underhill:

48. I agree that this appeal should be allowed. My reasons are, I believe, essentially the same as Irwin LJ’s but I will briefly state them in my own words.
49. The Appellant’s application was refused on the sole basis that the Secretary of State believed that there was no “genuine vacancy” for the role stated on his certificate of sponsorship and thus that paragraph 77H (a) of Appendix A to the Immigration Rules applied. The term “a genuine vacancy” is defined in paragraph 6 of the Rules, which Irwin LJ sets out at para. 20 of his judgment. It is important to note that paragraph 77H (a) is not concerned with the suitability of the applicant to fill that vacancy, if it exists: that is covered by paragraph 77H (b). Nor is it concerned with whether the job could be done by a UK or EEA national or person with settled status: that is only relevant to the “Resident Labour Market Test” under paragraph 78 of Appendix A, and it was common ground that that did not apply in this case.
50. As I understand it, it was not the Secretary of State’s belief that the sponsor had no vacancy for the applicant at all – that is, that the whole offer was simply a sham. Rather, he believed that the vacancy which there was, was for a role which was insufficiently

skilled to be covered by the SOC code identified in the CoS, and so was not “genuine” in the sense defined in paragraph 6. Such a situation does not necessarily involve any deliberate deception on the part of the sponsor or the Appellant. Job descriptions are not hard-edged, and what the Secretary of State may reasonably regard as a misclassification may simply reflect a different assessment of what the job required, or a looseness of thought, or perhaps an element of wishful thinking or exaggeration falling short of dishonesty.

51. I agree with Irwin LJ that the reasons originally relied on by the Secretary of State appear on their face to be concerned with the question whether the Appellant was appropriately qualified to fill the vacancy advertised, which is the subject of paragraph 77H (b), and not with whether there was a genuine vacancy at all; and the reference to whether a resident worker could have been trained to do the job likewise appears to be directed at paragraph 78 (and in circumstances in which it did not even fall to be applied).
52. The Secretary of State’s response, which persuaded UTJ Kopieczek, is that the facts that an applicant is not suitable for the job and/or that it could have been done by a resident worker may be relevant to the genuineness of the vacancy as well as being potential reasons for refusal in their own right. Like Irwin LJ, I accept that that may be so in a particular case, but I have to say that I am not persuaded that it represents the Secretary of State’s reasoning in this case. The argument looks to me much more an *ex post facto* rationalisation of a decision that was not properly thought through at the time. The clear impression given by the decision letter is that the caseworker did not focus on what test he or she was applying and mixed up various potential grounds for refusal without any proper analysis. The reference to the sponsor not having sought to recruit a resident worker is particularly telling in this regard. What is said is that the sponsor has failed to explain why, if the role required training, a resident worker could not have been trained to undertake it. I do not see how that can be even indirectly relevant to the genuineness of the vacancy: if the Secretary of State’s point is that the job is unlikely genuinely to have the necessary requirements if the sponsor is willing to recruit an untrained person for it, it can make no difference whether the untrained person is resident or not. If that reference was confused, it seems to me likely that the same goes for the other points based on the Appellant’s lack of experience, and that the Secretary of State while purporting to apply one test was, at least to some extent, applying another.
53. That conclusion would be sufficient to require the Secretary of State’s decision to be quashed. I think I should nevertheless consider whether the material before him was capable of justifying his conclusion, for the reasons that he gave, that the vacancy was not genuine (in the sense identified). I have not found this easy. I do not doubt that there are cases where sponsors exaggerate the requirements of the post offered (whether or not with the specific intention of recruiting a particular applicant and/or enabling them to acquire leave to remain), and it is entirely reasonable for the Secretary of State to be alive to this possibility. His decision whether that was so in a particular case must be respected as long as it is a rational conclusion on the material available to him (including the responses received to any enquiries he makes). Considering whether that is so in this case is made more difficult by the fact that we have not seen the full exchanges between the Home Office and the sponsor, and I am rather surprised that

these were not produced, or sought on disclosure; but we can only judge by what is contained in the decision letter.

54. I agree with Irwin LJ that the reasons given in the decision letter and on the administrative review are not very compelling. The four points relied on in the decision letter are summarised at para. 21 of his judgment. As to the first two, it does not seem to me very surprising that an applicant would be offered a job of this particular kind – as, NB, a “new entrant” – without previous directly relevant experience, so that he or she would require training on the job; and that is so notwithstanding that the job itself would involve some training of junior staff. As to the remaining points, these are hard to evaluate without seeing exactly what the sponsor was asked, and said, about the recruitment process. But we know at least that the Appellant was interviewed and appeared intelligent and keen. If there was reason to believe, nevertheless, that there was no attempt to find anyone else and that the interview was a formality that might justify a degree of scepticism about whether the vacancy was genuinely as described; but it would depend on the wider circumstances established. The new point taken in the administrative review decision, based on the similarities between the job description in the CoS and the terms of the relevant SOC definition, likewise might justify some scepticism. But the similarities fall well short of complete identity, and I agree with Irwin LJ that there is force in Mr Karim’s point that it is understandable that employers who sponsor tier 2 migrants for jobs which genuinely fall within a SOC classification should have one eye on the relevant definition when drafting the job specification. I am very conscious of the need to respect the judgment of the Secretary of State and of the limited nature of our review; but in the end, and not without hesitation, I have concluded that the reasons given by the Secretary of State are not, in the particular circumstances of this case, capable of justifying his conclusion.
55. I note paras. 44-45 of Irwin LJ’s judgment. As he says, the system as a whole is designed to work so far as possible on a “tick-box” basis: see not only the observations of Lord Walker in *Alvi* which he cites but the recent decision of this Court in *Mudiyanselage v Secretary of State for the Home Department* [2018] EWCA Civ 65, [2018] 4 WLR 55, which reviews the numerous authorities about the nature of decision-taking under the PBS. But the present case illustrates that some of the judgments required or permitted by it may necessarily involve a more sophisticated assessment and the making of further enquiries. I would not criticise the Secretary of State for undertaking that process, but I regard it as extremely regrettable that he took so long over it: see para. 7 of Irwin LJ’s judgment. I quite accept that the need to assess the genuineness of the vacancy meant that it would not be reasonable to expect a decision within the ten days maximum advertised as normal for the “priority service”. But it is hard to see how it justifies a delay of almost 18 months, particularly where the Appellant had paid an enhanced fee for expedition. No explanation has ever been given for the extraordinary delay; and it is disappointing that the Secretary of State has offered no apology for it.
56. Since the appeal is against a refusal of permission to apply for judicial review, the formal consequence of allowing the appeal is only that the permission must be granted, so that the substantive application for judicial review will proceed. But, as Irwin LJ says, the effect of our reasoning is that the decision of the Secretary of State will have to be quashed.