JR/6738/2018 and JR/6740/2018
(V)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of
Adham Abdelaleem Ahmed TAHA (First Applicant)
Marim Adel Zaid BOTROS (Second Applicant)

Applicants

v

ENTRY CLEARANCE OFFICER, EGYPT
ENTRY CLEARANCE OFFICER, KUWAIT

Respondents

Before Upper Tribunal Judge Norton-Taylor

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Mr S Knafler QC, and Ms S Pinder, of Counsel, instructed on a Direct Access basis, on behalf of the applicants and Mr T Tabori, of Counsel, instructed by the Government Legal Department, on behalf of the respondents, at a hearing conducted on 25 August 2020 by *Skype for Business* with the Upper Tribunal sitting at Field House, London.

Decision: the application for judicial review is GRANTED

INTRODUCTION

1. The applicants are both citizens of Egypt. At all material times, Mr Taha ("AT") has resided in Egypt, whilst Mrs Botros ("MB") has resided in Kuwait. Since 2013, AT has been the Managing Director of a company called Regents Education Services. This company, based in Egypt, introduces potential students residing in the Middle East to educational institutions based in the

United Kingdom. Commission is paid to the company by such an institution if an individual enters into an educational contract with it.

2. By applications made on 18 April 2018, AT and MB sought entry clearance for leave to enter the United Kingdom as Tier 1 Entrepreneurs, pursuant to paragraph 245DB of the Immigration Rules ("the Rules"). AT applied to the entry clearance post in Egypt, whilst MB applied in Kuwait. They put themselves forward as an entrepreneurial team. It was proposed that AT and MB would establish a business together in the United Kingdom. This enterprise was to take the form of an educational consultancy service predicated on facilitating foreign students from the Middle East to come and study in the United Kingdom. It would also provide ancillary services such as finding accommodation for students and suchlike. The business plan submitted with the applications emphasised the relevance of AT's experience and contacts in the Middle East and the United Kingdom. In essence, it was said that the new venture would be a logical extension of Regents Educational Services.

3. Both applicants were interviewed separately and at the same time on 17 May 2018. The answers provided at those interviews are central to the issues in these proceedings.

4. The applications were refused by the respondent on 13 June 2018. Administrative Review was sought, and on 16 July 2018 the original refusals were maintained in full. The Pre-Action Protocol was complied with and an application for judicial review made on 11 October 2018. Permission was refused on the papers and then upon oral renewal. The latter decision was appealed to the Court of Appeal. Permission was granted by the Court on 31 December 2019. By way of a Consent Order sealed on 26 February 2020, the appeals were allowed and permission to apply for judicial review was granted. The cases were then case managed by the Upper Tribunal and set down for a substantive hearing.

5. That hearing took place on a remote basis using the *Skype for Business* platform. Save for some limited interference with Mr Tabori's audio connection which did not affect his ability to put forward and my reception of his submissions, the hearing proceeded without difficulty. Both of the applicants "attended" remotely.

THE RULES

6. Paragraph 245DB of the Rules provided, as at the date of the decisions and insofar as relevant to these proceedings, as follows (it is to be noted that the Tier 1 Entrepreneur route was closed to new applicants in March 2019):

> **"245DB. Requirements for entry clearance**
>
> To qualify for entry clearance as a Tier 1 (Entrepreneur) Migrant, an applicant must meet the requirements listed below. If the applicant meets those requirements, entry clearance will be granted. If the applicant does not meet

these requirements, the application will be refused.

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

(b) The applicant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A.

(c) The applicant must have a minimum of 10 points under paragraph 1 to 15 of Appendix B.

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

(e) An applicant who has, or was last granted, leave as a Tier 4 Migrant and:

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

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

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

(f) Where the applicant is being assessed under Table 4 of Appendix A, the Entry Clearance Officer must be satisfied that:

(i) the applicant genuinely intends and is able to establish, take over or become a director of one or more businesses in the UK within the next six months;

(ii) the applicant genuinely intends to invest the money referred to in Table 4 of Appendix A in the business or businesses referred to in (i);

(iii) that the money referred to in Table 4 of Appendix A is genuinely available to the applicant, and will remain available to him until such time as it is spent for the purposes of his business or businesses;

(iv) if the applicant is relying on one or more previous investments to score points, they have genuinely invested all or part of the investment funds required in Table 4 of Appendix A into one or more genuine businesses in the UK;

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

(g) The applicant must provide a business plan, setting out his proposed business activities in the UK and how he expects to make his business succeed.

(h) In making the assessment in (f), the Entry Clearance Officer will assess the balance of probabilities. The Entry Clearance Officer may take into account the following factors:

(i) the evidence the applicant has submitted;

(ii) the viability and credibility of the source of the money referred to in Table 4 of Appendix A;

(iii) the viability and credibility of the applicant's business plan and market research into their chosen business sector;

(iv) the applicant's previous educational and business experience (or lack thereof);

> (v) the applicant's immigration history and previous activity in the UK; and
> (vi) any other relevant information.
>
> …"

7. Successful applicants would have been granted a period of three years entry clearance, conferring leave to enter the United Kingdom.

THE DECISIONS UNDER CHALLENGE

8. The wording of the refusals of AT's and MB's applications is almost identical. Neither fell foul of the general grounds for refusal. Both were awarded the requisite points under Appendices A-C. Thus, it was accepted that: the applicants had access to the required £200,000; that these funds were held in regulated financial institutions; that the money was disposable in the United Kingdom; that they met the appropriate English language level; and that they were able to maintain themselves in this country.

9. The applications were refused under sub-paragraph 245DB(f), with reference also to (h). The Entry Clearance Officer's reasons in respect of AT's refusal read as follows:

> "During your interview you stated that the £100,000 that you are contributing to the Attributes requirement was received into your bank account in multiple deposits. However, your business partner states that she provided these funds to you in a single deposit. These discrepancies raise concerns over the viability and credibility of the source of your funds.
>
> You were asked during your interview what role you intend to undertake in the business. You stated that he will oversee daily operations: marketing activities and sales enquiries. However, your business partner indicated that your role will cover "the financial side of the business". I do not find it credible that a genuine entrepreneurial team would not have agreed or know their intended roles before investing £200,000 into a business in the UK. These concerns undermine the viability and credibility of your business plan and market research.
>
> During your interviews you and your business partner were asked to provide the estimated turnover, gross profit and net profit for the first year of your intended business. I note you agreed on your estimated turnover and gross profit. However, you estimated you would "break even" regarding net profit, whereas your business partner stated your business would make £8000. I do not find it credible that a genuine entrepreneurial team would not have agreed the expected profitability of their business before investing £200,000. These concerns further undermine the viability and credibility of your business plan and market research.
>
> When your business partner was asked to provide a breakdown of how your team's £200,000 would be spent on your business she stated "I can't remember the numbers my partner will know more as he is more responsible into the

> financial side". I note again that this contradicts the role you stated you would undertake. Furthermore I do not find it credible for a genuine entrepreneurial team that each team member would not be familiar with how funds would be invested in their business.
>
> Given these concerns I am not satisfied of the credibility of the source of your team's funds, that your team genuinely intend to invest at least £200,000 into one or more UK business, or that your business plan and market research is viable and credible. Your application is therefore refused under paragraph 245DB(f) and (h) of the Immigration Rules."

10. In respect of MB's refusal, the very same points are made, although of course reference is made to the information provided by her business partner, namely AT.

11. For ease of reference and in view of the way in which the arguments have been put to me, I will hereafter refer to the Entry Clearance Officers' bases of refusal as "reasons 1-4". These reflect the four points taken against the applicants, as set out in paragraph 9, above.

12. As is the case with entry clearance applications such as those with which I am concerned here, the ability to seek Administrative Review was limited. Only evidence submitted with the original applications would be considered.

13. In summary, the Administrative Review decisions upheld the original refusals in full. I note here a couple of points arising from AT's decision. First, when referring to the issue of whether there were multiple deposits or a single deposit, the reviewing officer stated that, "[w]hilst your documents may confirm the statements made in the review ground [namely that there had been a misunderstanding by the interviewing officer], the interview is to test your knowledge to determine the credibility of your application." Second, it is said that:

> "There is no doubt the ECO has considered the documents and business plan that were submitted with the application. However the interview is to test your knowledge of the business plan."

THE PARTIES' RESPECTIVE CASES

14. Without intending any disrespect to Counsel, I propose to set out the parties' respective cases in summary form only, having had full regard to the clear and concise written and oral arguments which had been put forward. There have been no amendments to the applicants' grounds of challenge, nor any material concessions by the respondents.

15. Both parties have referred to three authorities throughout their arguments; Balajigari [2019] EWCA Civ 673; [2019] 1 WLR 4647, R (on the application of Anjum) v Entry Clearance Officer, Islamabad (entrepreneur - business expansion - fairness generally) [2017] UKUT 406 (IAC), and R (on the application of Mushtaq) v Entry Clearance Officer of Islamabad, Pakistan (ECO – procedural

fairness) IJR [2015] UKUT 224 (IAC). I will deal with these in appropriate detail when setting out my conclusions, below.

The applicants' case

16. AT and MB assert that the respondent's refusals of their applications are, in the first instance, irrational. It is said that, on a proper analysis of the answers provided by the applicants at their respective interviews, the conclusion that they were not genuine entrepreneurs was, in all the circumstances, not one which could have been properly reached. Mr Knafler emphasised the uncontroversial facts of the applicants' background, the availability of requisite funds, the successful existing business, and the "logical extension" of that business into the United Kingdom. He submitted that certain answers provided at interview by the applicants, in particular MB, had been misunderstood by the interviewing officer and/or the decision-maker, leading to irrational conclusions as regards reason 1. The interview evidence, if considered in the context of the supporting documentary evidence (in particular the business plan) simply could not, it is submitted, admit of the conclusion that the applicants were not genuine.

17. The second ground of challenge, which it is fair to say was pursued in greater detail at the hearing, is that the interviews were procedurally unfair, which in turn led to unlawful decisions. In essence, it was said that in the context of these cases and having regard to relevant authorities, the interviewing officers should have, but did not: (a) raise any relevant concerns with the applicants at the time; (b) probed and/or clarified answers provided by the applicants. If concerns only came to light once the interviews had been conducted, it was for the respondents to ensure that a fair procedure was put in place to permit the applicants a fair opportunity to respond to any adverse points likely to be taken against them.

18. It was submitted that there was, at the very least, ambiguity as to the answers provided by the applicants at interview and as these answers related to reasons 1-4. Detailed submissions have been made in respect of all four reasons, and I will deal with these in due course. Mr Knafler emphasised the fact, as he submitted it to be, that no concerns were put to the applicants at interview. The cases of Anjum and Mushtaq provided support for the applicants' cases in terms of the general requirement for fairness of interviews and on the facts.

19. A final point made was that the respondent had failed to conduct a proper weighing of all relevant evidence before reaching the conclusion that the applicants were not genuine entrepreneurs. Reasons 1-4 related to interview answers only, without any reference to the business plan or other supporting documentation.

20. For the respondents, Mr Tabori submitted that the irrationality challenge was nothing more than an argument on the merits, and that it fell well short of meeting the relevant threshold. The respondents were clearly entitled to take account of the interview answers and to weigh these up when considering

paragraph 245DB(f) and (h) of the Rules. He submitted that there were clear discrepancies and/or gaps in knowledge arising from the interviews, and that the respondents were entitled to take these into account. On any view, the conclusions reached did not "fly in the teeth" of the information provided by the applicants in response to questions.

21. Mr Tabori responded in detail to the applicants' procedural unfairness argument, relying on the Detailed Grounds of Defence and his skeleton argument. The central thrust of his submissions was as follows. Procedural fairness is very much a context-dependent issue. It does not always require the respondent to clarify and/or probe answers given by an interviewee. In the present cases, questions put to AT and MB were clear. The applicants knew in advance that they had to satisfy the respondents that they were genuine entrepreneurs and there is no question that they were in any way "ambushed", taken by surprise by the issues raised at interview, or left unaware of the "gist" of the case that they had to meet. There was no obligation on the respondents to provide the applicants a further opportunity to clarify or rectify the interview answers after the event. Indeed, Mr Tabori submitted that any suggestion that there should have been a second interview or other form of follow-up prior to decisions being made on the applications would lead to a form of "never-ending" decision-making process.

22. In respect of the three relevant authorities, there were obvious distinguishing factors, in particular that the applicants in these proceedings had been interviewed. Further, unlike Mushtaq, there is no question that the applicants had held against them matters that were not fairly put at the interviews. In contrast to the scenario in Anjum, the interview records did not disclose inflexibility or obscure questions.

23. Turning to the four reasons relied on by the respondents when refusing the applications, Mr Tabori submitted that no unfairness had arisen in respect of any of them. In reality, all that had occurred was that the applicants gave discrepant answers and, particularly in respect of MB, displayed a material lack of knowledge.

24. On the question of the deposit(s), Mr Tabori accepted that it was fairly clear that MB's answer to question 10 was different to what AT had said in reply to the same question. On a proper reading of MB's answer, she had either avoided giving an answer as to how the £200,000 had been accumulated because she did not know, or there was some other inexplicable reason. Either way, the matter was clearly adverse to her credibility.

25. It was submitted that the answers provided by the applicants as to what their respective roles would be in the business were at least unclear and it was clearly rational for the respondents to hold this evidence against them. If the applicants had been given another opportunity to "rectify" their answers, this would effectively defeat the whole purpose of interviews and the efficiency of the decision-making process.

26. In respect of reason 3, there was an obvious discrepancy between both applicants' answers as regards the expected year 1 net profit of the business. In addition, both of their answers were discrepant with the figures set out in the business plan itself. If an applicant could simply rely on the contents of a business plan at interview there would be no point in holding them.

27. As to the breakdown of expenditure, Mr Tabori submitted that MB had effectively tried to avoid the question. There was no unfairness on the part of the interviewing officer where the interviewee was in reality asking for the subject matter of the questions to be changed.

28. In the course of Mr Tabori's submissions, I raised the issue of whether, in this particular case or in general, there is a danger of interviews being conducted in a vacuum, so to speak. The applicants put in a good deal of supporting documentary evidence and yet none of this is referred to in the interview, despite a number of questions relating to matters set out in, for example, the business plan. Mr Tabori responded by submitting that there was no such "vacuum": there was a clear link between the interview and the documentary evidence. Interviews were an appropriate means of testing the knowledge of the applicants vis-à-vis their applications and the supporting evidence. A lack of knowledge was relevant to the genuineness of their proposed enterprise.

29. In reply, Mr Knafler submitted that there was no meaningful connection between the interview and the business plan. The interview had effectively been a memory test. On the deposits issue, Mr Knafler took me back to question 10 of both the interviews and the Administrative Review decision in AT's case. Reason 1 related to an alleged discrepancy in the evidence of AT and MB as to how the £100,000 was deposited, not in respect of the accumulation of the £200,000 investment fund. This was contrary to Mr Tabori's submission and it indicated that either the question or the answers were ambiguous; clarification had been required prior to an adverse point been taken against the applicants.

30. During submissions I raised with Counsel the decision of Saini J in Karagul [2019] EWHC 3208 (Admin). My provisional view was that this case might have some relevance to the present. I invited written submissions from both parties within a set timeframe. I'm grateful to Counsel for providing their submissions expeditiously.

CONCLUSIONS

31. Although the first ground put forward by the applicants is that of an irrationality challenge, I propose to begin with the procedural unfairness argument. I do so because I have reached the conclusion that there was procedural unfairness in the decision-making process in these cases, with particular reference to the interviews conducted on 17 May 2018 and the adverse inferences drawn therefrom.

32. In setting out my reasons for this conclusion I will need to examine in some detail reasons 1-4 and the relevant aspects of the interview records. However, before turning to these issues, it is appropriate to identify certain matters arising from the authorities to which I have been referred.

The authorities

33. The judgment of the Court of Appeal in Balajigari is by now well-known. There are obvious distinctions on the facts, not least that the claimants had not been afforded the opportunity of attending an interview prior to a decision being made on their applications. However, the Court, with reference to previous authorities, emphasised the following (see paragraphs 45 - 55):

    i. the requirements of procedural fairness are context-specific;

    ii. fairness will "very often" require a person who may be adversely affected by a decision to have an opportunity to make representations before that decision is made;

    iii. fairness also "very often" require that the applicant is informed of the "gist" of the case which he has to answer;

    iv. the opportunity to address potential concerns may be provided through interview or by "some appropriate means";

    v. the seriousness of the effect of a negative decision (for example, that an individual had acted dishonestly) might have a bearing on the requirements necessary to ensure fairness.

34. Anjum concerned an applicant who had been refused entry clearance as a Tier 1 Entrepreneur. In light of answers given at interview, the ECO had concluded that he was not a genuine entrepreneur. The Upper Tribunal held that, on analysis, the requirements of procedural fairness had not been complied with and that the decision under challenge should be quashed. Paragraph (ii) of the judicial headnote to Anjum reads as follows:

> "An immigration interview may be unfair, thereby rendering the resulting decision unlawful, where inflexible structural adherence to prepared questions excludes the spontaneity necessary to repeat or clarify obscure questions and/or to probe or elucidate answers given."

35. Two points may be noted from the body of the decision. First, the questions and answers of the interview in that case had not been read back to the applicant. It would appear as though the same is true in these proceedings. However, in contrast to Anjum, AT and MB were invited at the end of the interview to make any additional comments on what had been said. Both declined the offer.

36. The second point arises from paragraphs 17 and 22 of the decision. At paragraph 17, the former President stated:

> "One striking feature of the interview record is that the Applicant was not asked any questions about the content of his Business Plan. Nor did the interviewing ECO attempt to correlate any of the Applicant's replies to the latter. Furthermore, this exercise was not attempted in the ensuing refusal decision, subsequent affirmation thereof or the response to the PAP letter."
>
> (Emphasis in the original)

37. In concluding that the procedural unfairness challenge was made out in that case, McCloskey J noted at paragraph 22 that:

> "The single enduring reason for the refusal of the Applicant's Tier 1 application was based on a series of interview answers which on any reasonable and fair showing demanded further probing and clarification, together with a linkage to the Business Plan…"

38. Mushtaq involved an applicant who had been refused entry clearance as a student. Again based on interview answers, the ECO concluded that Mr Mushtaq was not a genuine applicant. The approach taken at the interview was deemed to be unfair and a number of the adverse conclusions reached were irrational. Paragraph (ii) of the judicial headnote states:

> "ECO interviews serve the basic twofold purpose of enabling applications to be probed and investigated and, simultaneously, giving the applicant a fair opportunity to respond to potentially adverse matters. The ensuring decision must accord with the principles of procedural fairness."

39. The concluding observation made by McCloskey J in paragraph 19 of that decision reads as follows:

> "The choice of questions and words in ECO interviews requires care and planning. Ambiguous words and phrases are to be avoided. Furthermore, fairness will often require that the interviewer invite the subject to clarify or expand an answer or probe a response. These simple mechanisms will also illuminate the court's assessment of whether any ensuing adverse decision was preordained. The nationals of impoverished and deprived countries who have invested large sums of money and whose admission to the United Kingdom as lawful if they satisfy the requirements of the relevant legal rules are deserving of no less."

40. Finally, there is a decision of Karagul. Saini J was there dealing with a number of linked cases all of which concerned Turkish citizens who had applied for leave to remain in the United Kingdom as business-persons. This case bears relevance to the present proceedings in respect of the second issue identified at paragraph 5, namely whether the decisions under challenge breached the requirements of fairness in the context of assertions by the respondent that the applicants did not hold a "genuine intention" or "genuine wish" to set up their respective businesses.

41. Having referred to the authorities analysed by the Court of Appeal in Balajigari

and that judgment itself, Saini J sets out three propositions at paragraph 103 which are to be derived from the general principle that public law decision-making must be fair, albeit that the specific requirements for this may vary depending on context:

> "(1) Where a public authority exercising an administrative power to grant or refuse an application proposes to make a decision that the applicant for some right, benefit or status may have been dishonest in their application or has otherwise acted in bad faith (or disreputably) in relation to the application, common law fairness will generally require at least the following safeguards to be observed. Either the applicant is given a chance in a form of interview to address the claimed wrongdoing, or a form of written "minded to" process, should be followed which allows representations on the specific matter to be made prior to a final decision.
>
> (2) Further, a process of internal administrative review of an original negative decision which bars the applicant from submitting new evidence to rebut the finding of wrongdoing is highly likely to be unfair.
>
> (3) The need for these common law protections is particularly acute where there has been a decision by the legislature to remove an appeal on the merits to an independent and impartial tribunal."

The relevant principles applicable in the present cases

42. The overarching general principles relating to fairness are uncontroversial. Decision-making in immigration cases must be conducted fairly. Precisely what fairness requires is context-specific; it will vary depending on the nature of the relevant legal framework, the type of application, and the nature of conclusions reached. The requirements of fairness in any given case cannot be sacrificed for the sake of simple administrative convenience. Whether the procedure adopted in a particular case is fair or not is a matter for the Tribunal or Court.

43. I now set out the context in which the fairness of the decision-making in the present cases falls to be assessed. The relevant matters fall into two categories: the more general and the more case-specific.

44. Beginning with the more general. First, those who have made applications for entry clearance (and for that matter leave to remain) as Tier 1 Entrepreneurs or in a number of other categories, will have paid the United Kingdom government a good deal of money to do so. In many cases, they will also have incurred a lot of time and expense in, for example, engaging legal representation, accumulating relevant evidence, and attempting to arrange their affairs in order to try and meet the strict criteria under the Rules. Whether or not countries from which applicants originate should be described as "impoverished and deprived", in my view *all* applicants are deserving of careful and fair consideration of their cases (see Mushtaq, at paragraph 19).

45. Second, whilst there is undoubtedly a strong public interest in preventing non-genuine applicants from entering or remaining in United Kingdom, there is

surely a corollary to this, namely that there is real benefit to the economy of the United Kingdom if genuine entrepreneurs are permitted to pursue their plans in this country.

46. Third, I respectfully agree with the view of Saini J in Karagul that an allegation that an applicant is not "genuine" in making and pursuing their application is a serious matter. I accept that it is not the same as an out-and-out allegation of dishonesty such as would engage the provisions of Part 9 of the Rules (general grounds for refusal). However, the term "genuine" as defined in the Oxford English Dictionary (3rd Edition) denotes something "having the character or origin represented" and being "real, true, not counterfeit, unfeigned". A conclusion that an individual has made an application with a non-genuine intent inevitably involves the assertion that they have acted disreputably and with a lack of integrity. In my view, Saini J's reasoning in Karagul in the context of the Rules in that case can properly be read across to the context of paragraph 245DB(f) and (h). The "genuineness" test arising under paragraph 245DB(f) and (h) will, if the conclusion reached is adverse to the individual, amount to a serious imputation of their character and conduct. To this extent, I disagree with Mr Tabori's argument at paragraph 4 of his post-hearing submissions that there should be no doubling-up of honesty requirements in which matters akin to general grounds for refusal are inserted into paragraph 245DB. In addition, whilst Mr Tabori is correct to point out that the refusal decisions in the present cases referred to the credibility and viability of aspects of the applicants' applications, the refusals also said that the decision-maker was not satisfied that they "genuinely intended" to invest requisite funds. Finally, the entire purpose of paragraph 245DB(f) is predicated on a genuineness test.

47. Mr Tabori's post-hearing submissions seek to distinguish Karagul from the present cases on a number of grounds. There are factual differences, not least that Saini J was considering a different aspect of the Rules (those relating to the so-called Ankara Agreement) and the absence of an interview as part of the decision-making process. However, the more general points that I have highlighted and relied on do not depend upon precise factual mirroring.

48. Fourth, the "genuineness" criterion, whilst clearly stated in the Rules, is in my view a broad concept, much like that of "character" in respect of application for naturalisation as a British citizen. It is one thing for the applicant to know in advance that they must prove that they are indeed a "genuine" entrepreneur and to have in mind the criteria under paragraph 245DB(f) and (h) as a guide. It is another to be given an opportunity to address potential concerns as to particular aspects of the genuineness test arising from evidence they have provided. In this regard I do not accept the suggestion by the respondents that individuals such as the applicants will necessarily know the gist of the case which they have to meet. Whilst they should be aware of the criteria set out in the Rules, that is not the same thing as being able to address *concerns* arising from the evidence (in whatever form) provided in order to try and meet those criteria (see Balajigari at paragraph 48). Further, I do not accept any suggestion that provided questions are clear, there is no need for the interviewer to clarify

and/probe the resulting answers. Again, I emphasise the importance of the case-specific context. What fairness requires will depend on the particular case. It may be, for example that a clear question is met with an answer that should raise the possibility that the interviewee has simply misunderstood, or that the response specifically refers to supporting documentary evidence that may, potentially, need to be examined and clarification and/or probing undertaken by way of additional questions.

49. Fifth, Mr Tabori's written and oral submissions forcefully made the point that affording interviewees a second opportunity to respond to concerns from an interview would: (a) simply allow an applicant to fill in the gaps in their evidence; (b) would effectively defeat the point of holding interview in the first place; (c) prevent the respondent from properly testing the genuineness of an application; and (d) would represent a marked departure from the existing parameters of the requirements of fairness.

50. There is merit in certain aspects of these submissions. Decision-making processes cannot go on forever: there could be a danger of applicants seeking one further opportunity after another in order to put forward additional information. Opportunities to address concerns arising from an interview could also be seen as defeating the purpose of that initial step: applicants may simply supply the missing information or explain away any discrepancies.

51. However, when seen through the context-specific prism of what fairness requires in any given case, I conclude that the objections raised ultimately fall away. The principal reason for this is that, in light of the more general contextual matters that I have set out previously, the interview itself and the requirements of fairness relating thereto, takes on an increased significance. It is at this stage that particular care has to be taken in order to, for example: ensure the clarity of questions; potentially clarify and/or probe answers given (whether or not the question itself is clear); have regard to relevant documentary evidence when asking questions and/or clarifying and/or probing answers. Thus, it may be that longer and more detailed interviews are, depending very much on the facts of the case, necessary in order to ensure procedural fairness without potentially resorting to post-interview opportunities to address concerns before a decision is taken on the application. Alternatively, if post-interview information is provided, the respondent would plainly be entitled, when considering this, to have regard to any apparent deficiencies in the evidence provided at the interview itself when determining the credibility, viability, and genuineness of an application. That, it seems to me, is consistent with what was said by Martin Spencer J in Khan (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC), which was relied on by Saini J in Karagul. Paragraph (ii) of the judicial headnote to Khan states:

> "Where an Applicant has presented evidence to show that, despite the prima facie inference, he was not in fact dishonest but only careless, then the Secretary of State must decide whether the explanation evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty"

52. The further evidence referred to by Martin Spencer J in Khan would have been provided following an assertion by the respondent that the individual had acted dishonestly (or at least that the respondent was minded to draw that conclusion). Thus, the gist of the adverse case against the individual had been put and an opportunity to respond provided.

53. Sixth, returning to the proposition set out by Saini J, the limited nature of Administrative Review and the absence of an appeal on the merits to a tribunal are also relevant factors not simply in respect of the need for fairness, but also in terms of what fairness will require in cases subject to restricted remedial avenues. Notwithstanding the distinguishability of Karagul on the facts, it is the case that unsuccessful Tier 1 Entrepreneur applicants are subject to the same limited remedial regime.

54. The more fact-specific contextual matters that I now turn to are uncontroversial in the sense that they have been either expressly accepted by the respondents or are at least undisputed.

55. First, AT was already an established businessman who was running a profitable enterprise in the field of educational consultancy for prospective students to pursue courses in the United Kingdom.

56. Second, on the face of it, the proposed United Kingdom-based business on which the applications were predicated was a logical extension of the existing business.

57. Third, whilst plainly in no way decisive of the genuineness of the applications, the respondents were satisfied as to the relevant attributes under Appendices A-C of the Rules, including access to the requisite funds and the fact that these were disposable in the United Kingdom.

58. Fourth, and flowing from the above, the applicants had provided a significant amount of documentary evidence including a detailed business plan.

59. With the contextual landscape in mind, I now turn to analyse the four reasons given by the respondents for refusing the applications.

Reason 1: the deposit(s)

60. Questions 7-10 of AT's interview read as follows (I have italicised the answers for ease of reading):

> "7. How much money do you have to invest in the UK?
> *We have £200,000 as per the Immigration Rules and the business plan we wrote*
>
> 8. Whose account is this money (£200,000) in?
> *I have £100,000 in my current account in the UK and [MB] has £100,000 in her personal account in Kuwait*

9. How long has this money been held for in this account?
Over £200,000 it was held in [MB's] account for 6 months

10. Where did this money originate from?
This money is from some savings and she has another company in Germany and I have transferred £45,000 but we did not mention this.
Additional questions:-
If deposited, was this in a single deposit or multiple deposits?
It was multiple deposits as we were trying to prepare for this from last year and the exchange rate was different so we had to do multiple deposits.
What date was this deposited into the account?
I am not sure as I didn't have access to deposit but I have access to use the funds for investment.
How much was deposited (try to obtain an exact amount) on each day?
No answer recorded."

61. Questions 7-10 of MB's interview record read as follows:

"7. How much money do you have to invest in the UK?
£200k

8. Whose account is this money (£200,000) in?
It was my bank account and I asked the solicitor and said that I should have £100k in my bank account and another £100k in my partner's bank account.
Was the money originally yours?
Yes it's all my money the £200k

9. How long has this money been held for in this account?
Since I started thinking of investing in the UK and it's been in the bank for more than 9 months and I have bank statement that shows the money has been in the bank for more than 6 months.

10. Where did this money originate from?
From my work money as I don't need it and save it straight away and my husband pays for all my expenses etc and I save it plus my husband's company gave me the money. Also we are partners in a company in Germany called Almasreyah International and it's for importing and exporting shisha accessories. And I have profits from…
Additional questions:-
If deposited, was this in a single deposit or multiple deposits?
I sent the papers to the Home Office in the UK.
What date was this deposited into the account?
I don't remember the date it was around 9 months ago.
How much was deposited (try to obtain an exact amount) on each day?
The £200k was in my bank account and I transferred £100k to my partner on one deposit."

62. It will be recalled that reason 1 was based on the assertion that there was a material discrepancy in the applicants' interview evidence as to whether the

£100,000 to be contributed by AT had been deposited into his account in a single deposit or multiple deposits. Reason 1 did not relate to the £200,000 investment fund as a whole.

63. Mr Knafler's basic submission is that, on a proper reading of the interview answers, the phrase "this money" appearing repeatedly in the relevant questions related to the £200,000 fund, not the £100,000 contribution by AT, and it was in relation to the former that AT was providing information. In other words, the "multiple deposits" referred to the accumulation of the £200,000 fund, not the manner by which the £100,000 was transferred into AT's account. In contrast, the respondents assert that there is a discrepancy in the evidence.

64. I conclude that the proper analysis of reason 1 is that put forward by Mr Knafler. That reason plainly does not relate to any perceived discrepancy as to the £200,000 investment fund, but solely to the issue of the £100,000 contribution. Any apparent vagueness in MB's evidence as to the accumulation of the £200,000 is beside the point because it was not relied on by the decision-maker. In any event, given what MB did in fact say in response to question 10 concerning what was clearly an assertion that the money came from different sources, fairness would have required specific questions on the issue of how the funds from the sources were deposited into her account.

65. Coming back to what reason 1 actually says, and given the contextual factors I have set out previously and the answers provided by AT and MB, I conclude that, for the following reasons, this aspect of the applicants' fairness challenge is made out.

66. First, whilst as a whole the questions put in the interviews were clear, it is apparent from the record of each, and indeed the differing interpretations placed on the same material by Counsel at the hearing (which, I am bound to say, also left me with a degree of judicial head-scratching, as it were), that the phrase "this money" as used in question 8 related specifically to the £200,000 (this figure is stated in parenthesis immediately after the phrase). Unlike question 8, question 10 does not include a specific reference to £200,000. This, in my view, is unfortunate: it opened up scope for misunderstanding by the interviewing officers and/or (which is the relevant point here) the applicants.

67. Second, on what I consider to be a fair and reasonable reading of AT's answers, he was referring to the £200,000 when stating that there had been "multiple deposits". At no stage did he state in terms that such deposits related to the £100,000. MB related the first part of her answer to question 10 to the different sources of the £200,000 investment fund, but in response to the third additional question, MB then specifically stated that the £100,000 contribution had been transferred to AT in a single deposit.

68. Third, in light of the above, we have a situation in which the applicants have provided answers based upon their particular understanding of questions put. AT's interpretation of question 10 was, on my reading of the phrase "this

money" and in the absence of any clarification from the interviewing officer, entirely legitimate: his response related to the £200,000 and not to the transfer of the £100,000. On the face of the record, MB's responses to questions 8-10 indicate that she had both the £200,000 and the £100,000 figures in mind.

69. What this cried out for in respect of both interviews were clarificatory questions on what was, in the event, a material issue. I have indicated my concern over the ambiguity in the usage of the phrase "this money" in the relevant questions. Leaving this to one side, however, the nature of *the answers themselves* required follow-up questions as a matter of fairness in order to ensure that: (a) each applicant had in fact properly understood the question put; and/or (b) that the interviewing officer had properly understood the answers provided; and/or (c) that any potential concern that either applicant had deliberately sought to avoid answering the question or was displaying a distinct lack of reasonable knowledge, could have been put to them at that stage in the decision-making process (it is scenarios (b) and (c) that are material in these proceedings). My conclusion does not involve the introduction of any novel or onerous requirement on the respondent part: it is simply an application of established principles of fairness in the context of these cases.

70. It is manifestly the case that no clarification was sought from either applicant at the interview (or indeed thereafter).

71. Fourth, two consequences flow from the above. The failure to have sought any clarification of the applicants' answers to question 10 of their respective interviews was procedurally unfair, having regard to all contextual factors that I have identified earlier in this decision. This procedural unfairness has then resulted in irrationality in respect of reason 1. On my analysis of the applicants' responses to questions 8-10 there simply was no discrepancy in their respective answers. AT provided information on the accumulation of the £200,000 and said nothing about the depositing of £100,000 into his account, whereas MB (after having made generalised reference to various sources of that fund) specifically referred to a single deposit of the £100,000. Reason 1 is predicated on the false basis that both applicants provided specific answers in relation to the depositing of the £100,000.

72. Reason 1 is therefore unsustainable.

Reason 2: the roles in the business

73. Question 21 of AT's interview read as follows:

> "21. What will your role be in the UK business?
> *I will be managing the Daily operations and providing the marketing activities and Sales enquiries."*

74. MB's answer to the same question was as follows:

> *"21. I will be the director - my partner will be a director to he will be for the*

financial side of the business."

75. Reason 2 states that these answers indicated that the applicants had not agreed or known their intended roles, and that this undermined the viability and credibility of the business plan and market research, which in turn went to the issue of genuineness. The particular focus was on the evidence relating to AT's role.

76. The applicants submit that when this evidence is read in the context of the business plan in particular, there was no inconsistency. Alternatively, there was at least ambiguity in the interview answers which required clarification and/or probing. In essence, the respondents' position is that AT's response was entirely nebulous, and that MB was specific. There was an obvious discrepancy and the respondents were entitled to take this into account. Fairness did not require an opportunity for the applicants to rectify their interview answers: the interviews were the opportunity to put forward a clear account of the proposed business venture.

77. I accept that the term "daily operations" is wide-ranging in its potential scope. As a matter of common sense, it could incorporate the financial operations of a business and a question might be raised as to why AT did not state in terms that he was to be in charge of the financial side of things. Having said that, and at risk of repeating myself, context is all. Here, AT's answer was not clearly inconsistent with him being in charge of financial matters. Nor was MB's answer necessarily inconsistent with what her partner had said. Further, the respondent (in the person of the interviewing officer) had reviewed the documentary evidence in advance of the interview (it is not clear whether this evidence was present at the interview itself). An obviously important element of that evidence was the business plan. Page 22 of that plan (page 118 of the judicial review bundle) describes AT as the "Operations Director". On the following page, AT's "Key Responsibilities" are set out as follows:

> "[AT] as Operations Director will lead the commercial management of the business including:
> - Direction of all areas of revenues
> - Development of Sales and Marketing strategies
> - Managing the operations team (sales and admissions)"

78. The significance of business plans was highlighted by McCloskey J in Anjum (see paragraphs 36 and 37, above). If there had been even a relatively cursory consideration of the business plan in the present cases, it would have been apparent that what AT had said in response to question 21 was entirely consistent with the plan. The same applies to MB's answer.

79. There was no attempt to correlate the interview answers to the business plan either at interview, post-interview, or indeed when the refusal decisions themselves were drafted. In my view, this is not a case in which the interviewing officers were required to engage in unduly speculative or

disproportionate investigation of the body of evidence as a whole. Rather, in respect of what the respondents described as a "nebulous" answer from AT, fairness required a follow-up question, whether with specific reference to the business plan or simply to clarify what was meant by "daily operations". As with reason 1, my conclusion is nothing more than application of established principles of fairness applied to the context of these cases.

80. The failure of the respondent at any stage (but in particular at the interviews) to seek clarification and/or probe and/or make any reference to the business plan in respect of the roles was procedurally unfair.

81. Reason 2 is also unsustainable.

Reason 3: net profit in year 1

82. I shall deal with this point briefly. Question 30 of the interviews and the answers provided thereto were entirely clear. As regards AT :

> "Net profit for year 1?
> *I think we will break even for the first year."*

83. In response to the same question, MB replied, "*It's around £8k*".

84. In context, I conclude that whilst the issue could potentially have been explored further, fairness did not require there to be any clarification or probing in respect of the answers provided. There was no apparent ambiguity. Further, the business plan included projections that differed from the answers provided by both the applicants.

85. In respect of reason 3, the procedural unfairness challenge fails.

Reason 4: breakdown of expenditure

86. In response to question 20 in which he was asked to provide a breakdown of what the £200,000 would be used for, AT replied:

> *"It will be used for overhead costs like Office Rent £30,000-£34,000, Direct costs like wages around £40,000-£44,000 the monthly costs for accounts and legal fees Around £20,000 including Marketing activities that will be paid twice during the high season for the first year."*

87. In her answer to the same question, MB said:

> *"As soon as we arrive I will start the business with £14,200 including the £500 for training, £500 advertising, £30k for renting approximately I can't remember the rest of the numbers.*
> *Solicitor fees - around £2k I can't remember exactly as there are many numbers. But I know everything on papers now I can't remember the numbers written on the papers.*

> *I can't remember the numbers. My partner will know more as he is more responsible into the financial side. I don't have a memory to remember the numbers. We agreed he will be responsible for the financial side of the business."*

88. I remind myself of what reason 4 actually says. Its first limb states that MB's evidence on what role AT was to take in the business was inconsistent with what he had said. For reasons set out above, that aspect of the respondents' decision is flawed by virtue of procedural unfairness.

89. The remaining aspect of reason 4 is that it was not "credible for a genuine entrepreneurial team that each team member would not be familiar with how the funds would be invested in their business." Mr Tabori's submission was that an applicant such as MB could not simply avoid answering questions properly put to them, and that procedural fairness did not require her to be given the opportunity to provide further and better answers in any follow-up process.

90. I conclude that there are two problems with the fairness of this aspect of the decision-making, each of which is sufficient to render what is left of reason 4 unsustainable. First, as highlighted previously, the business plan made it very clear that it was AT who was to be in charge of the commercial management of the business, including all areas of revenues. The plan and its content were part and parcel of the case-specific context in which the interview needed to be conducted and the subsequent decision-making had to have regard to. However, there was no correlation between the business plan and MB's interview answers. Second, in my view an interview should not be considered a memory test. They serve the "basic twofold purpose of enabling applications to be probed and investigated and, simultaneously, giving the applicant a fair opportunity to respond to potentially adverse matters." (see Mushtaq). In the present cases, the interviewing officer knew, or should have known, that it was AT who was to have responsibility for the revenues of the business. In this context, fairness required either follow-up questions at the interview, or at least that MB be given an opportunity to respond to any concern arising from her answer that she could not remember all of the numbers. In saying this, I note that the specific numbers she did in fact provide are consistent with what is said in the business plan (see page 125 of the judicial review bundle). This is another example of a failure to seemingly have any specific regard to that plan when questioning the applicants, or indeed when drafting the refusal decisions.

91. In conclusion, reason 4 is unsustainable.

Summary

92. In light of my conclusions that three of the four reasons put forward by the respondents' refusing the applicants' applications are flawed, I am of the view that the decisions as a whole cannot stand. This is not a situation in which it can properly be said that it is "highly likely" that the outcome for the applicants would not have been substantially different if the procedural unfairness had not occurred (see section 15(5A) of the Tribunals, Courts and Enforcement Act 2007 and section 31(2A) of the Senior Courts Act 1981). My conclusion on this would

be the same even if it were the case that only reasons 1 and 2 were flawed. The genuineness test under paragraph 245DB(f) and (h) of the Rules involves a global assessment of the evidence. It is of a different character to a straightforward consideration of whether an applicant satisfies narrow, mandatory criterion under the relevant Rule (such as the awarding of points). If a significant constituent part of the reasoning underpinning a refusal is unsustainable, there is a strong possibility that the overall assessment that an applicant is not a genuine entrepreneur will have been infected by the errors. At the very least, it cannot be said that, absent the errors, the outcome would be "highly likely" to be essentially the same.

CONCLUSIONS ON THE IRRATIONLITY CHALLENGE

93. As set out in paragraph 71, above, one specific aspect of the rationality challenge has been made out in respect of reason 1.

94. In respect of the other three reasons, absent the procedural unfairness which I have concluded occurred in respect of two of them, the high threshold irrationality challenge has not been made out (although that failure is only by a narrow margin in respect of reason 2). The adverse points taken against the applicants were not Wednesbury unreasonable.

95. The partial success of the rationality challenge further supports my conclusions on the procedural unfairness issue, but is in no way a necessary element of my ultimate decision that these applications for judicial review must be granted.

NOTICE OF DECISION

96. The applicants' applications for judicial review of the respondents' decisions to refuse entry clearance are granted.

Signed: *H Norton-Taylor*

Upper Tribunal Judge Norton-Taylor

Dated: **29 September 2020**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on: 08/10/2020

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 appellant'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).

JR/6738/2018 and JR/6740/2018

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of
Adham Abdelaleem Ahmed TAHA (First Applicant)
Marim Adel Zaid BOTROS (Second Applicant)

Applicants

v

ENTRY CLEARANCE OFFICER, EGYPT
ENTY CLEARANCE OFFICER, KUWAIT

Respondents

Before Upper Tribunal Judge Norton-Taylor

ORDER

UPON consideration of all documents lodged and having heard the parties' respective representatives, Mr S Knafler, QC, and Mis S Pinder, of Counsel, instructed on a Direct Access basis, on behalf of the applicants and Mr T Tabori, of Counsel, instructed by the Government Legal Department, on behalf of the respondent, at a hearing conducted on 25 August 2020 by *Skype for Business* with the Upper Tribunal sitting at Field House, London

UPON handing down the substantive Decision in this application for judicial review remotely at 09:30 on Tuesday 29 September 2020

UPON the respondent confirming that re-determination of the applicants' applications made on 18 April 2018 for leave to remain will not be prevented by the fact that the Tier 1 (Entrepreneur) Migrant route is now closed to new applications

AND UPON consideration of the parties' written submissions on the amount of costs to be paid by way of summary assessment, as provided for in paragraph 4, below

IT IS DECLARED THAT

1. The applicants' applications for judicial review (JR/6738/2018 and JR/6740/2018) are granted.

IT IS ORDERED THAT

1. The decisions of the respondents, dated 13 June 2018, refusing the applicants' applications for entry clearance as Tier 1 (Entrepreneur) Migrants and the Administrative Review decisions, dated 16 July 2018, are hereby quashed;

2. Permission to appeal to the Court of Appeal is refused.

COSTS

1. The respondent is to pay the applicants' costs of the present proceedings (JR/6738/2018 and JR/6740/2018) and the proceedings before the Court of Appeal (C7/2019/1294 and C7/2019/1295);

2. The issue of the quantum of costs payable by the respondent to the applicants will be the subject of a separate Decision, to be issued following receipt of further written submissions from the applicants.

Signed: *H Norton-Taylor*

Upper Tribunal Judge Norton-Taylor

Dated: **29 September 2020**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
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