JR-2023-LON-002017

In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

In the matter of an application for Judicial Review

The King on the application of

BENAZIR MOSTAFA
Noor Ahamed
Nawwaf Noor Ahamed
Nawaz Noor Ahamed

Applicant

v

Entry Clearance Officer

Respondent

ORDER

BEFORE Upper Tribunal Judge Rimington

UPON hearing Zane Malik KC instructed by David Wyld & Co Solicitors for the Applicant, and Michael Biggs instructed by the Government Legal Department for the Respondent at the final hearing on 6th June 2024,

And upon the Upper Tribunal handing down its judgment on 3rd September 2024

IT IS ORDERED that:

1. The application for judicial review is granted in accordance with the judgement attached.

2. The Respondent's decisions of 15th November 2022 and 23rd June 2023 are quashed.

3. The Respondent shall pay the Applicant's costs to be assessed on a standard basis if not agreed.

Permission to appeal to the Court of Appeal is refused.

Although no application was made by the Respondent to appeal, I refuse permission to appeal because I consider my judgment contains no arguable error of law and the issues in this application are case specific and would have no realistic prospect of success on appeal.

Signed: H Rimington

Upper Tribunal Judge Rimington

Dated: **3rd September 2024**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 03/09/2024

Solicitors:
Ref No.
Home Office Ref:

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 point 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).

Case No: JR-2023-LON-002017

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

Before:

UPPER TRIBUNAL JUDGE RIMINGTON

- -

Between:

THE KING
on the application of

BENAZIR MOSTAFA
Noor Ahamed
Nawwaf Noor Ahamed
Nawaz Noor Ahamed

Applicant

- and -

ENTRY CLEARANCE OFFICER

Respondent

- -

Mr Z Malik KC
(instructed by David Wyld &Co Solicitors) for the applicant

Mr M Biggs
(instructed by the Government Legal Department) for the respondent

Hearing date: 6th June 2024

- -

J U D G M E N T

- -

Judge Rimington:

1. The applicant challenges the decision of the Entry Clearance Officer (ECO) dated 15th November 2022 (the Decision) maintained by an Administrative Review decision dated 23rd June 2023 (AR) refusing an application for entry clearance under Appendix Representative of an Overseas Business (ROB) of the Immigration Rules (the rules), specifically ROB 5.2 and 8.2.

2. The application relates to a business based in Bangladesh namely Probridhi Apparel Limited (PAL). The applicant is a Bangladesh national born on 19th August 1982. Her husband and two children (listed above) are her dependants and their applications stand or fall with the application of the lead applicant.

3. On 20th October 2022 the applicant was interviewed and asked a range of questions. The ECO then proceeded to make the Decision, the subject of this challenge.

The Decision

4. The material parts of the underlying Decision are as follows:

> 'You have applied for entry clearance as a sole representative of an overseas business, the business being Probidhi (sic) Apparels LTD which is a Garment manufacturing and export business in Bangladesh.
>
> As part of your application process you were asked to take part in an interview, you were asked if you had any help while completing your business plan to which you responded "No the plan was completed and prepared by the management of Probridhi Apparels Ltd. (PAL) I wasn't involved but I do understand the aim of the business by setting a base office in the UK. By the board of directors 4 persons."
>
> You were also asked how much you intend to charge for your products and services, you answered "actually we haven't prepared the UK charge budget yet because we have to set up the office facilities first, then we have to study the market and the demands and you know how much we can produce and more export there after preparing and reviewing all the documents the management will decide. I will be there to report all the related areas, all the studies to the management."
>
> When questioned what is your recruitment plan for the company you replied "This will all be set by the company management, they will set up the office and other facilities, the area will also be chosen by them most probably be near to the central of London, or north west zone which will easy be communicated with the buyers. first I will be alone the sole representative and once the office facilities will be set up in place then management will decide to recruit more employees."

> You were also asked where will you base your business in the UK, you gave the answer " the area will also be chosen by the company management most probably be near to the central of London, or north west zone which will easy be communicated with the buyers. it will be fixed after getting the visa, no address yet for the business but the management want close to central London."
>
> When asked for basic information that a genuine candidate should be able to answer you were unable to provide information on where you plan to base the business as you do not have a location picked out, you did not know what your costs and charges for your products and services are going to be and by your own admission you did not have a hand in creating the proposed business plan as this was created by the management of Probridhi Apparels LTD.
>
> Lastly when questioned about your business plan you have stated that Germany and France are a bigger market than the UK, why not establish your business there instead of in the UK? You stated that "UK is nearer to Bangladesh, more than Germany and France. That is the reason we want to set up the base office in UK. And here the UK Bangladesh time difference is less than Germany and France. Because we want to decrease the communication barriers with our buyers so for that reason UK will be the perfect position for a base office."
>
> This is incorrect and further supports that you do not have the required skill or knowledge of this business to be able to open and run a new branch in the UK.
>
> Therefore | am not satisfied that you meet the current requirements under the Appendix ROB 5.2 and ROB 8.2.'

Grounds for judicial review

5. The grounds of application for judicial review were as follows:

    1) The respondent had stated, when refusing the applicant's application, that she did not have 'the required skill or knowledge of this business to be able to open and run a new branch in the UK'. Rule ROB 8.2, however did not require an applicant to demonstrate an ability to 'open and run a new branch in the UK' and the ECO had read words into the rule which were not there. The ECO had made points in the decision but arguably failed to explain how those points were relevant to ROB 5.2 and 8.2 and were determinative. The reasoning did not relate to the natural and ordinary meaning of the words in the rules.

    2) The interviews conducted by the ECO did not conform with R (Mushtaq) v ECO of Islamabad, Pakistan (ECO-procedural fairness) IJR [2015] UKUT 224 (IAC), specifically headnote (ii)

such that the applicant should have a fair opportunity to respond to potentially adverse matters. Nor did the interview comply with R (Anjum) v ECO Islamabad (entrepreneur – business expansion - fairness generally) [2017] UKUT 406 (IAC) at headnote (ii) which held that 'inflexible structural adherence to prepared questions excludes the spontaneity necessary to repeat or clarify obscure questions and/or to probe or elucidate answers given.'

Permission for Judicial Review

6. Permission was granted by UTJ Norton-Taylor on 12th January 2024 on the basis that there was 'some uncertainty as to what the 'role' was in this case against which the respondent was applying ROB 8.2.'

The Grounds of Defence

7. The respondent advanced that the grounds were without merit. The rules required the decision maker to make an evaluative assessment as to whether, for example, the applicant had the required skills for 'the role' she was to undertake (the opening and running of a new branch in the UK). ROB 5.2 mandates refusal if there were reasonable grounds for believing the provision therein was not fulfilled. This did not need to be spelt out but even if it did the reliance on ROB 8.2 was sufficient.

8. The ECO gave legally adequate reasons which were rational. There was no procedural unfairness. The applicant was not accused of reprehensible conduct and the decision making did not concern nor affect an existing interest or fundamental right.

9. Mahad v ECO [2009] UKSC 16 and R (Wang & Anor) v SSHD [2023] UKSC 21 applied to the interpretation of the Immigration Rules which should be interpreted sensibly and in context with a view to the purpose of the rule. There should be a purposive construction of the relevant provisions. The ECO reasonably assessed the materials before him/her and concluded rationally that the requirements of the rules were not met. Under ROB 8.2 the ECO had to make an evaluative assessment as to whether, for example, the applicant had the 'required skills' for 'the role' and the ECO did not need to explain this further. The words 'open and run a new branch in [the] UK' used in the Decision referred to the decision maker's sustainable understanding of 'the role' the applicant sought to undertake in the UK for the purposes of the application of ROB 8.2. Nothing was read into the rule which was inconsistent. Additionally the ECO gave cogent reasons. Even if this was incorrect in relation to ROB 5.2 this would make no difference because the application was to be refused under ROB 8.2.

10. In relation to ground 2, South Bucks DC v Porter (No 2)[2004] UKHL 33, at [36] was the leading authority. In effect the conclusions on the 'principal important controversial issues' should be resolved and the reasoning 'must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn'.

11. Procedural fairness was highly context dependent. There was no reprehensible conduct in contradistinction to Balajigari v SSHD [2019] ECWA Civ 673 and R (Karagul & Ors) v SSHD [2019] EWHC 3208. The applicant should have been aware of the rules and the onus was on the applicant to show she met the rules. The applicant was interviewed and given the opportunity to set out her case and she had time to prepare and the interview was conducted in a procedurally fair manner and without an inflexible approach and which addressed a range of plainly relevant questions. Mushtaq and Anjum were clearly distinguishable.

The Legal Framework

12. Section 3(2) of the Immigration Act 1971 provides as follows:

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

The relevant part of the rules is the Appendix: Representative of an Overseas Business (ROB).

Rule ROB 5.2 set out this eligibility requirement for entry clearance under
the Overseas Business Representative route:

> "The decision maker must not have reasonable grounds to believe the business is being established in the UK by the overseas business, or the applicant has been appointed as a representative of the overseas business or media organisation, mainly so the applicant can apply for entry clearance or permission to stay."

Rule ROB 8.2 set out this eligibility requirement for entry clearance under
the Overseas Business Representative route:

> "The applicant must be a senior employee of the overseas business with the skills, experience and knowledge of the business necessary to undertake the role, with full authority to negotiate and take operational decisions on behalf of the overseas business."

Submissions

13. Mr Malik explained that the ECO had misconstrued both ROB 5.2 and 8.2. The purpose of the rule contrasted with, for example the Tier 1 entrepreneur rule. ROB was not for the employee to set up their own business nor run their own business. The purpose was merely to establish the branch of the existing company in the UK. Once established it would be for the business to decide whether to retain the applicant's services or to recruit local staff. It was not for the applicant to establish their own business but simply to establish the existing business elsewhere, such as here in the UK. This operation could be short term. This purpose aided in the understanding of the actual requirements and explained why the ECO Decision was flawed.

14. It was clear that the suitability and eligibility requirements were met. It was accepted that ROB 4.1 (the overseas business must be active and trading outside the UK with its principal place of business remining outside the UK) was fulfilled. Nor was the applicant refused under ROB 5.1. ROB 5.2 prevents abuse by facilitating an applicant simply to come to the UK. The ECO had erred in the application of ROB 8.2. This required experience of the business abroad which enabled the applicant to undertake the role and to have full authority to take operational decisions. There was no requirement for the applicant to show they could run the business and that is what the ECO, in error, required. The role was not to set up the applicant's own business or to run it but to establish a branch, nothing more. The reference to 'necessary' in the rule was in relation to enough skills and knowledge of the business to enable the applicant to establish the branch office. The ECO made no finding that the business sought to employ the applicant mainly so they could apply for entry clearance. The ECO was reading words into the rule which did not exist. The rules were entirely independent and separate.

15. In relation to ground 2, I was referred to South Bucks District Council v Porter at [36], and it was clear that ROB 5.2 and 8.2 were the controversial issues. The ECO's reasoning should not give rise to substantial doubt which was the relevant threshold in this matter and that had not been achieved.

16. In terms of fairness Bank Mellat v HM Treasury [2013] UKSC 39 at [179] was particularly relevant and Karagul made clear that this applied to immigration cases. Karagul at [103] suggested that where

there was an assertion that the applicant had acted disreputably there should be an opportunity to respond. An administrative review was not the answer; administrative review was not an opportunity to present further evidence and nor was judicial review. This was a point considered in Balajigari and the argument, that the fact an interview had been afforded meant there was no unfairness, had been rejected. The question of whether someone was accused of doing something wrong should be put to them. In essence this was not a case of dishonesty but the principle extended to acting disreputably. Mushtaq was an entry clearance case and being out of country did not alleviate the requirement to act fairly. The applicant should have a fair opportunity to respond to potentially adverse matters. Further to Anjum, which related to a Tier 1 entrepreneur application, the interview may be unfair if inflexible structural adherence excluded the repetition or clarification of questions to probe or elucidate answers given.

17. The applicant was not told she had been acting in bad faith i.e. that the business was seeking to establish a branch mainly to obtain her entry to the UK. The purpose of the interview was not set out. The applicant overall gave entirely cogent and proper answers to the questions at 12, 13, 14, 15, 16 and 17 of the interview. The ECO omitted question 13 totally in the Decision. In relation to question 18 it was not the applicant's business. Questions 19-21 had references to linguistic and cultural barriers but the ECO merely assumed the applicant was referring to geographical distance. It could clearly be seen from the answers that they related to communication. There were no follow up questions and clarification was absent. The answer to question 21 directly related to ROB 8.2 but again was omitted.

18. Why would the business do a budget when it did not have an office? When asked about location the applicant had stated that London would be chosen and how could the applicant know the detail of which products would be selected when the business had no presence? The applicant was not required to select a location. It was not the applicant's business plan but that of the company and this demonstrated that the ECO was confusing and muddling the application with the requirements for a Tier 1 entrepreneur application. In the penultimate paragraph of the body of the decision, it was not clear what the ECO was referring to as 'incorrect'. Nothing objectionable in the applicant's answers was identified. The Decision was inadequately reasoned. This was plainly an applicant who has skills, experience and knowledge of the business which was required under the immigration rules. There is substantial doubt that the ECO misunderstood the evidence and its application.

19. In relation to the questions on the time difference, the question needed to be considered in context and what was 'incorrect', as referenced in the Decision about the applicant's response, was not

clear. It was not clear whether the question was in fact in relation to communication difference. The ECO could have asked what he meant about the time difference with a follow up question and did not. The applicant's role was to establish the branch not to run it. Further the ECO had not explained how the application was mainly to obtain entry to the UK. This was plainly an applicant who has experience, skills and knowledge of the business. There was a substantial doubt that the ECO understood the evidence. The reasoning was defective.

20. The applicant had been denied an opportunity to put her case. Mr Biggs had invited me to dismiss the application on the basis of materiality but I was again referred to Balajigari at [135] and R(TT) v SSHD [2024] EWHC 843 at [269] for a distillation of the principles as to materiality and the caution to be exercised in refusing relief on the basis of materiality.

21. Mr Biggs submitted that the ECO adopted the correct construction of ROB 5.2 and 8.2. Mr Malik had not defined 'establishing' nor 'subsidiary'. His argument entailed a sole representative coming to the UK to do research to set up a branch. Those were pre-requisites. The route is not available to those who wish to explore the possibility of coming here to establish a branch or subsidiary. Establishing means setting up or running a branch. That could be inferred from the language of the associated rules such as ROB 4.3 which required the individual to work fulltime. The intention of the rules was that the individual should come to the UK to work full time and establish and run the business and not merely establish and go home having undertaken preparatory steps only. This was important and informed what the ECO was rationally entitled to expect.

22. The experience related to running the business in the UK not the business abroad and the ability to establish and run an overseas business in the UK. This permitted the ECO to expect the applicant to understand the nature of the UK market and other relevant factors. It was the business in the context of expanding the business in the UK market. 'Necessary' was to undertake the role. When the decision maker used the word 'required' to open the business that was merely a synonym for 'necessary'. 'Necessary' introduced the concept of knowledge of the UK market. It was not incompatible with ROB 8.2. Undertaking the role was a reference to a 'sole representative establishing' a branch. The role in this case was as a sole representative establishing a branch and not just setting up the business and going home but to run the business for a period of time. There were three requirements (i) to be a senior employee, (ii) have skills, experience and knowledge of the business to undertake the role, (iii) with full authority to take negotiate and take operational decision. Mr Malik had only focussed on requirement (iii) but not (ii).

23. ROB 5.2 was mandatory and thus the ECO must look at all the circumstances if he/she then had reasonable grounds to believe the business was being established mainly so the applicant can apply entry clearance it has to be refused.

24. ROB 10.1 and 10.2 made clear that all of the requirements must be satisfied otherwise entry clearance must be refused. The legal authorities made plain that the rules should be construed with the purpose and context in mind, Wang [29]. When the word 'role' in ROB 8.2 was read in context and fairly interpreted the approach was consistent.

25. In relation to ground 2 and inadequate reasoning, South Bucks DC v Porter was the leading authority and the decision maker was only required to state briefly his conclusions in respect of the key issues in dispute and see [34] and [36]. The ECO was not required to deal with every aspect. The Decision was legally adequate and the main issues had been addressed. Ordinary English should be applied without any gloss. The rules were fairly clear as to what was being said. Structurally the Decision was understandable; the ECO identified the rules and set out the interview. Mr Malik was suggesting that the ECO should have engaged more with the answers and set out more questions. That would be unworkable. The Decision set out on the penultimate page why ROB 8.2 was not satisfied, not least because the applicant did not know the basic information a genuine candidate should be able to answer such as how much customers would be charged and where the branch would be based. The fact that a different view might be taken was not to the point as the application should be approached on Wednesbury principles. Paragraph 2 was understandable. When asked why she wished to establish the business in the UK, the response that the UK is nearer to Bangladesh was simply wrong. The answer could not be explained, as Mr Malik suggested, by cultural differences. The response was indicative of someone who did not have skills to open a branch in the UK.

26. Mr Biggs accepted that ROB 5.2 was not addressed in terms but given the nature of ROB 5.2 the ECO was compelled to rely upon it. This was triggered in the light of the applicant not satisfying the ECO that they had the necessary skills to open and run a branch in the UK and thus there were reasonable grounds to believe the application was pursued mainly for the purpose of securing entry clearance. No witness statement was needed from the ECO.

27. Turning to procedural fairness, [179] of Bank Mellat did not assist. The applicant had had the opportunity to make representations because the applicant herself made the application. In Karagul at [103], there was a conclusion that the applicant had no genuine intention of establishing a business and that the application was put

forward on a false basis. Here, there was no allegation of reprehensible conduct and ROB 5.2 was only based on suspicion and did not imply wrong doing. The Karagul requirements were met because there was an interview and in the interview, there was no requirement to put every concern. The factors affecting Mr Kawos in Balajigari, where there was a clear allegation of dishonesty, a hostile environment and the applicant was in the UK, did not apply here, and this applicant was on notice. Where there is an interview, even a brief interview as in Kanwal v SSHD [2022] EWHC 110 (Admin), that was sufficient. What was central, as in Taj v SSHD [2021] EWCA Civ 19 [54] was that the applicant had control over the relevant information and the burden of providing information and evidence was on the applicant. She was given adequate notice of the interview and had time to prepare. There was no reason to conclude there was systematic unfairness. The system here was plainly fair.

28. The context of the case could clearly be seen from the summary at the close of the interview. Neither Mustaq nor Anjum suggested that the applicant had to be confronted with an 'I put it to you' scenario. The process demanded a reasonable opportunity to provide relevant information. Here relevant questions were asked and issues relied upon. The questions were not confusing or over formulaic as in Anjum. The nature of the interview was set out. Question 15 went directly to the applicant's skills for the 'role' in establishing a business and related properly to ROB 8.2. At the end of the interview the ECO asked the applicant if she was happy and raised the question of whether she was a genuine entrepreneur.

29. Mr Malik responded that I was being invited to rewrite the rules by inserting the words 'and run a business' into the rule overall and insert 'and the UK market' between 'business' and 'necessary' in ROB 8.2. If the Secretary of State had intended those insertions to be in the rules she would have done so. I was provided with the rule relating to paragraph 245D, the route for a Tier 1 Entrepreneur Migrant which at (c)(ii)(4) specifically references 'establish or run' in relation to the applicant's own business. The rule meant setting up but not running. Although Mr Biggs submitted that paragraph 245D was an entirely different rule Mr Malik retorted that that was the whole point of his submission. That very misunderstanding had confused the ECO's reasoning.

30. There was no dispute as to the construction of ROB 5.2 merely that there was no finding in the decision that there were reasonable grounds to believe that the business was being established mainly so the applicant could apply for entry clearance.

31. It was not submitted that every consideration should be set out. The test in South Bucks DC v Porter was the 'substantial doubt test'. The complaint was not that the word 'required' was not explained but it

had not been used. The ECO did not read questions 19, 20 and 21 in full. There was no challenge to the entire system. The principle in Bank Mellat applied to immigration cases.

Conclusions

32. The application is a challenge in essence to the rationality of the ECO Decision which was an evaluation of whether the applicant had the required skills for the 'role' she was detailed to undertake in the UK. The question is what role and application was the ECO assessing?

33. As context, there was no challenge to the existence of the business in the Decision nor to the submission that this garment manufacturing and export business exported to Germany, France, Italy the Netherlands and the United Kingdom (UK). The company wished to expand into exporting summer clothing to the UK.

34. Mahad and Wang both confirm that the Immigration Rules should be interpreted sensibly and in context with a view to the purpose of the rule. The relevant rule here is entitled Appendix Representative of an Overseas Business [my underlining]. That title is a guide to the purpose of the rule. The applicant is to be a representative not an entrepreneur setting up and directing their own business.

35. The introduction of the immigration rule in force at the material time is as follows:

> *'Appendix Representative of an Overseas Business*
>
> *The Representative of an Overseas Business route is for an employee of an overseas business which does not have a presence in the UK.*
>
> *A person applying as a Representative of an Overseas Business must either be a Sole Representative or a Media Representative.*
>
> *A Sole Representative is a senior employee of an overseas business who is assigned to the United Kingdom for the purpose of establishing a branch or subsidiary.*
>
> *A Media Representative is an employee of an overseas media organisation posted to the United Kingdom on a long-term assignment.*
>
> *A dependent partner and dependent children can apply under this route.*
>
> *Representative of an Overseas Business is a route to settlement.'*

36. The opening to the introduction to the rule specifies first that the route is for an employee of an overseas business which does not have a presence in the UK, which indicates that the interpretation of the 'role' cannot have assumed a knowledge of the business in the UK as it does exist. Secondly the person must be a 'Media Representative' or 'Sole Representative'. There was no dispute that the applicant falls into the second category. The definition of the Sole Representative is found in the third opening paragraph of the introduction to this rule namely that

> *'A Sole Representative is a senior employee of an overseas business who is assigned to the United Kingdom for the purpose of establishing a branch or subsidiary'.*

37. Thus the language of the introduction refers to an employee who is assigned by the company for the purpose of establishing a branch or subsidiary. In relation to the 'role' there is no reference to the requirement for the applicant to 'run' a business.

38. Further the fourth paragraph specifies that in the case of a Media Representative the employee must be posted on a long-term assignment. No such requirement is set out for the 'Sole Representative'.

39. The validity, suitability and eligibility requirements were not in contention.

40. Under the rubric 'Work requirement for ROB' 4.1-4.4, the first requirement was that

> '*4.1 The overseas business ….that the applicant represents must be active and trading outside the UK with its headquarters and principle place of business remaining outside the UK'*

41. There was no dispute that the business was established and operating in Bangladesh and supplied customers in the UK such as River Island and Marks and Spencer. Nor was there any dispute that the applicant was a senior employee and had been employed in the company since 2015.

42. Again ROB 4.2 refers to an employee, and ROB 4.3 states

> *'4.3 The applicant must intend to work full-time as the representative of the overseas business….and must not intend to undertake work for any other business or engage in business of their own'.*

43. Mr Biggs submitted that implicit in ROB 8.2 was that the applicant was not merely coming to the UK to establish the business but obviously, under the rule, to stay on and run the business and thus the ECO properly interpreted the rule. Working full time, however, is precisely that, it does not necessarily import a meaning of working long term. I am not persuaded that the reference in ROB 4.4 to establish and supervise the branch intends to import the meaning of 'run' as advanced particularly in the light of the introduction to the rule as highlighted above. Indeed no reference was made to supervision within the Decision. I agree that the sensible and natural interpretation of the rule, in force at the relevant time, is that the role or operation could indeed be short term with a view to recruiting local staff. Shortly after the application was made, the immigration rules were on ROB were amended but the relevant rule is that cited herein.

44. For convenience I repeat the rule ROB 8.2 here

> "*The applicant must be a senior employee of the overseas business with the skills, experience and knowledge of the business necessary to undertake the role, with full authority to negotiate and take operational decisions on behalf of the overseas business*."

45. The rule consists of three requirements (i) to be a senior employee of the overseas business (ii) with the skills, experience and knowledge of the business necessary to undertake to role and (iii) with full authority to negotiate and take operations decisions on behalf of the company.

46. In relation to (i) the rule specifically requires that the applicant is an employee albeit a senior one not someone setting up their own business.

47. In relation to (ii) the logical flow and sensible construction of the rule is that the applicant must have the skills, experience and knowledge of the business overseas, not a business in the UK. Mr Biggs submitted the phrasing of the rule permitted the ECO to expect the applicant to understand the nature of the UK market and other relevant factors but that is a distortion of the meaning of the rule. Not least the business has not even been established in the UK and the rule refers specifically to the business overseas. 'Necessary' to undertake the role relates to establish and cannot extend to knowledge of the UK market when specifically, the role is to establish the business in the UK, with authority to negotiate and take operational decisions to establish the business. 'Establish', in the ordinary interpretation, is to set up or institute; not to run the business. The role as set out above in the introduction is to be a sole representative to establish the branch in the UK and the rule indicates an understanding of the business such that the

requirements of the business would be understood in order to establish a business abroad. Nothing in the rule indicates that the applicant should have knowledge of the UK market. There is no requirement for the applicant to remain in the UK to run [the business] or long term having established the business. That is simply not part of the rule which applies (owing to the command paper of HC 1118) and in force at the date of the application notwithstanding that the rule appears to have subsequently changed and now makes a reference to an extension of an existing visa or application for settlement. The reference to 'necessary' in the rule is in relation to enough skills and knowledge of the *business overseas* to enable the applicant to establish the branch office in the UK.

48. I am reinforced in my conclusions when contrasting the Rule of the ROB and the Tier 1 Entrepreneur Migrant rule under paragraph 245D for entrepreneurs which specifically states that the applicant must be able to establish and run a business. The focus is different and the Secretary of State has chosen not to write the ROB rule in that form.

49. In relation to (iii) the 'role' incorporates the requirement for the applicant to have full authority to negotiate and take operational decisions on behalf of the company not to set the business plan, nor already to have selected a location and to know details of the costs and charges of the products. There was no requirement for the applicant to show they could run the business and that is what the ECO assumed in error to be part of the rule.

50. Mr Biggs' submitted that the ECO was compelled to rely on ROB 5.2 because of the assessment under ROB 8.2. Mr Malik submitted that the ECO had not given reasoning on ROB 5.2, simple reliance on ROB 8.2 was insufficient and as the title of ROB 5 is 'genuineness requirement for the Representative of an Overseas Business', the refusal, in effect, advanced reprehensible conduct on the part of the applicant such that the applicant should have an opportunity to respond which she had not.

51. First, I observe, as conceded, that there was no specific reasoning given with reference to ROB 5.2 and having found for the reasons given elsewhere that the approach to ROB 8.2 was flawed, mere reliance on ROB 8.2 to support ROB 5.2 was insufficient particularly as the genuineness of the application was brought into question. A 'minded to' process need not necessarily be undertaken in every case where the genuineness of an application is under consideration or on every concern. The genuineness of an applications can be doubted, for example, because there is a lack of evidence or vague or unspecific answers given in interview to evidently clear and reasonable questions and does not necessarily entail or impute 'disreputable' conduct.

52. Although Bank Mellat at [178] and [179] identified that fairness very often 'will require that a person who may be adversely affected by the decision will have an opportunity to make representations' and Balajigari at [135] exhorted that courts should exercise great caution in refusing relief on the basis of immateriality, particularly in cases when the person affected by a finding of misconduct has been denied an opportunity to put their case, the overarching principle is found in R v SSHD, ex parte Doody [1994] AC 531, which identifies that what is fair depends on the context. I can accept that Bank Mellat applies to immigration matters but an out of country application, as this was, is still part of the context and, contrary to the applicants in Balajigari, the applicant was on notice of the immigration rules. Here, the applicant was the person presenting the material.

53. Although the point on interview was discussed in Balajigarii, contrary to the case of Mr Kawos in Balajigari [159]-[160], this applicant was not being accused outright of dishonesty. Karagul [2019] EWHC 3208 at [103] suggests that where a public authority exercising an administrative power which proposes to make a decision that the applicant 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 the final decision.' This, however, does not depart from the approach advocated in Doody, not least in the use of the word 'generally'. Even if the 'minded' to principle is extended to acting disreputably, I am not persuaded that every challenge to the genuineness of an application necessarily entails a charge of acting disreputably.

54. Notwithstanding that I find there was no requirement for a 'minded to' interview, Anjum makes the point that fairness still must be administered, albeit an entry clearance case. The headnote at (ii) confirms that 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 probe or elucidate answers given'.

55. The difficulty with the interview in this matter, as pointed out, was that the ECO at the close of the interview referred to 'whether or not you [the applicant] are a genuine entrepreneur'. Despite the 'Application Endorsement of an Overseas Business Representative ('OBR')' being included in the formal record at the opening of the interview details, and a reference at question 8, of 'how did you hear about the overseas business representative route?', the questions by

the Home Office interviewer, are numerously geared towards whether the applicant is an entrepreneur and hence the questions; Q5 in relation to whether the applicant had help with the business plan; Q9 'Can you describe what your business idea is?'; Q13 'How much do you intend to charge for your products/services?'; Q16 'what is your recruitment plan for the company?; Q17 'Where will you base your business in the UK ...?' and Q18 'What details about your current circumstances support your decision to establish a business in the UK now?'. Although some of the questions could relate to an ROB, there would appear to have been an interview formula adapted which included questions geared to the entrepreneur route. On that basis I would agree that the questions were unfair as they were focussed to the entrepreneur route. Individually these questions may not transgress but cumulatively they disclose a flawed approach and overall a misunderstanding of the application. As Mr Malik submitted the applicant's answers geared to the ROB route were entirely rational.

56. At the close of the interview this was said:

> *'This marks the end of the interview. The ECO will now consider all the evidence provided (including the information supplied today at interview) and will make a decision on the balance of probabilities, whether or not you are a genuine entrepreneur. Thank you so much for attending. Have a nice day. '*

57. The Decision specifically cited and relied on the answers to the question at Q5 (business plan) and at Q13 how much the applicant intended to charge for 'your products', Q16 (recruitment plans) and 17 (location) to which the applicant gave cogent responses as an employee not an entrepreneur. There is substantial doubt that the ECO applied the correct rule.

58. The final conclusion in the Decision stated

> *'When asked for basic information that a genuine candidate should be able to answer you were unable to provide information on where you plan to base the business as you do not have a location picked out, you did not know what your costs and charges for your products and services are going to be and by your own admission you did not have a hand in creating the proposed business plan as this was created by the management of Probridhi Apparels LTD.'*

59. That conclusion was axiomatic to the reasoning and the question as to the geography and relation of Bangladesh to the UK and Germany was arguably not clear; even if it were this did not rationally found a

refusal. The applicant was being tested on her role as an overseas business representative not a cartographer. Nor was it clear to what the ECO was referring in his assessment as 'incorrect' when stating 'this is incorrect and supports that you do not have the required skill or knowledge of this business to be able to open and run a new branch in the UK'.

60. The AR decision which maintained the underlying Decision merely opined that the decision maker's conclusions were reasonable that the applicant did not have the required skill or knowledge to be able 'to open and run' a new branch in the UK and the ECO had explained his/her reasoning in relation to the interview. Although the AR considered that the correct law and policy had been applied, as reasoned above the approach adopted was flawed on public law grounds and thus the AR acting as an echo is similarly flawed.

61. There was no reasoning given in relation to the use of ROB 5.2 and for the reasons given reliance on ROB 8.2 is flawed because the approach to ROB 8.2 is itself flawed. There is substantial doubt as to whether the ECO understood the important matter of the immigration rule he/she was applying and thus in reaching a rational decision on relevant grounds.

62. I find that the approach to ROB 8.2 discloses a public law error or the reasons given, and its application cannot, in this instance, support the use of ROB 5.2.

63. I therefore find the applicant's challenge succeeds such that the Decision and AR should be quashed and invite the parties to submit an order reflecting this decision.

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