UT Neutral Citation Number: [2024] UKUT 00281 (IAC)

R (on the application of Ghadam) v Secretary of State for the Home Department
(Discretion – further enquiries – s31(2A))

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Heard at Field Hou

Heard on 12th July 2024
Promulgated on 1st August 2024

Before:

UPPER TRIBUNAL JUDGE KEITH

- - - - - - - - - - - - - - - - - - -

Between:

THE KING
on the application of
Ahmad Zarrin Ghadam

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - - - - - - - - - - - - - - -

Zane Malik KC and Arif Rehman
(instructed by Haven Green Solicitors), for the Applicant

Paul Skinner
(instructed by the Government Legal Department) for the Respondent

© CROWN COPYRIGHT

Hearing date: 4th June 2024
Handed down on 12th July 2024
Reissued under Rule 42 on 29th July 2024

- - - - - - - - - - - - - - - - - - -

J U D G M E N T

- - - - - - - - - - - - - - - - - - -

(1) Where a rule permits, but does not require, consideration of certain matters, as in R (Khatun) and others v London Borough of Newham [2004] EWCA Civ 55, a useful related assessment is that proposed by Schiemann J in R v Nottingham City Council ex parte Costello (1989) 21 HLR 301. The court should establish what material was before the decision-maker and should only strike down a decision by the decision-maker not to make further enquiries, if no reasonable decision-maker in possession of that material could suppose that its enquiries were sufficient.

(2) In considering the application of section 31(2A) of the Senior Courts Act 1981, the Court of Appeal confirmed in R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214, at §§272 and 273 that first, the matter is not simply one of discretion, but rather becomes one of duty provided the statutory criteria are satisfied. This is subject to a discretion vested in the court nevertheless to grant a remedy on grounds of "exceptional public interest". Secondly, the outcome does not inevitably have to be the same; it will suffice if it is merely "highly likely". Thirdly, it does not have to be shown that the outcome would have been exactly the same; it will suffice that it is highly likely that the outcome would not have been "substantially different" for the claimant. That is different from the test for the materiality of an error of law in a statutory appeal, as confirmed in ASO (Iraq) v SSHD [2023] EWCA Civ 1282 at §43, namely whether any rational Tribunal would have been bound to come to the same decision on the evidence before the Tribunal.

Judge Keith:

1. The parties provided a paginated composite bundle of documents. I refer to pages as 'page [x]/CB' for the remainder of these reasons. They also provided a paginated authorities bundle, to which I will refer as 'page [x]/AB', and skeleton arguments, which I do not recite, but have considered in full. I refer

to the parties' cases and submissions only where necessary to explain my decision.

Background

2. On 30th October 2023, the Applicant applied for permission to bring judicial review proceedings of the Respondent's decision of 28th May 2023 to refuse the Applicant's application to renew his Tier 1 Entrepreneur leave to remain in the UK. The Respondent maintained that decision following administrative review, in a decision of 17th July 2023.

3. The factual background is largely uncontentious and contained in the Applicant's statement of grounds (page [17]/CB). Contrary to the grounds which refer to second and third applicants, the wife and minor child of the Applicant, the claim form itself refers to a single Applicant. As a consequence, I have treated the application as being made by the first Applicant alone. In any event, the wife and child's applicants were in line with, and dependent on, the Applicant's application.

4. The Applicant is a citizen of Iran and was born on 17th November 1982. He arrived in the UK with leave to enter as a Tier 1 (Entrepreneur) Migrant on 11th July 2019. He planned to invest £200,000 in a UK business, the minimum investment required at the time. In the factual background of his application for judicial review, the Applicant refers to an investment in "Level Three Technology Solutions Limited" (which I refer to as "Level Three"). That might be misunderstood as meaning that his initial investment was in that company. In fact, as the Applicant's solicitor's later application to renew his visa makes clear (page [126]/CB), having obtained entry clearance, the Applicant initially registered a business on 21st August 2019, named, "Robin Investment Ltd". That business was disrupted due to the coronavirus pandemic and the company was dissolved on 24th November 2020. The Applicant registered a second company, Payfar Limited, on 11th August 2020, which was dissolved on 30th November 2021 for the same reason. He had already registered Level Three on 15th February 2021. He applied on 23rd November 2022 for further leave to remain on the same basis as before.

5. Before reaching its decision, on 5th March 2023, the Respondent asked the Applicant for further information, as recorded in the subsequent impugned decision (page 109/CB). The Respondent also conducted an interview with the Applicant on 27th April 2023, the notes of which begin at page [115]/CB.

The decision under challenge

6. The context is that the Tier 1 (Entrepreneur) visa was part of a "points-based system", under which those applying had to meet a specific set of requirements, for which they would be score "points". (The particular visa

route is now closed and has been replaced, which is why reference is in the past tense, but the requirements remain relevant to this application for judicial review). Visas are granted provided that (as well as meeting the other requirements) an applicant has sufficient points. The Applicant says that the Respondent applied a wrong part of the Rules, so that, just as applicants would fail to score points if they did not meet prescriptive requirements, the Respondent was bound to award points if the requirements were met. That was the cost and corresponding benefit of a system designed to minimise uncertainty.

7. In that context, the Respondent refused the Applicant's application on the basis that he scored insufficient points under Appendix A (Attributes), when he had needed 75 points, as required under Paragraph 245DD(b) of the Immigration Rules. Appendix A included two parts relevant for the purposes of this appeal. The first part was a set of "available points" for visa extension applications such as the Applicant's, set out in "Table 5". In Table 5, points were awarded for investment; registration with HM Revenue and Customs or Companies House; and the creation or the addition of specified sustainable new jobs. The award of points also depended on a visa applicant providing specified documents, as stipulated in the section, "Business activity: specified documents," which begins at Paragraph 47 of Appendix A. This was cited because although the Applicant had made the required investment and was a self-employed director in the business, the Respondent did not accept that he was engaged in the business activity in question at the time of application. The Respondent expanded on this in its reasons.

8. In its decision, at page [108]/CB onwards, the Respondent refused the Applicant's application on the basis that no points were awarded for "Applicant is engaged in business activity at the time of application." I pause to note the Applicant's submission that there is no such provision is in the Rules, and this is a gloss on what is in the Rules, merely Paragraph 245DD, linked to Table 5 of Appendix A, in turn linked to specified documents at Paragraph 47 onwards.

9. The Respondent gave its reasons, referring to Paragraph 48 of Appendix A:

> "48. The applicant must provide the following specified documents to show that they have established a new UK business or joined or taken over an existing business, and that they are engaged in business in the UK when they make their application: [sic]
>
> (b) if the applicant is a director of a UK company or member of a UK partnership, they must provide: .....
>
> (iii) a business bank statement from a UK account which shows business transactions, or a letter from the UK bank in question, on its headed paper, confirming that

> the company or partnership has a bank account, that the applicant is a signatory of that account, and that the company or partnership uses that account for the purposes of their business."

The bank statements you have provided show income coming in from only one client who shares a very similar name to your business. Throughout the bank statement, towards the later part of 2022, income seems to only come in when the business bank funds are running low.

Subsequently we requested an interview for yourself to attend. Upon receiving the interview documents, we have raised a few concerns regarding credibility of your business. On Question 16 'How do you advertise your products or services?' You answered with 'We have a website, but most orders come from clients We are planning to start an amazon store', then on Question 18 'Does your business have a website address?' you answered with 'www.lvlthree.co.uk', upon checking this, the website does not exist. Upon further investigation, the domain of www.lvlthree.co.uk' is available for purchase which means it has not been registered, this was checked on https://domains. google/. This contradicts the information you have given us through your interview.

On Question 31 'Why do your clients have a similar business name' you responded with 'I have recently invested in this business'. On Question 33 'Did you have any relations with your client Level Three Trading FZE prior to opening your business in the UK?' You answered with 'Yes'. You were subsequently asked on Question 34 'What sort of relationship did you have with them?' you answered with 'They are old friends of mine since the last 15 years' The reasoning you have provided as to why the business name is very similar to your client brings a question of credibility to your business as investing in a business doesn't usually relate to having a very similar name. As well as this, you have stated to have been friends with them for 15 years. Your bank statements that you have provided from the request for further information we had sent on 05/03/23 do not show income coming in from anyone else apart from this one business who you have stated to have known for 15 years. These bank statements were from January 2022 to January 2023. Considering these and the issue with the website you have stated to have been advertising your products/services which does not exist, we are not satisfied that the business claimed for is a genuine business. Therefore, you have not been awarded any points in this area."

The application for administrative review

10. The Applicant applied for administrative review (page [96]/CB onwards). The Applicant argued that first, the Respondent had referred to the wrong website address, when the Applicant had given the correct website address in writing in his solicitor's letter dated 23rd November 2022, which had enclosed the visa application. The Respondent had made an error, not the Applicant.

11. Second, the reason for the similarity between the corporate names of the Applicant's business and that of his client in the UAE was that his client, Level Three Trading FZE, was successful and had encouraged him to act as its UK reseller. While they had similar names and had a commercial relationship, this was an arms-length relationship in which the two remained separate legal entities, with separate owners. They were not legally or financially connected in any way other than in a relationship of client and reseller. The Respondent's decision to refuse the Applicant's application because of a similarity in company names was therefore arbitrary.
12. Third, the reason that Level Three's only income was from Level Three Trading FZE was that Level Three was a new business, having only been established in February 2021, with one client, albeit the Applicant expected that relationship to expand and he expected to gain new clients.

The administrative review challenge

13. The Respondent maintained its original decision in its administrative review decision dated 17th July 2023, beginning at page [79]/CB. In that decision, the Respondent acknowledged that the refusal had been incorrect in referring to paragraph 245DD(d) when it ought to have referred to paragraph 245 DD(b). I observe that nothing turns on that, other than to say that the correction is undoubtedly justified.

14. In relation to the issue of the website address, the Respondent accepted that its interviewer had written down the website address wrongly, but said:

> "however I would expect a genuine entrepreneur to be able to provide the correct web address and should this contain any anomaly that this should have been explained when providing the web address when requested. Furthermore it is also noted that this web address lack [sic] functionality."

15. The Applicant criticises this first, for making no sense, and second, ignoring that the Applicant had provided the correct website address in writing before the interview, which it was reasonable to expect the interviewer to have checked.

16. On the issue of the relationship between Level Three Trading FZE and Level Three, the Respondent noted that the Applicant claimed to have had prior relationships with Level Three Trading FZE before setting up his business, and the owners had been old friends for 15 years. While the Respondent accepted that the two were separate limited companies in different countries, the Respondent, "would expect a genuine entrepreneur to have expanded the business to incorporate new clients and businesses" (page [84]/CB).

The Applicant's grounds of challenge and the Response

17. The Applicant's application begins at page [8]/CB, while the detailed grounds begin at page [17]/CB. I set out each of the three grounds and Mr Malik KC's submissions on behalf of the Applicant, followed by the Respondent's response and Mr Skinner's submissions in reply.

Ground 1

The Applicant's case

18. The Applicant says that first, the Respondent misapplied Table 5 and Paragraph 48(b)(iii) of Appendix A. Table 5, although not referred to in the impugned decisions, relates to points scored for extension applications and so must be applicable. The requirements of this and the specified documents needed as a result of Paragraph 48(b)(iii) were clear. It was also clear that the Applicant met those requirements.

19. In relation to Table 5, the Applicant had been awarded points for his investment and the creation of jobs. The Respondent did not dispute that the Applicant had, within the three months before the date of application, registered himself as director of Level Three, so that he met the requirements of Table 5. On the question of specified documents, at Paragraph 48 of Appendix A, the Respondent did not dispute that the Applicant had provided a business bank statement showing business transactions and a letter from a UK regulated bank on headed notepaper.

20. The points-based system was prescriptive, and on the parts relied on by the Respondent for rejecting his application, the Applicant met them. As the Court of Appeal had noted in Alam v SSHD [2012] EWCA Civ 960; [2012] Imm AR 974, at §35, the price of securing consistency and predictability was the lack of flexibility and this was endorsed, with a need for clear objective criteria, by the Court in its decision, EK (Ivory Coast) v SSHD [2014] EWCA Civ 1517; [2015] Imm AR 367, particularly §28. The Court reiterated this in Kaur v SSHD [2015] EWCA Civ 13; [2015] Imm AR 526, particularly at §41. The impugned decisions were inconsistent with the clear language of prescriptive Immigration Rules and therefore contained a public law error.

21. In oral submissions, Mr Malik pointed out that nowhere in Table 5 did the Rules specify that the Applicant had to be "engaged in business activity at the time of the application", for which the Applicant had been awarded zero points. As mentioned earlier, this appeared to be an impermissible gloss on the Rules. Instead, Table 5 of Appendix A required first that the Applicant had invested £200,000, which the Respondent accepted; second, that he had registered with HMRC as self-employed or registered with Companies House as a director of a UK company, which once again the Respondent accepted; third, that within three months before the date of the application, he was registered with Companies House as a director of a UK company; and fourth, that he must have taken over or invested in a business or established a new business that had created the equivalent of at least two new full-time jobs, which once again, was not disputed. In relation to the specified documents, and Paragraph 48, the Respondent did not and does not contend that the Applicant had failed to provide the specified documents. Instead, what the Respondent appeared to have done was to question the genuineness of the Applicant's business activity. In doing so, the Respondent had failed to apply the provisions of the Immigration Rules which were relevant to the genuineness of a business, specifically Paragraphs 245DD(k) and (l). The Respondent stated that:

> "…we have not carried out an assessment as detailed in paragraph 245DD(k) of the Immigration Rules as your application has been refused. We reserve the right to carry out this assessment in any challenge of this decision or in future applications for Tier 1 (Entrepreneur)."

The Respondent's case

22. The Respondent argues that, as with ground (2) discussed later, although the Respondent stated that she had not conducted an assessment of genuineness as detailed in Paragraph 245DD(k), in reality, she had, as the remainder of the impugned decisions made clear. Moreover, to suggest that Table 5 and Paragraph 48 of Annex A entitled an applicant to score points automatically, without consideration of the genuineness of the business activity, ignored the provision of Paragraph 245DD(n), to which I refer in the discussion on ground (2).

Ground 2

The Applicant's case

23. As noted above, while the Respondent appeared to take issue with the genuineness of the Applicant's business, the decision letter had stated explicitly that the Respondent had not carried out an assessment, as detailed in paragraph 245DD(k), and that the Respondent reserved the right to do so in the future. That provision indicated that the Respondent must be satisfied

that the Applicant had established a genuine business, invested money referred to in Table 5, intended to continue operating that business and did not intend to take employment in the UK, other than in the terms outlined. 245DD(l) indicated that in making the assessment in (k), the Respondent needed to make an assessment on the balance of probabilities, and may take into account the following factors: the evidence which the Applicant had submitted; the viability and credibility of the source of money; the credibility of the financial accounts of the business; the credibility of the Applicant's business activity; the credibility of the job creation; the nature of the business and whether it required mandatory accreditation or insurance; and finally, any other relevant information. Not only had the Respondent expressly stated that it had not considered 245DD(k) and reserved the right to do so in the future, but it did not appear that the Respondent had considered anything other than what it regarded as the credibility of the Applicant's business activity, ignoring the wider evidence: the viability and credibility of the source of the money, the credibility of the financial accounts and the job creation, for which the Applicant had specifically been awarded points. Developing this, Mr Malik pointed out that the Respondent had made a positive decision to award points for job creation which was inconsistent with awarding zero for the Applicant's business activity and indicated the Respondent's failure to consider the wider subparagraph (l) factors. Not only had the Respondent failed to apply subparagraph (l), but in so doing, the Respondent had failed to apply its own guidance to its own staff, namely the Tier 1 (Entrepreneur) Guidance dated 6th October 2021, on conducting a detailed assessment of a genuine entrepreneur. Included within that, in a loose document, internal page [19], it stated:

> "Migrants making an extension application are subject to a genuine entrepreneur test.
>
> ….You must take into account the following:
>
> - the evidence they submit;
> - the viability and credibility of the source of money referred to in Table 5 of appendix A;
> - the credibility of the financial accounts of their business or businesses;
> - the credibility of their business activity in the UK;
> - the credibility of job creation for which they are claiming points…;
> - any other relevant information."

This was not simply a formal challenge but one also of substance where, even if Mr Skinner argued that there was discretion, the guidance went beyond that and made clear that the factors other than the credibility of the business activity were surely relevant. It was extraordinary to have awarded points for job creation but not to have considered the genuineness of job creation when considering the genuineness of the business. Mr Malik referred to the case of Pokhriyal v SSHD [2013] EWCA Civ 1568; [2014] Imm AR 711, in particular §42, as authority for the proposition that if the Respondent had declared that it would adopt a more lenient interpretation of the Rules then Courts and Tribunals could permissibly hold the Respondent to that more lenient interpretation.

The Respondent's case

24. The Respondent reiterated that it had considered the genuineness of the Applicant's application, when the impugned decisions were read in full. It was obvious that the reference to not considering Paragraph 245DD(k) was an error, taken erroneously from a template. Moreover, Paragraph 245DD(n) stated that:

> "If the Secretary of State is not satisfied with the genuineness of the application in relation to a points-scoring requirement in Appendix A, those points will not be awarded."

25. That was common sense. Mere production of specified documents could not override the situation where the Respondent was not satisfied with the genuineness of the application. Moreover, I needed to consider the overall process of the Respondent reaching its decisions. The Respondent had had concerns and had invited the Applicant to an interview, at which he had been asked questions and had had chance to answer them. Following the interview, the Respondent had reached the decision. It was not incumbent on the Respondent to have considered every one of the factors in Paragraph 245DD(l), and its discretion was clear in the word "may," in the same paragraph. The authority of Pokhriyal, cited by the Applicant, did not assist him, as the proposition depended on there being an ambiguity in the Rules, and there was no such ambiguity in Paragraph 245DD.

26. In response to the challenge that the Respondent had failed to consider relevant factors under Paragraph 245DD(l), even if they were discretionary, Mr Skinner referred to the authority of R (Khatun) and others v London Borough of Newham [2004] EWCA Civ 55, and in particular Laws LJ's comments §§34 and 35, citing Lord Scarman in Re Findlay [1985] AC 318, as authority for the proposition that for a proper exercise of an administrative discretion in a situation, where a rule permits, but does not require, consideration of certain matters, it is only when a rule requires matters to be taken into account that a court will hold the decision invalid, subject to 'Wednesbury' review. It is not

enough that a factor is one that may be taken into account, nor even that it is one which many people, including the court itself, would have taken into account, had they taken the decision. It was for the decision maker to decide the manner and intensity of enquiry to be undertaken into any relevant factor, unless no reasonable decision-maker, with the material before them, could conclude that the inquiries were sufficient.

27. Moreover, there were no procedural safeguards that otherwise would have benefitted the Applicant which had been omitted, because the Respondent had not referred expressly to Paragraph 245DD(l). The Respondent had raised its concerns and had interviewed the Applicant. The Applicant did not challenge a number of the Respondent's concerns in the impugned decisions, namely the source of Level Three's income as being from one client, Level Three Trading FZE, and the timings of payments by that client, namely when Level Three's cash in its bank appeared to be low. The grounds seeking judicial review had not referred anywhere to the timing of payments and the Applicant had not identified any factor, relevant to the genuineness of his business, which the Respondent had failed to consider.

Ground 3

The Applicant's case

28. The Applicant also submitted that the Respondent's conclusion was irrational and reached in a procedurally unfair way. In particular, the Respondent had been irrational in criticising Level Three's website as not having been registered, when the Applicant had correctly identified the website address in his covering application letter, which the Respondent's own interviewer had apparently mis-transcribed and even upon administrative review, had then sought to blame the Applicant for failing to correct. The Respondent's subsequent suggestion that the website was lacked "functionality" was opaque. If it were suggested that "this web address" was the correct website, it did not say so and any suggestion was supposition. The implication was that the Respondent had still not looked at the correct website. If it had referred to the correct website, it still made no sense. The new website was unarguably functional, in the sense that it worked. How it was otherwise deficient was unexplained.

29. In any event, if the Respondent had had concerns about the website or any other matter, she ought to have put them to the Applicant in line with her public duty to act fairly. The Applicant relied on R (Mushtaq) v ECO (ECO – procedural fairness) IJR [2015] UKUT 224 (IAC) and Anjum v Entry Clearance Officer (entrepreneur – business expansion – fairness generally) [2017] UKUT 406 (IAC). It was not enough for the Respondent to point to the fact of an interview. The Court of Appeal had considered and rejected a similar argument in Balajigari and others v SSHD [2019] EWCA Civ 673; [2019] Imm AR

1152, (in particular at §159 to §160.) Superficially, the fact of an interview might appear to meet the test of procedural fairness, but the substance was in the detail of what an interviewee could be expected to answer or address by way of any concerns, if they were unaware in advance of what those concerns were. These principles applied as much in a case which did not involve allegations of dishonesty as in cases where the Respondent alleged dishonesty. The Respondent has not alleged that the Applicant is dishonest. The Applicant did not suggest that he ought to have been provided with a list of questions, but he could have easily addressed concerns over the website, had he known this was an issue and the same was true about concerns regarding the relationship between Level Three and Level Three Trading FZE.

30. In addition to the procedural concerns, the substance of the Respondent's concerns were also irrational. First was the issue of the website. Second, was a suggestion that because the Applicant and his client had some similarities in their business names, that somehow indicated that the Applicant's business was not genuine. This ignored the documentation indicating that the two companies were accepted as being completely different entities, without any shared ownership etc. Merely to leap to the conclusion that a business was not genuine, because of its name was similar to that of its client, was also irrational.

The Respondent's case

31. On the question of procedural unfairness, the Respondent submitted that the Applicant had not identified any questions he ought to have been asked at interview but was not.

32. Any suggestion that the Respondent ought to have taken a further procedural step before reaching its decision ignored the legal principles that any "Doody" duty of fairness was attenuated in points-based system cases, as confirmed in R (Taj) v SSHD [2021] EWCA Civ 19; [2021] Imm AR 748. In terms of any suggestion that the Applicant would have been unprepared to answer questions, he must have known, as someone who was legally represented, that the Respondent wished to consider the genuineness of his business.

33. On the argument that the Respondent's decision was irrational, it was plainly rational and open to the Respondent to have concerns about the Applicant's business's name, in the context of a longstanding friendship between the Applicant and his client, and where the only income was from that client and payments were made between the two, which had the effect of helping the business's cashflow. The Respondent did not need to show that it was impossible for genuine businesses to have similar names, or to only have one client, rather that it was open to it to consider these as relevant factors.

34. The Respondent's website concerns, namely a lack of functionality, reflected the fact that it was merely a "landing page" without further functions. I issued directions that the Respondent confirm its position that it had considered the correct website, which the Respondent confirmed on 5th June 2024.

Materiality of any public law error

The Applicant's case

35. The Applicant's position was that the Respondent had not proven that it was highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred, the test set out in Section 31(2A)(b) of the Senior Courts Act 1981. The Court of Appeal confirmed in Balajigari (in particular at §135) that courts should observe great caution in refusing relief on the basis of immateriality. How a Court might apply the test in Section 31(2A) had been considered in TTT v Michaela Community Schools Trust [2024] EWHC 843 (Admin), particularly at §269. A witness statement or evidence of how the decision-making evidence would have been approached had public law errors not occurred might have assisted, (see §269(x)), but the Respondent who had adduced no evidence, either by way of file notes or other records from the decision maker.

The Respondent's case

36. Mr Skinner argued that the Respondent had met the test in Section 31(2A). Whilst TTT had been the most recent authority, the Court in that case had recited only part of the relevant case law. The cases of R (Cava Bien Ltd) v Milton Keynes Council [2021] EWHC 3003 (Admin) (at §52) and R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214 (at §272) had noted three differences between the test under Section 31(2A) and the previous materiality test under common law.

37. First, under statute, the matter was not simply one of discretion but was a statutory duty on the Court to refuse an application for judicial review, provided the statutory criteria were satisfied. This was subject to a discretion, vested in the Court to grant a remedy on grounds of exceptional public interest.

38. Second, the outcome would not inevitably have to have been the same, but it would suffice if it were highly likely.

39. Third, it did not have to be shown that the outcome would have been exactly the same provided it was highly likely the outcome would not have been substantially different for the Applicant. This was very much a lower test than the one in ASO (Iraq) v SSHD [2023] EWCA Civ 1282 at §43 for statutory

appeals, namely that any rational Tribunal must have come to the same conclusion.

The Law

The relevant Immigration Rules

40. Paragraph 245DD states:

> "To qualify or leave to remain as a Tier 1 (Entrepreneur) Migrant under this rule, an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.
> Requirements:
>
> (a) The applicant must not fall for refusal under the general grounds for refusal, except that paragraph 322(10) shall not apply, and must not be an illegal entrant.
>
> (b) The applicant must have a minimum of 75 points under paragraphs 35 to 53 of Appendix A.....
>
> (e) The applicant who is applying for leave to remain must have, or have last been granted, entry clearance, leave to enter or remain:
>
> (i) a Tier 1 (Entrepreneur) Migrant,
>
> ...
>
> (k) Where the applicant has, or was last granted, leave as a Tier 1 (Entrepreneur) Migrant and is being assessed under Table 5 of Appendix A, the Secretary of State must be satisfied that:
>
> (i) the applicant has established, taken over or become a director of one or more genuine businesses in the UK, and has genuinely operated that business or businesses while he had leave as a Tier 1 (Entrepreneur) Migrant; and
>
> (ii) the applicant has genuinely invested the money referred to in Table 5 of Appendix A into one or more genuine businesses in the UK to be spent for the purpose of that business or businesses; and
>
> (iii) the applicant genuinely intends to continue operating one or more businesses in the UK; and

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

(l) In making the assessment in (k), the Secretary of State will assess the balance of probabilities. The Secretary of State 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 5 of Appendix A;

(iii) the credibility of the financial accounts of the business or businesses;

(iv) the credibility of the applicant's business activity in the UK, including when he had leave as a Tier 1 (Entrepreneur) Migrant;

(v) the credibility of the job creation for which the applicant is claiming points in Table 5 of Appendix A;

(vi) if the nature of the business requires mandatory accreditation, registration and/or insurance, whether that accreditation, registration and/or insurance has been obtained; and

(vii) any other relevant information.

(m) The Secretary of State reserves the right to request additional information and evidence to support the assessment in (k), and to refuse the application if the information or evidence is not provided. Any requested documents must be received by the Secretary of State at the address specified in the request within 28 calendar days of the date of the request.

(n) If the Secretary of State is not satisfied with the genuineness of the application in relation to a points-scoring requirement in Appendix A, those points will not be awarded.

(o) The Secretary of State may decide not to carry out the assessment in (k) if the application already falls for refusal on other grounds but reserves the right to carry out this assessment in any reconsideration of the decision."

41. Appendix A includes the following:

> "35. An applicant applying for entry clearance, leave to remain or indefinite leave to remain as a Tier 1 (Entrepreneur) Migrant must score 75 points for attributes.
>
> ...
>
> 37. Available points are shown in Table 5 for extension applications for applicants who have entry clearance, leave to enter or leave to remain as a Tier 1 (Entrepreneur) Migrant, or have had such leave in the 12 months immediately before the date of application.
>
> ...
>
> Table 5: Extension applications as referred to in paragraph 37
>
> ...

Row	Investment, business activity and job creation	Points
...		
3	Within the three months before the date of the Application, the applicant was: (a) registered with HM Revenue & Customs as self-employed, or (b) registered with Companies House as a director of a UK company or member of a UK partnership.	15

> 48. The applicant must provide the following specified documents to show that they have established a new UK business or joined or taken over an existing business, and that they are engaged in business in the UK when they make their application:
> ...
>
> (b) if the applicant is a director of a UK company or member of a UK partnership, they must provide:
> ...
>
> (iii) a business bank statement from a UK account which shows business transactions, or a letter from the UK bank in question, on its headed paper, confirming that the company or partnership has a bank account, that the applicant is a signatory of that account, and that the

company or partnership uses that account for the purposes of their business."

Relevant statutory provisions

42. Section 31(2A) of the Senior Courts Act 1981 states:

> "The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) …
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

43. Section 15(5A) of the Tribunals, Courts and Enforcement Act 2007 states:

> "In cases arising under the law of England and Wales, subsections (2A) and (2B) of section 31 of the Senior Courts Act 1981 apply to the Upper Tribunal when deciding whether to grant relief under subsection (1) as they apply to the High Court when deciding whether to grant relief on an application for judicial review."

44. The summary of how Section 31(2A) applies in practice was set out by Kate Grange KC, sitting as a Deputy High Court Judge, in R (Cava Bien), at §52, as recited, in part, in R (TTT):

> "52. The proper approach to this test is not in dispute between the parties. It has been considered in a number of authorities and it seems to me that the central points can be summarised as follows:
> i) The burden of proof is on the defendant: R (Bokrosova) v Lambeth Borough Council [2016] PTSR 355 [88];
> ii) The "highly likely" standard of proof sets a high hurdle. Although s. 31(2A) has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test set out in authorities such as Simplex GE (Holdings) Ltd v Secretary of State for the Environment (1988) 57 P & CR 306 , the threshold remains a high one: R (Public and Commercial Services Union) v Minister for the Cabinet Office [2018] ICR 269 at [89] per Sales LJ, approved by Lindblom, Singh and Haddon-Cave LLJJ in R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214, [2020] PTSR 1446 at [273].
> iii) The "highly likely" test expresses a standard somewhere between the civil standard (the balance of probabilities) and the criminal standard (beyond reasonable doubt): R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group [2021] EWHC 12 (Admin) at [98] per Kerr J.

iv) The court is required to undertake an evaluation of the hypothetical or counterfactual world in which the identified unlawful conduct by the public authority is assumed not to have occurred: R (Public and Commercial Services Union) v Minister for the Cabinet Office (supra) [89], R (Plan B Earth) v Secretary of State for Transport (supra) [273], R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group (supra) [98].

v) The court must undertake its own objective assessment of the decision-making process and what the result would have been if the decision-maker had not erred in law: R (Goring-on-Thames Parish Council) v South Oxfordshire District Council [2018] 1 WLR 5161, judgment of the whole court at [55], R (Gathercole) v Suffolk County Council [2020] EWCA Civ 1179, [2021] PTSR 359 at [38] per Coulson LJ, (Asplin and Floyd LLJJ concurring at [78] and [79]).

vi) The test is not always easy to apply. The court has the unenviable task of (i) assessing objectively the decision and the process leading to it, (ii) identifying and then stripping out the "conduct complained of" (iii) deciding what on that footing the outcome for the applicant is "highly likely" to have been and/or (iv) deciding whether, for the applicant, the "highly likely" outcome is "substantially different" from the actual outcome': R (Ron Glatter) v NHS Herts Valleys Clinical Commissioning Group (supra) [98]-[99].

vii) It is important that a court faced with an application for judicial review does not shirk the obligation imposed by section 31(2A); the matter is not simply one of discretion but becomes one of duty provided the statutory criteria are satisfied: R (Gathercole) v Suffolk County Council (supra) at [38], [78] and [79] and R (Plan B Earth) v Secretary of State for Transport (supra) at [272].

viii) The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic: R (Gathercole) v Suffolk County Council (supra) at [38], [78] and [79].

ix) The provisions 'require the court to look backwards to the situation at the date of the decision under challenge' and the 'conduct complained of' means the legal errors that have given rise to the claim: R (KE) v Bristol City Council [2018] EWHC 2103 (Admin) at [139] per HHJ Cotter QC, citing Jay J in R (Skipton Properties Ltd) v Craven DC [2017] EWHC 534 (Admin) at [97]-[98].

x) The Court can, with due caution, take account of evidence as to how the decision-making process would have been approached if the identified errors had not occurred. Section 31(2A) is not prescriptive as to material which the Court may consider in determining the "highly

likely" issue: R (Enfield LBC) v Secretary of State for Transport [2015] EWHC 3758 at [106], per Laing J. Furthermore, a witness statement could be a very important aspect of such evidence: R (Harvey) v Mendip District Council [2017] EWCA Civ 1784 at [47], per Sales LJ, although the court should approach with a degree of scepticism self-interested speculations by an official of the public authority which is found to have acted unlawfully about how things might have worked out if no unlawfulness had occurred: R (Public and Commercial Services Union) v Minister for the Cabinet Office (supra) [91].

xi) Importantly, the court must not cast itself in the role of the decision-maker: R (Goring-on-Thames Parish Council) v South Oxfordshire District Council (supra) at [55]. While much will depend on the particular facts of the case before the court, 'nevertheless the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law.' R (Plan B Earth) v Secretary of State for Transport (supra) [273].

xii) It follows that where particular facts relevant to the substantive decision are in dispute, the court must not 'take on a fact- finding role, which is inappropriate for judicial review proceedings' where the 'issue raised...is not an issue of jurisdictional fact'. The court must not be enticed 'into forbidden territory which belongs to the decision-maker, reaching decisions on the basis of material before it at the time of the decision under challenge, and not additional evidence after the event when a challenge is brought'. To do otherwise would be to use s.31(2A) in a way which was never intended by Parliament: R (Zoe Dawes) v Birmingham City Council [2021] EWHC 1676 (Admin) , unrep., at [79] – [81] per Holgate J.

xiii) The impermissibility of the court assuming the mantle of the decision-maker has been particularly emphasised in the planning context where e.g. it may require an assessment of aesthetic judgment or adjudicating on matters of expert evidence: R (Williams) v Powys CC [2018] 1 WLR 439 per Lindblom J at [72] and R (Thurloe Lodge Ltd) v Royal Borough of Kensington & Chelsea [2020] EWHC 2381 (Admin) at [26] per David Elvin QC (sitting as a Deputy High Court Judge).

xiv) Finally, the contention that the s.31(2A) duty is restricted to situations in which there have been trivial procedural or technical errors (see e.g. the dicta of Blake J in R (Logan) v Havering LBC [2015] EWHC

3193 (Admin) at [55]) was rejected by the Court of Appeal in R (Goring-on-Thames Parish Council) v South Oxfordshire District Council [2018] 1 WLR 5161 [47] and [55] and in R (Gathercole) v Suffolk County Council (supra) [36], [77] and [78].

53. I should make clear that, although the Court of Appeal decision in Plan B Earth was reversed in the Supreme Court on a question as to whether oral statements in Parliament by ministers amounted to 'government policy', the Supreme Court did not address the s.31(2A) duty – see R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd [2020] UKSC 52 . Nevertheless the parties are agreed (and I accept) that the important statements by the Court of Appeal in Plan B Earth about the limitations of the court's task under s.31(2A) of the 1981 Act remain good law and I note that they are entirely consistent with the earlier Court of Appeal decision in R (Goring-on-Thames Parish Council) v South Oxfordshire District Council (supra) at [55]."

45. As R (Cava Bien) recognises, in considering the application of section 31(2A), Court and Tribunals also need to consider the important statements by the Court of Appeal, referred to in Plan B Earth, at §§272 and 273:

"272. The new statutory test modifies the Simplex test in three ways. First, the matter is not simply one of discretion, but rather becomes one of duty provided the statutory criteria are satisfied. This is subject to a discretion vested in the court nevertheless to grant a remedy on grounds of "exceptional public interest". Secondly, the outcome does not inevitably have to be the same; it will suffice if it is merely "highly likely". And thirdly, it does not have to be shown that the outcome would have been exactly the same; it will suffice that itis highly likely that the outcome would not have been "substantially different" for the claimant.

273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court...."

46. That is different from the test for the materiality of an error of law in a statutory appeal, as confirmed in ASO (Iraq) v SSHD [2023] EWCA Civ 1282 at §43, namely whether any rational Tribunal would have been bound to come to the same decision on the evidence before the Tribunal.

Conclusions - Grounds (1) and (2)

47. I take grounds (1) and (2) together, as there is substantial overlap between the two. I begin by commenting briefly on the structure of the Immigration Rules

and the interplay between Paragraphs 245DD(b); 245DD(k) to (n); and Appendix A, Table 5 and Paragraph 48.

48. I accept the Applicant's challenge that the Respondent added a misleading gloss, when stating that it had awarded zero points for "Applicant is engaged in business activity at the time of the application." The danger with that gloss is that it led the Respondent into error in navigating the prescriptive course of the Rules. The rubric is in the whole of Paragraph 245DD. It refers to the score at sub-para (b). It includes sub-paragraph (k), which is not mandatory, as sub-para (o) states that the respondent may decide not to carry out the assessment in sub-para (k) if the application already falls for refusal on other grounds. However, where the respondent is not satisfied as to the genuineness of an investment or business or its operation, sub-para (k) is plainly relevant and there are then the discretionary factors which may be considered at sub-para (l). If the Respondent is not satisfied with the genuineness of the application, then it cannot award relevant points. In the context of that overall rubric, the points table is set out in Table 5, and the specific criteria are prescriptive, as are the specified documents criteria at Paragraph 48. I accept Mr Malik's submissions that the Applicant can only succeed if he meets the criteria in Table 5 and Paragraph 48. However, while these are necessary for an applicant to succeed, they are not sufficient for him to do so. That is not an end of the enquiry, simply because the Applicant has produced the relevant evidence. The Respondent can and indeed must go on to consider the genuineness of the business, so as to be satisfied and award points. The gate-keeper provision is 245DD(k) unless the application falls for refusal for other reasons.

49. Following that course of logic through, I accept Mr Skinner's submission that one cannot consider the specified evidence provisions at Paragraph 48 of Appendix A in isolation from Paragraph 245DD, as that conflates necessary requirements as being sufficient.

50. The difficulty from a public law perspective with the Respondent's impugned decisions is that at first sight, they have considered the necessary criteria of Table 5 and Paragraph 48, which, as Mr Malik points out, the Respondent does not dispute that the Applicant meets. The Respondent states that it has not considered Paragraph 245DD(k) to (l), but for all intents and purposes then goes on to consider the genuineness of the Applicant's business, although it is unclear whether this is in relation to genuine past and present operation of the genuine business (sub-para (i)), genuine investment (sub-para (ii), noting that the Applicant was awarded points for investments), or genuine future intentions (sub-para (iii)). There is a mismatch between the Rules cited which the Respondent accepts are met (specified evidence) and the reasons for the decision, with the misleading gloss which seeks to join the two.

51. In relation to ground (1), the Respondent cited the wrong provisions of the Rules, by reference to its reasons for refusing the application (namely Paragraph 48 of Appendix A). I also accept the challenge that it failed to apply all of the correct provisions of the Rules, namely Paragraph 245DD(k), as supplemented by sub-paragraphs (l) to (n), for the reasons set out in relation to ground (2).

52. Ground (1) therefore succeeds on public law grounds.

53. In relation to ground (2), while it may be that there was an error in the use of a proforma decision and while I accept that there is no requirement for the format of a decision, the further consequence of the error in the structure of the decisions is that the Respondent has not referred expressly to having considered the discretionary factors at Paragraph 245DD(l). I proceed on the assumption that the reference to not considering Paragraph 245DD(k) is a mere typographic error. I also accept Mr Skinner's argument that, as per Khatun, the Respondent's decision is not undermined on public law grounds because it has not taken into account factors such as the viability and credibility of the source of the Applicant's investment or the credibility of his financial accounts and job creation, even if those are factors which many people might have taken into account. That is to enter the forbidden territory of substituting the Tribunal's view for that of the decision maker. However, even accepting that line of argument so far, I do not accept that in the impugned decisions, the Respondent can be inferred as having considered, but then chosen not to exercise its discretion, to evaluate certain factors, namely those in Paragraph 245DD(l). The error is not in deciding to ignore or place no weight on the sub-paragraph (l) factors. The error is in failing to consider that they might be relevant and that there was a discretion to consider and place weight on them at all.

54. I have considered how that error ran its course in practice. Where a Court or Tribunal is considering whether there has been a proper exercise of an administrative discretion where a rule permits, but does not require, consideration of certain matters, as in Khatun, a useful related assessment is that proposed by Schiemann J in R v Nottingham City Council *ex parte* Costello (1989) 21 HLR 301, p.309, cited with approval at §35 of Khatun:

> "In my view the court should establish what material was before the authority and should only strike down a decision by the authority not to make further enquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient."

55. In considering the case by the related proposition of whether the Respondent had made sufficient inquiries, here, on the one hand, the Respondent had material on the source of the Applicant's investment, his business's financial accounts and the creation of jobs. If, as appears to be the case, the business

was not accepted as genuine, there were a whole host of obvious questions, including in relation to the reliability of the financial accounts and the nature and genuineness of the jobs which had been created, for which there was Real Time Information ('RTI') payroll data apparently showing thousands of hours worked. I express no view on the reliability of that evidence, but it begs the question why there were no enquiries and why the Respondent thought that this material was sufficient, but still rejected the Applicant's application. It was, of course, open to the Respondent to decide not to consider such factors, but that is not explained anywhere. This is because, returning to the flip side of the public law error, the Respondent did not in fact consider whether to exercise its discretion under Paragraph 245DD(l) at all. This explains the inconsistency, as Mr Malik pointed out, between the zero points awarded in relation to the "business activity" and the points awarded for the investment in the business. Even if I accept Mr Skinner's argument that a failure to follow the Respondent's own guidance to its caseworkers does not amount to a public law error, it begs the question of whether the Respondent's case worker even considered the underlying Rules.

56. Ground (2) therefore succeeds on public law grounds.

Conclusions - Ground (3)

57. On the one hand, I accept the Respondent's submission that any duty of procedural fairness applies to the points-based system but the manner of its application will be fact and context specific (see §50(i) of R(Taj)). On the other hand, the fact of the interview in this case did not mitigate the public law errors. The Respondent's attempt to blame the Applicant for its own transcription error in writing down the correct website address is an obvious example. Had the Applicant known of the concern, he could have reminded the Respondent of the correct address, rather than having to somehow know that it had been written down incorrectly, and then address any questions on functionality. Quite what the Respondent meant by the website lacking "functionality" remains opaque, without crossing into the forbidden territory of a merits-based appeal. The applicant has never been able to address any concerns about the website, or even to understand what these concerns are. The process was therefore procedurally unfair, on public law grounds.

58. On the challenge of perversity, I do not go so far as to conclude that it was impermissible for the Respondent to be concerned about the similarity of corporate names between client and reseller. I do, however, conclude that the Respondent was perverse in taking to account its own misrecording of the Applicant's business' website address, on the basis that had the Applicant's business application been genuine, he would have corrected that error at interview. The Respondent knew the correct website address, because it was in the application before it. The decision maker did not check, and then

sought to blame the Applicant for that error in their decision, even on administrative review.

59. On ground (3), the challenge succeeds on procedural unfairness and partially on grounds of perversity.

Conclusions - materiality

60. On the one hand, I accept Mr Skinner's submission that the Applicant did not address the concerns of the timing of payments from the client to his business, namely that it was running short of funds and that it was permissible to consider the similarity of names between those two companies. On the other hand, I have accepted that the Respondent erred in failing to consider its discretion in relation to the factors set out in Paragraph 245DD(l). This may or may not prompt further questions, depending on whether the material before the Respondent is sufficient in light of the exercise of that discretion. Moreover, the Respondent's stated concern about the website, based on a misrecording of the address, was perverse and the process by which the Respondent reached its conclusions was procedurally unfair.

61. I accept Mr Skinner's submissions on how Section 31(2A) of the 1981 Act operates. Making my own objective assessment of the decision-making process, I caution myself not to take the role of the decision-maker. Consideration of the exercise of discretion relating to the factors set out in Paragraph 245DD(l) is highly fact sensitive. Whether the Respondent considers, for example, that the genuineness of the jobs which had been created, is relevant, is a matter for it, in the context of the wider evidence and any outstanding concerns about the timing of payments from Level Three Trading FZE to Level Three. However, I do not accept that the Respondent has proven that, had it considered whether to exercise its discretion to consider the factors under Paragraph 245DD(l), it is highly likely that the outcome would not have been substantially different. This because the Respondent's failure to consider the exercise of discretion is fundamental and would otherwise require this Tribunal to trespass into taking the role of the decision-maker, in such fact-sensitive circumstances.

Summary of Decision

62. In summary, the Applicant succeeds on grounds (1) and (2). The Applicant also succeeds on ground (3) insofar that the decisions were procedurally unfair and in part, perverse.

63. I have invited the parties to draw up the appropriate orders.

~~~~0~~~~
~~~~