



***Subjective? Objective?
How to steer clients through
“Genuineness”***

Judith Farbey QC



Tier 2: Genuine Vacancy

See Sponsor Guidance

- **Specific** duties and responsibilities
- **No lower-skilled** duties
- Doesn't exist to **enable migrant to come to/stay in UK**
- **Must not be tailored** to exclude resident workers from being recruited

Genuine entrepreneur test e.g. initial applications

See HC 395 para 245DB; Tier 1 (Entrepreneur) Guidance

- Genuinely intend to establish/take over/become director of UK business
- Genuinely intend to invest money
- Money genuinely available
- Previous investments made into genuine UK business
- No intention to take other UK employment

Genuine entrepreneur test - criteria

SSHD will take into account:

- Evidence submitted
- Viability and credibility of source of money
- V&C of business plan
- Previous educational/business experience (or lack thereof)
- Immigration history/previous activity in UK
- Accreditation/registration/insurance
- Any other relevant info

On the one hand...

- Assessment of genuineness is:
 - ‘not a mechanistic exercise. Rather, it requires evaluative judgment and intuition on the part of the decision maker’ and
 - ‘characteristics of genuineness...are not regulated by a comprehensive, prescriptive code’.

Arshad v SSHD (Tier 1 applicants – funding – “availability”) [2016] UKUT 00334 (IAC) para 45 per McCloskey J

On the other hand...

- Interpretation of rules and policy guidance is a matter for the Court i.e. OBJECTIVE
- “Reasonable and literate individual test” – *R (Goldsmith International Business School) v SSHD* [2014] EWHC 1232 (Admin)
- Interests of immigration control may require sponsor guidance to be interpreted strictly (*R (London College of Finance & Accounting) v SSHD* [2015] EWHC 1688 (Admin))
- BUT the Court will take the ultimate decision on meaning

Context is everything

- Policy “must not fall outside the terms and purpose of the relevant power” (i.e. what is the statutory objective?) – *De Smith’s Judicial Review* para 5-080
- So what is the purpose of genuineness tests? Preventing abuse.

Interviews:

R (Anjum) v ECO [2017] UKUT 00406 (IAC)

- Construction of any document – inc interview record – is a matter of law
- Fairness requires that applicant have opportunity to challenge reliability/accuracy of interview record
- Interview may be unfair if founded on inflexible structure with no opportunity for clarification of questions or elucidation of answers. Resulting decision may be unlawful

Reading the decision-maker's mind

- DON'T LIKE: Queue jumping – getting an advantage over people who do it the long way round
- DO LIKE: Immigration control - fair and consistent
- DO LIKE: Making sure the Immigration Rules work
- *Reaction to client's situation will hinge on these sorts of public interest factors – which you can predict and advise on*

Presenting your client's case

- Early instructions: client gets it right first time
- Detailed instructions: be thorough, be clear
- Put your case – no platitudes
- Give client's explanation; provide mitigation for errors as strongly as you can
- Pre-emptive strike / damage limitation – better to come clean about error rather than await investigation?

Over to you...

?? Questions ??

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