OUTER HOUSE, COURT OF SESSION

[2026] CSOH 91

P1156/25

OPINION OF LORD HARROWER

in Petition of

JHARNA SHITAL ADWANI (AP) (FE)

Petitioner

for

Judicial Review of a decision to refuse an application for administrative review

Petitioner: James; Drummond Miller LLP
Respondent: Smeaton; Office of the Advocate General

22 September 2026

Introduction

[1] The petitioner is a national of India. She entered the United Kingdom in September 2016 and was initially granted leave to remain in the United Kingdom as a student. Since completing her studies, she has enjoyed leave to remain, first, as a graduate entrepreneur, and then, as a Tier 1 (Entrepreneur), a now historical points-based route designed for individuals setting up or taking over a business in the United Kingdom. On 14 September 2023, the petitioner applied to the Secretary of State for the Home Department, who is the respondent in these proceedings, to extend her leave to remain as a Tier 1 (Entrepreneur).

[2] In order to succeed in her application, the petitioner had to demonstrate, by submitting certain specified documents, that she had established a business that created the equivalent of two full-time jobs for workers with settled status. The petitioner's application was made in respect of workers employed at a café that she operated in Edinburgh. The application contained documents bearing to demonstrate compliance with the job creation requirement. By separate letter, the petitioner also relied, in the alternative, on the respondent's policy relaxing the job creation requirement to take account of business disruption caused by the COVID-19 pandemic. Although that policy had been withdrawn on 1 August 2023, prior to the petitioner submitting her application, she argued that online guidance gave her to understand that the exemption was still in effect.

[3] On 28 January 2024, the respondent refused the application and, following requests for reconsideration by the petitioner, refused it again on three further occasions, most recently on 11 August 2025. The petitioner has now brought this petition for judicial review, in which she seeks reduction of the respondent's decisions. She does so primarily on the basis that the respondent failed to follow her own published guidance, thereby frustrating the petitioner's legitimate expectation. She also claims that the respondent failed to take into account relevant documentation, or that, if she did, she failed to provide adequate reasons for refusing her application. The matter came before me at a substantive hearing.

Background

[4] In terms of the relevant provisions of the Immigration Rules, the job creation requirement for a Tier 1 (Entrepreneur) extension application was that the applicant must have created at least two new full-time jobs for settled workers, and that each job must have existed for at least 12 months. A full-time job was defined as a minimum of 30 hours per

week or 120 hours per month. Two part-time jobs could be combined to count as one full-time job share, for example, two employees working 15 hours per week each over 12 months. However, multiple part-time roles could only be combined if they represented the equivalent of one single full-time role over that timeframe. Each of the two roles must have existed for at least 12 consecutive months during the applicant's most recent grant of leave.

[5] In order to demonstrate compliance with the job creation requirement, the applicant had to provide certain specified documents, including so-called "real time information" printouts from HM Revenue & Customs relating to tax and national insurance contributions, hourly time sheets signed by the employee and manager to verify the hours worked, and proof of the employees' settled status.

[6] The respondent introduced a temporary concession during the COVID-19 pandemic allowing non-consecutive months to count toward the 12-month requirement. The guidance relied upon by the petitioner was version 10/2021. It explained the concession as follows:

> "If your business has been disrupted, you no longer need to employ at least 2 people for 12 consecutive months to qualify for an extension. The 12 month period you are required to employ someone can be made up of multiple jobs across different months, but when combined this must be the equivalent to 2 full time jobs. You must submit all required evidence in line with standard job creation requirements […] for each employee you are relying upon for meeting this requirement.
>
> […]
>
> If you've not been able to employ staff for 12 months by the time your visa expires, you'll be allowed to extend your stay for a further 2 years, if you can show:
>
> - You've created at least 2 jobs by the date you apply
> - You've been unable to employ staff for 12 months due to coronavirus.
>
> To apply for the additional leave, you should submit an extension application and all associated evidence as normal, with an exception under the job creation requirement and the understanding that this will be a limited extension of 2 years."

The document from which this guidance was taken had been published on the respondent's website, where it was accessible at the time of the petitioner's application by clicking on a link provided on the relevant webpage. That webpage also stated:

> "This route closed to new applicants on 29 March 2019.
>
> You can still use this guidance if you have already been granted leave in the Tier 1 (Entrepreneur) or Tier 1 (Graduate Entrepreneur) categories".

However, as at 1 August 2023, when the COVID-19 exemption was withdrawn, the visas and immigration section of the Home Office's webpage stated:

> "This is advice for visa customers and applicants associated with COVID-19.
>
> **If you're in the UK**
>
> There are no current COVID-19 visa application concessions in the UK. You'll need to follow the normal visas rules for your chosen visa."

It should also be noted that on the very first page of version 10/2021 of the guidance, underneath the heading, "Tier 1 (Entrepreneur) of the Points Based System – Policy Guidance", applicants were advised that the guidance was correct at the time of publication in October 2021, but that it was subject to change, and that it "should be read with paragraphs 245D to 245DF of the Immigration Rules on GOV.UK" (emphasis in the original). For more information on how to apply, applicants were also specifically directed to the above-noted visas and immigration section of the Home Office's webpage.

The respondents' decision letters

[7] On 27 December 2023, prior to its initial decision refusing the application, the respondent had written to the petitioner, explaining that the evidence submitted was not sufficient to satisfy the job creation requirement. The respondent had requested evidence of settled status in relation to a number of specified workers. It also requested print-outs of the

petitioner's real time full payment submissions, demonstrating that the petitioner had complied with the PAYE reporting requirements to HM Revenue & Customs.

[8] In the respondent's initial decision letter dated 28 January 2024, refusing the application, the case-worker noted that evidence of settled status in respect of some of the petitioner's employees had still not been submitted and that therefore none of these employees could be considered as contributing to the job creation requirement. In response to the respondent's request for information, the petitioner had replied, enclosing payroll information, which she submitted, should be read together with the real time information. The respondent noted that explanation, but considered it insufficient for the respondent to disregard the fact that the full payment submissions did not comply with the requirements of the Immigraton Rules. In refusing the petitioner's application, the respondent explained further that the COVID-19 exemption had been withdrawn. Moreover, the respondent drew attention to the fact that the last UK lockdown had ended on 12 April 2021, providing the applicant with over 2 years in which to recruit and retain employees in compliance with the job creation requirement

[9] In the final review letter dated 11 August 2025, the respondent noted that the petitioner had now provided evidence of settled status for her employees. However, the decision letter added that this information still did not demonstrate the equivalent of two full-time workers. The respondent acknowledged that the petitioner had created part-time jobs with a duration of 12 months. However, having reviewed the documentation submitted for the relevant period, the respondent concluded that the combined hours did not demonstrate the hours worked by an equivalent of two full-time workers for every month. The respondent went on to note that excess hours worked in any one month could

not be carried over into another month. Regarding the missing real time information, the respondent adhered to the original case-worker's decision. The respondent concluded:

> "On review, I am therefore satisfied that you have failed to provide sufficient evidence to demonstrate that you have created the equivalent of two full time jobs for settled workers. You have also failed to provide the specified RTI and therefore I am satisfied that it was reasonable for the original decision maker not to award points for job creation."

The decision letter went on to confirm that the COVID-19 exemption had been withdrawn prior to the application being made, and that therefore it could not be relied upon.

Petitioner's submissions

[10] Counsel for the petitioner placed the respondent's guidance at the forefront of his submissions. He argued that the guidance included a clear and unambiguous representation that the COVID-19 exemption still applied. Where a clear and unambiguous undertaking had been made, the authority giving the undertaking should not be allowed to depart from it unless it had shown that it was fair to do so (*Re Finucane's application for judicial review (Northern Ireland)* [2019] UKSC 7, [2019] HRLR 7). The respondent had failed to discharge that onus. In her answers, the respondent had sought to rely for the first time on the visas and immigration section of the Home Office's webpage. That document had not been referred to in the respondent's decision letters. She should not be allowed to rely on it now (*Absalom* v *Governor of Kilmarnock Prison* [2010] CSOH 109).

[11] Alternatively, counsel submitted that the guidance represented the government's published policy which the respondent should be required to follow unless there were good reasons not to do so (*Mandalia* v *Secretary of State for the Home Department* [2015] 1 WLR 4546). There had been nothing to prevent the respondent from withdrawing the COVID-19 exemption from the Immigration Rules, while retaining the exemption within its

guidance. The respondent clearly had the ability to update her own policy, but had chosen not to do so. The principles of good administration and fairness required her to follow her own published policy.

[12] The respondent's refusal to allow the application had been irrational. The petitioner had submitted real time information and payroll documentation demonstrating that payments had been made to employees through the PAYE system. The respondent's decision, refusing the application, in part because the information had not been in a single document, had been *Wednesbury* irrational. In any event, the respondent had failed to have regard to a relevant consideration, namely, paragraph 245AA of the Immigration Rules, which allowed the respondent to consider information even if it had been in the wrong format. Insofar as the respondent now claimed to have considered all relevant information, that did not fit with her own decision letter made on 11 August 2025. In that letter, the respondent stated that, because the real time information had not been provided, it had been reasonable for the original case-worker not to award any points for job creation.

Decision

[13] The relevant principles of administrative law were not in dispute between the parties and need not be re-examined in this opinion. It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise or representation made which is "clear, unambiguous and devoid of relevant qualification" (*R* v *Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd* [1990 1 WLR 1545, per Bingham LJ at 1569). The guidance was perfectly clear on its face, firstly, that although correct at the time of publication in October 2021, it was subject to change; and secondly, that it should be read together with the relevant Immigration Rules themselves. In these circumstances, I do

not consider that any representation made within it that the COVID-19 exemption still applied, could be considered to be clear, unambiguous and devoid of relevant qualification. The express reference to the Immigration Rules was a relevant qualification, and any applicant referring herself to these rules, would have appreciated that the exemption had been withdrawn, or at the very least that the guidance could not be considered clear and unambiguous.

[14] I have reached this conclusion entirely without regard to the visas and immigration section of the Home Office's webpage, which made it clear that the COVID-exemption had been withdrawn. However, I do not agree with the petitioner that the respondent should not be permitted to rely on this document. Lord Tyre's decision in *Absalom, op cit*, relied upon by counsel for the petitioner, offers no support for his argument. In that case, the court was not satisfied that the answers given by the prison governor were consistent with the contemporaneous documentation before the court. In the present case, firstly, the respondent was relying on a contemporaneous webpage to which the applicant would have been directed had she followed the instruction in the guidance; and secondly, it is perfectly consistent with the reasons given by the respondent in the decision letters.

[15] I would also reject, and for similar reasons, the petitioner's submission that the respondent should not be permitted to depart from her published policy. Properly understood, the guidance had to be interpreted as being subject to change, and requiring to be read in conjunction with the Immigration Rules. As such, the guidance had expressly been made subject to the Immigration Rules, in whatever form they might take from time to time. At the relevant time, namely, when the application was submitted, the Immigration Rules had withdrawn the COVID-19 exemption.

[16] So far as the application of the Immigration Rules is concerned, the petitioner's application failed primarily because it had not demonstrated compliance with the job creation requirement. It is true that the initial decision letter had not taken into account workers in respect of whom the petitioner had failed to submit evidence of their settled status. However, by the time the final review decision was made, the relevant passports had been submitted and considered. Notwithstanding that additional documentation, and even while taking account of these additional workers, the decision letter was clear that the petitioner had failed to satisfy the job creation requirement. There was no challenge to the rationality or the reasoning given in support of this particular aspect of the respondent's decision. Rather, the petitioner's complaint was directed at a lack of flexibility in the respondent's consideration of the real time information and the payroll documentation. However, the decision letter was clear that the petitioner's failure to submit the relevant documentation in the correct form merely provided an additional reason for refusal. Since the primary reason for refusal had been a failure to meet the job creation requirement, any defect in the respondent's decision-making regarding the form in which the documentation had been submitted could not be sufficiently material to justify reduction of the respondent's decision.

[17] In any event, I am not persuaded that the respondent failed to have regard to that part of the Immigration Rules permitting the respondent to exercise flexibility with regard to documentation. The petitioner founded on rule 245AA, which applies where *inter alia* the applicant submits the specified documents in the wrong format, or where the document submitted does not contain all the relevant information. The rule permits the respondent to contact the applicant in writing and request the correct documents, which must be

submitted by the applicant within 10 working days of the request. Rule 245AA(d) then provides that, if the missing information is verifiable:

> "from other documents provided with the application or elsewhere, the decision maker may grant the application despite the error or omission, if they are satisfied that the applicant meets all the other requirements of the Rules".

It follows that, even if the missing information were verifiable from the petitioner's payroll documentation, as the petitioner contended, the respondent was under no obligation to grant the application if the respondent had not been satisfied that the applicant had met all the other requirements of the rules. In the petitioner's case, as the respondent had already made clear in its decision letters, the petitioner had not satisfied the job creation requirement. In my view, therefore, the petitioner has failed to demonstrate that the respondent's decision was either irrational or inadequately reasoned. The reasons were sufficient to enable the petitioner to understand why the matter was decided as it was (*South Bucks DC* v *Porter (No 2)* [2004] 1 WLR 1953, per Lord Brown of Eaton-under-Heywood at paragraph 36).

[18] Ultimately, therefore, I have concluded that there is no merit in any aspect of the petitioner's submissions, however attractively they were presented by Mr James on her behalf.

Disposal

[19] I shall uphold the respondent's third plea-in-law and refuse to grant the orders sought by the petitioner. I shall reserve any question of expenses meantime.