

Case No: CO/1339/2017

Neutral Citation Number: [2018] EWHC 105 (Admin)

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 26 January 2018

Before :

**KAREN STEYN QC**  
**(sitting as a Deputy High Court Judge)**

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Between :

<b>R (on the application of Sheraz KHAN [as a managing partner of EXMOOR SURGERY])</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>THE SECRETARY OF STATE FOR THE HOME DEPARTMENT</b>	<b><u>Defendant</u></b>

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**Daniel Bazini** (instructed by **KTS Legal**) for the **Claimant**  
**Jennifer Gray** (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 19 October 2017

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**Judgment**

## **Karen Steyn QC :**

### **Introduction**

1. The Claimant, Exmoor Surgery, is a General Practitioners' practice providing primary medical services to around 3,200 patients within the London Borough of Kensington and Chelsea. On 13 December 2016, UK Visas and Immigration ("UKVI", which forms part of the Home Office) refused Exmoor Surgery's application for a Tier 2 (general) sponsor licence. The Claimant seeks judicial review of this decision, permission having been granted by David Elvin QC, sitting as a Deputy High Court Judge, on 8 June 2017.

### **The Facts**

2. Exmoor Surgery is a partnership led by Dr Vaqas Rashid and Mr Sheraz Khan. Dr Rashid has been the Principal General Practitioner (GP) at Exmoor Surgery since 2015. Mr Khan is a Managing Partner. In addition to Dr Rashid and Mr Khan, Exmoor Surgery comprises four salaried GPs, two part-time practice nurses, a part-time health care assistant, a part-time phlebotomist, and four administrative staff. Since March 2016, Exmoor Surgery has also employed Ms Ramya Palanisamy as a "*business development manager*" ("BDM") and it is this position, and Ms Palanisamy's recruitment, which lies at the heart of this case.
3. Ms Palanisamy is a national of India. She graduated in 2005 from Bharathidasan University, India, with a BSc in biotechnology, achieving a first class degree with distinction. She also attained first class marks when awarded an MSc in biotechnology in 2007 by the same university and an MPhil in biotechnology by Vinayaka Missions University, India, in 2008. Ms Palanisamy then undertook an MBA ("Master of Business Administration") at Alagappa University, in which she was again ranked first class, in 2009. Ms Palanisamy continued her studies in the UK, successfully undertaking (and obtaining a merit grade in) an MSc (Cancer) at University College London.
4. Ms Palanisamy began working for Exmoor Surgery as a receptionist in October 2012, having already (according to her application) worked there on a voluntary basis since November 2010. In January 2013, she was promoted to Deputy Manager and she continued to work at Exmoor Surgery in this role until January 2014.
5. In February 2014 Ms Palanisamy began working for Noor Business Solutions as a BDM. As Ms Palanisamy is not a UK, European Union (EU) or European Economic Area (EEA) national, she required a Tier 2 (general) visa to permit her to work in the UK. Noor Business Solutions was a Tier 2 (general) sponsor and so granted her a Certificate of Sponsorship and the Home Office granted her a visa with an expiry date of 16 February 2017.
6. It appears from Mr Khan's first statement that, whilst maintaining her primary employment with Noor Business Solutions, Ms Palanisamy began working for Exmoor Surgery again in early 2015, on a part-time basis, as a BDM.
7. On 7 October 2015 Noor Business Solutions' Tier 2 (general) sponsor licence was revoked. As a result, Ms Palanisamy's primary employment with Noor Business

Solutions, and her Tier 2 sponsorship, was about to come to an end. (Although there is some reference to Ms Palanisamy having ceased to work for Noor Business Solutions in August 2015, it appears from Ms Palanisamy's application on 10 November 2015 for a full-time post with Exmoor Surgery that she was still employed by Noor Business Solutions at that time.)

8. On 15 October 2015, Exmoor Surgery advertised online for a full-time BDM. The advertisement was posted on Universal Job Match from 15 October to 14 November 2015 and on NHS Jobs from 15 October until 24 November 2015. The salary range was given as £22,000 to £35,000 per year. A job description was provided, as well as a "*person specification*" which listed qualifications, experience, skills and knowledge which Exmoor Surgery considered "*essential*" or "*desirable*" for the post. The "*essential*" criteria included, amongst others, the following:
  - (1) "*Management qualification equivalent to MBA (Masters in Business Administration)*";
  - (2) "*Experience of dealing with QOF [Quality Outcomes Framework] and CQRS [Clinical Quality Reporting System] and managing finance within General Practice(s)*";
  - (3) "*Working in primary care or health or social sector experience*"; and
  - (4) "*Expert level skills on patient management software i.e. Systemone and Intradoc*".
9. Exmoor Surgery received 28 completed applications (and two incomplete applications) via NHS Jobs and a further 12 applications via Universal Jobs Match. Five of the 40 applicants were shortlisted and invited to interview. The other 35 applicants (and the two whose applications were incomplete) were rejected. Mr Khan's evidence is that those rejected without interview did not meet the person specification and so were not suitable.
10. The interviews were held on 25 November 2015. Dr Rashid and Mr Khan interviewed the candidates. Three of the five shortlisted candidates failed to attend. Two of these candidates (Candidates 611 and 001) did not respond to the invitation to attend an interview. The third candidate (Candidate 199) confirmed that she would attend the interview, but then failed to do so (explaining long afterwards that she had been unable to attend due to ill health). As a result, only two candidates were interviewed: Ms Palanisamy and Candidate 371.
11. Each of the short-listed candidates was asked to "*prepare a 15 minute (power point) presentation on the Topic: Where do you see the future of General Practice in the next five years*" and to give their presentations at the interview. The records of the interviews show that the interviewers then asked each of the candidates the same 15 questions. On the "*interview scoring form*" the interviewers gave the candidates scores for each question, apply a scale of "*0 – No Evidence*", "*1 – Some Evidence*", "*2 – Good*" and "*3 – Excellent*".
12. Ms Palanisamy scored 37 overall and the interviewers' comments stated: "*Excellent presentation, exceptionally well spoken, presented, dynamic, enthusiastic, great ideas*

*about role and requirements, knows SI inside out. Needs a little development on managing finances, but exceptional candidate*". Candidate 371 scored 17 overall and the interviewers' comments stated "*Nice chap, not dynamic enough, poor awareness of wider health landscape. Written English poor, presentation was poor. Did not know core information re CQC, QOF points, Contract changes, QIPP etc.*" In both cases, the presentations and the interviewers' manuscript notes of the interviews provide support for the scores and comments.

13. Following this recruitment exercise, Exmoor Surgery offered the full-time BDM post to Ms Palanisamy, with a salary of £33,500 p.a., which she accepted. Exmoor Surgery had been granted a Tier 2 (general) sponsor licence a year earlier, on 22 January 2015. And so, on 12 January 2016, Ms Palanisamy was granted a Tier 2 migrant visa, until 15 March 2019, under the sponsorship of Exmoor Surgery (licence SPL5496000033).
14. Shortly thereafter, Exmoor Surgery sought to inform UKVI of a change of circumstances. On 4 March 2016, UKVI advised that the change in control of the partnership - from a partnership between Dr Rahman and Dr Malik, to a partnership between Dr Rahman, Mr Khan and Dr Rashid – was such that Exmoor Surgery would need to apply for a new sponsor licence and surrender the existing licence.
15. Exmoor Surgery proceeded as advised by UKVI, making an application for a new Tier 2 (general) sponsor licence on 23 March 2016.
16. Following a visit on 11 April 2016, UKVI refused Exmoor Surgery's application for a fresh licence on 13 May 2016 ("the first refusal decision"). Exmoor Surgery was removed from the Sponsor Register on 17 May 2016.
17. Exmoor Surgery sent a letter before claim and then issued a claim for judicial review of the first refusal decision. Those proceedings resulted in a consent order dated 31 October 2016 by which the Secretary of State agreed to consider Exmoor Surgery's application for a new Sponsor licence afresh (on receipt of a fresh application), to refund the application fee, and to pay Exmoor Surgery's costs. In addition, Ms Palanisamy's position was protected, pending consideration of the new application.
18. In accordance with the consent order, Exmoor Surgery made a new application. Following a further visit by UKVI on 28 November 2016, and some further enquiries, UKVI again refused Exmoor Surgery's application for a sponsor licence. The second refusal decision, given in a letter dated 13 December 2016, is challenged in these proceedings.

### **The Legal Framework**

19. The Tier 2 Points-Based System is a scheme, operated by UKVI on behalf of the Secretary of State, whereby skilled non-EEA workers are allowed leave to remain in the UK to fill particular jobs which cannot be filled by settled EEA workers.
20. The role of the UK sponsor/employer is central to the operation of the Tier 2 scheme. A prerequisite to obtaining leave to enter or remain as a Tier 2 employee is that a non-EEA worker must have obtained a Certificate of Sponsorship from a licensed sponsor.

An employer may only issue such a certificate if it is a licensed sponsor.

21. UKVI has published detailed guidance entitled “Tiers 2 and 5: guidance for sponsors” (“the Guidance”). Version 04/16 applies to applications made on or after 6 April 2016 and so it is the relevant guidance in respect of the challenged decision.

22. Paragraph 1.3 of the Guidance states:

*“Sponsorship plays 2 main roles in a migrant’s application for permission to come to, or remain in the UK to work ...:*

- *it provides evidence that the migrant will fill a genuine vacancy that cannot be filled with a suitably qualified or skilled settled worker, ...*
- *it involves a pledge from the sponsor that it accepts all of the duties expected when sponsoring the migrant.”*

23. Paragraph 1.4 of the Guidance emphasises that when a sponsor is granted a Tier 2 licence, “*significant trust is placed in them. With that trust comes a responsibility to act in accordance with the Immigration Rules and the sponsor guidance*”. The courts, too, have emphasised the trust placed in licensed sponsors, in view of the active and crucial role they play in support of immigration control, and their concomitant responsibility to comply with the rules contained in the Guidance.

24. In *R (Raj and Knoll Ltd) v Secretary of State for the Home Department* [2016] EWCA Civ 770, Tomlinson LJ (with whom Moore-Bick and Kitchin LJ agreed) observed at paragraph 2:

*“Tier 4 is a similar, but obviously not identical, system for licensing educational institutions to sponsor students from outside the EEA to enter and remain in the UK. In that context, Lord Sumption has observed, in R (New London College Ltd) v Secretary of State for the Home Department [2013] 1 WLR 2358 at 2372, paragraph 29:*

*‘There are substantial advantages for sponsors in participating [in the Tier 4 scheme], but they are not obliged to do so. The rules contained in the Tier 4 Guidance for determining whether applicants are suitable to be sponsoring institutions, are in reality conditions of participation, and sponsors seeking the advantages of a licence cannot complain if they are required to adhere to them.’*

*The same is obviously true for those who seek the advantage of a Tier 2 licence.”*

25. Paragraph 7.1 of the Guidance provides that all applications for a sponsor licence must meet the eligibility and suitability criteria. Paragraph 7.5 states:

*“To assess suitability criteria we look at whether:*

- *you have human resource and recruitment systems in place to meet, or continue to meet your sponsor duties. We may judge this by visiting you either before or after your licence is granted. ...*
- *you can offer a genuine vacancy which meets the criteria of the category you*

*are applying to be licensed for*

- *you have an unspent criminal conviction for a relevant offence ...*
- *we have any evidence of previous non-compliance by you”*

(Original emphasis.)

26. Paragraph 9.5 of the Guidance explains that applicants (and licence holders, when checks are carried out) will be given a score of “met” or “unmet” for four criteria. Paragraph 9.8 states that the application will be refused if one or more of the criteria are not met. The fourth criterion is described in these terms:

*“employment – in respect of Tier 2 (General) licences we will assess whether you can offer genuine employment which meets the Tier 2 (General) criteria on skill level and appropriate rates of pay*

*Below are 2 examples of circumstances in which we may not be satisfied you can offer genuine Tier 2 (General) employment.*

...

#### ***Example 2***

*You tell us you require or have already sponsored a person in a managerial role which appears unnecessary. This could be if you are a small fast food outlet and you tell us you need, or have appointed a full time business development manager, HR manager or publicity manager.*

*Note: these examples are not exhaustive.”*

27. Paragraph 24.7 of the Guidance states:

*“Tier 2 allows UK employers to employ nationals from outside the settled workforce and Croatian nationals to fill skilled jobs which cannot be filled by settled workers. A migrant sponsored under any Tier 2 category must not displace a suitable settled worker, which means that you can only offer a job to a migrant you wish to sponsor under Tier 2 if there is no suitable settled worker available to fill the vacancy.” (Emphasis added)*

28. Migrants sponsored under Tier 2 (General) can only work in a skilled occupation at or above National Qualifications Framework (NQF) 6 i.e. bachelor’s degree level. Paragraph 24.9 of the Guidance states: *“This does not mean that the person employed to fill the job must be educated to that level, it means that the work that person will do is pitched at that level.”*

29. A critical part of the Guidance is part 28, which addresses the resident labour market test in these terms:

*“28.1 The resident labour market test is there to protect the settled workforce and means that you must advertise the job you want to recruit for to give settled workers a chance to apply. You can only recruit a migrant if:*

- you have completed a resident labour market test in accordance with this guidance and can show that no suitable settled worker is available to fill the job or
- the job is exempt from the resident labour market test

28.2 A suitable settled worker means any settled worker who has the skills and experience you are seeking. If you find that you have more than one candidate with all the necessary skills and experience you advertised for, where one is a settled worker and the other is a migrant, you must appoint the settled worker even if the migrant is more skilled or experienced. The only exception is if the job falls within one of the PhD standard occupation classification (SOC) codes listed below, when you can appoint a migrant if they are the most suitable candidate.”

(Emphasis added)

30. In order to conduct a resident labour market test, it is necessary also to comply with various rules, such as regarding the placement of advertisements and the rates of pay advertised: see the Guidance, paragraphs 26.1-26.6 and 28.18-28.27).

### **The Decision**

31. In the decision letter dated 13 December 2016, UKVI responded to Exmoor Surgery’s application for a Tier 2 (General) sponsor licence:

***“We are not satisfied that the role of Business Development Manager is a genuine role within your organisation and that you can offer genuine employment which meets the Tier 2 General criteria.***

*Annex 1 Paragraph (n) of the Tier 2 & 5 Sponsor Guidance 04/16 states that we will **refuse** your application if the information available to us suggests that you do not yet have in place a process necessary to comply with your duties as a sponsor.*

*Annex 1 Paragraph (o) of the Tier 2 & 5 Sponsor Guidance 04/16 states that we will **refuse** your application if you are applying under Tier 2 and we are not satisfied that you can offer genuine employment that cannot be filled by a resident worker, and/or that meets the Tier 2 requirements.”*

(Original emphasis)

32. The reasons for this conclusion were given in these terms:

**“Record Keeping and Recruitment**

*Our Compliance Officer is not satisfied that you have demonstrated a genuine attempt to recruit from the resident labour market, thus failing to meet paragraphs 15.14, 15.15 and 15.19 of the sponsor guidance.*

...

*There were a total of 42 candidates for the Business Development Manager's job. Out of these 42 only 2 were interviewed (including the migrant). Our Compliance Officer looked through a selection of other candidates [who] were rejected and it appears that some of these have the qualifications and NHS experience to effectively carry out the role. For example: [Candidate 857] (Immigration Status – ILR) was rejected but meets the requirements as stated on job advertisement. There was no information available as to why this candidate was not considered for the position or why he was rejected.*

***In addition, the education requirement (Masters) of the role has been found to be exaggerated to be difficult for a settled worker to meet.***

*There were other candidates with Degree qualifications and experience who could have been considered for the position. It appears the role has been created specifically for the migrant as there wasn't a valid justification as to why an overseas worker is required to fill this role in-line with 15.14 and 15.15 of the Sponsorship Guidance.*

*In view of the above, our Compliance Officer was not satisfied that your organisation has [made] a genuine attempt to recruit within the EU/UK labour force.*

***You do not have a robust system in place to meet PBS [points-based system] requirements in relation to record keeping and recruitment.***

### **Skill Level**

*From the information provided, the role of Business Development Manager is not believed to be a genuine role within your organisation.*

*It is noted that your representative's letter of 18/07/2016 states, 'the surgery has a dedicated accountant and outsources its payroll.'*

...

*Paragraph 17.7 of our published guidance states that we may also make checks with other government departments. We have contacted the Occupation Information Team at the Office of National Statistics (ONS). They have confirmed that they would allocate SOC code 1241 to the job description.*

...

### **1241 Health Care Practice Managers**

...

*Related job titles:*

- *Clinic manager*
- ***GP practice manager***

- *Veterinary practice manager*

*Salary rates: New entrant: £20,800 Experienced: £25,900*

***Health Care Practice Managers (SOC code 1241) are skilled to NQF Level 4.***

*From 14<sup>th</sup> June 2012 applicants entering Tier 2 must have been offered a job which meets a National Qualification Framework Level 6 on the Tier 2 Codes of Practice and in the Tier 2 & 5 Policy Guidance for Sponsors. ...*

***We are not satisfied that the position you wish to fill, either falls within an exception or is a skilled occupation at or above National Qualification Framework (NQF) level 6 (or the equivalent in Scotland).***

**Genuine Vacancy**

*In this case we do not consider that the role is of a sufficiently skilled level to meet the Tier 2 (General) requirements and that the role has been exaggerated to make it appear to meet the requirements of Tier 2 in order to enable Ms Palanisamy to stay in the UK.*

...

*Paragraph 15.15 of our published guidance states:*

*A genuine vacancy is one which:*

- requires the jobholder to perform the specific duties and responsibilities for the job and meets all of the requirements of the tier and category – if you have already assigned a CoS the vacancy must be for the duration of the CoS
- does not include dissimilar and/or lower-skilled duties

*We may request additional information and/or evidence from you or the migrant to establish this requirement, and may refuse the migrants application if this is not provided within our deadline.*

*Below are 3 examples of vacancies that are not considered to be genuine.*

- one which contains an exaggerated or incorrect job description to deliberately make it appear to meet the requirements of the tier and category when it does not
- for a job or role that does not exist in order to enable a migrant to come to, or stay in, the UK
- advertisements with requirements that are inappropriate for the job on offer, and have been tailored to exclude resident workers from being recruited”

(Original emphasis)

33. The Claimant sent a letter before claim on 14 February 2017, to which the Defendant responded on 28 February 2017. The Defendant maintained the decision, but made two significant admissions:
- (1) The Defendant conceded that Candidate 857 was not a suitable settled worker with the skills and experience the Claimant was seeking, accepting the Claimant's explanation that Candidate 857 "*did not have the required primary care experience as stipulated in the job advertisement and this was the reason he was excluded from the shortlist of suitable candidates*".
  - (2) The Defendant disclosed that when the ONS had been asked to advise as to the appropriate SOC code for the job to which Ms Palanisamy had been appointed, a portion of the job description had been omitted. The Defendant also provided copies of its relevant communications with the ONS.

### Analysis

34. Counsel for the Claimant, Mr Daniel Bazini, contends that the Defendant's decision was very weak, pervaded with fundamental errors that have not been rectified. In particular, the Claimant submits that:
- (1) the Defendant's conclusion that Exmoor Surgery had not demonstrated a genuine attempt to recruit from the residential labour market was irrational;
  - (2) the assertion that requiring applicants to have an MBA (or equivalent management qualification) was exaggerated to make it difficult for a settled worker to meet was irrational;
  - (3) reliance on the fact that the surgery has a dedicated accountant and outsources its payroll in support of the conclusion that the role of BDM was not genuine shows a lack of understanding of business structures and functions and was irrational; and
  - (4) the Defendant's conclusion that the job filled by Ms Palanisamy met SOC code 1241 (GP practice manager), rather than the higher level SOC code 3545 (BDM), was based on (a) the view of the ONS in circumstances where the ONS was provided with an incomplete job description and/or (b) a misconception as to the ONS's view.
35. In response, Counsel for the Defendant, Mrs Jennifer Gray, makes the overarching point that the rationality of the Defendant's decision must be assessed by reference to the evidence before the Defendant at the material time. Citing paragraph 32 of Tomlinson LJ's judgment in *Raj and Knoll*, Mrs Gray also observed that revocation of a sponsor licence would involve no fundamental right on the part of the licensee, but on the contrary a right contingent upon adherence to the rules. Decisions made by the Defendant in this field, in which "*the SSHD has special expertise ... and experience of decision-making*", do not attract an "*enhanced standard of judicial scrutiny*". The same must be true (if not *a fortiori*) in the context of a challenge to a refusal of an application for, rather than revocation of, a licence.

36. I agree with this approach. But the fact that the ordinary rationality standard applies does not preclude the possibility that, on proper analysis, a decision may indeed lack a rational foundation.

37. I shall address each of the four grounds relied on by the Claimant in turn.

*(i) Compliance with the residential labour market test*

38. The recruitment exercise undertaken by the Claimant undoubtedly met many of the requirements for the proper conduct of a residential labour market test. For example, it is not disputed that the post was suitably advertised, on appropriate websites and for the proper period of time, in accordance with the Guidance. Nor is it suggested that the process of drawing up a short-list of five applicants, or the interview process for the two applicants on the short-list who attended the interviews, was a sham.

39. The Defendant has implicitly accepted that there was no failure on the Claimant's part in respect of the four candidates (other than Ms Palanisamy) who were short-listed. The three applicants who did not attend an interview, when invited to do so (Candidates 611, 001 and 119), cannot properly be regarded as available, suitable settled workers. And the Claimant has given a sufficient explanation as to why Candidate 371 was considered, following an interview, not to be suitable.

40. The essential point made by the Defendant was that the Claimant had not demonstrated that none of the other 35 applicants (leaving aside the two who failed to complete their applications, and so for that reason may be regarded as unsuitable) had the necessary skills and experience.

41. The Claimant countered that the Defendant had identified one applicant in the decision letter as having the necessary skills and experience, namely Candidate 857, and then very quickly conceded that this was not the case because he did not have primary care experience. The Claimant suggests that it may be assumed that UKVI identified the person it thought was the strongest candidate. The Defendant has been unwilling to identify anyone else amongst the remaining 34 applicants who is said to have the necessary skills and experience, despite having all the applicants' CVs, and so the Claimant says it does not know who is said to be suitable or on what basis.

42. The Claimant also sought to rely on a document produced for the hearing which contains a brief analysis of the reasons for short-listing or rejecting each applicant. The reason given in the case of each of the 35 applicants who were rejected at the short-listing stage was: "*No experience in General Practice and System One software*". However, four of these candidates were categorised by the Claimant as a "*reserve candidate*" by reason of their "*experience*" or more specifically "*experience in the Primary Care Trusts*".

43. The Defendant contends that the Claimant's approach is flawed. The Claimant had to satisfy the Secretary of State that, amongst many apparently reasonably well-qualified applicants for the post, there was no suitable settled worker. The Claimant is seeking to reverse this by suggesting the onus was on the Secretary of State to go through all of the CVs and show which applicants were suitable. In respect of the analysis produced by the Claimant for the hearing, the Defendant contends, first, that as it was not before the decision-maker when the decision was made, it cannot assist the Claimant and,

secondly, that it assists the Defendant in showing that other candidates were potentially suitable.

44. I have reached the conclusion that this first ground of challenge fails. The Secretary of State's decision that Exmoor Surgery had not demonstrated a genuine attempt to recruit from the residential labour market was not irrational.
45. First, paragraph 28.1 of the Guidance provides that a sponsor can only recruit a migrant if the sponsor "*can show that no suitable settled worker is available for fill the job*". In my judgment, this supports the Secretary of State's submission that the onus was on the Claimant to satisfy her that no suitable settled worker was available.
46. Secondly, what Exmoor Surgery appears to have done on receipt of the 40 applications for the advertised post was, as Mr Bazini himself put it in his skeleton argument, to shortlist "*the top five candidates*". In and of itself this gives no cause for criticism. But having found that a non-settled worker was the best (and only suitable) candidate amongst "*the top five*", Exmoor Surgery could not, consistently with the Guidance, move directly to appoint her without considering the potential suitability of settled workers who had not been shortlisted.
47. There is an obvious difference between selecting the five best candidates and determining the full pool of candidates who, subject to interview, appear to have the requisite skills and experience for the post. For example, the candidates ranked 6<sup>th</sup> to 10<sup>th</sup> could all have been suitable in the sense of having the skills and experience required, even though their written applications were not assessed to be as strong as the top five candidates.
48. The effect of the residential labour market test is that a settled worker who is suitable for an advertised post should be recruited in preference to a non-settled worker, even if the latter is considered to be the better candidate. So having found that Ms Palanisamy was the best and only suitable candidate amongst the top five, Exmoor Surgery had to consider whether there were any settled workers outside the short-list who were potentially suitable for the post. On the materials before the Defendant when the decision was made, it was far from irrational for the Defendant to take the view that Exmoor Surgery had not shown that it had given this type of consideration to candidates outside the top five (albeit such applications had been considered in the short-listing process).
49. Thirdly, although the Claimant has given reasons, since the decision, for rejecting the other applicants, the Claimant has also disclosed that four candidates were classified as reserves, who would have been considered further if none of the short-listed candidates had been suitable. This reinforces the impression that, having found that Ms Palanisamy was the best candidate, the Claimant did not appreciate the need to consider whether any of the reserves (or any other non-shortlisted candidates) had the requisite skills and expertise.
50. Fourthly, one of the reasons given (after the decision) for rejecting each of the non-shortlisted candidates was that they lacked "*experience in General Practice*". However, the person specification identified "*working in primary care or health or social sector experience*" as essential. Experience working in General Practice was not specified as a prerequisite and so candidates, such as those who were categorised as reserves due to

their experience working in the health sector, including for Primary Care Trusts, could not properly be regarded as unsuitable by reason of not having worked in General Practice.

51. The other reason given was lack of experience of System One software. “*Expert level skills on patient management software i.e. Systemone and Intradoc*” were identified in the “*person specification*” as essential. However, whether or not the reserves, or the other non-shortlisted candidates, all lacked experience of System One software was not demonstrated by the Claimant giving the application forms to the Defendant.
52. The Claimant was understandably concerned that, in suggesting that it had not made a genuine attempt to recruit from the residential labour market, the Secretary of State was questioning Exmoor Surgery’s good faith and the authenticity of the recruitment exercise it conducted. I have found that the Secretary of State’s conclusion that Exmoor Surgery had not demonstrated a genuine attempt to recruit from the residential labour market was not irrational. That is not because the recruitment exercise was a charade: it is because Exmoor Surgery failed fully to appreciate what was required to comply with the residential labour market test.

***(ii) Requirement of an MBA or equivalent***

53. The person specification identified as “*essential*” a “*Management qualification equivalent to MBA (Masters in Business Administration)*”. The job summary describes the required education level as “*Masters degree or postgraduate certificate/diploma*”. The decision letter suggested that this requirement was “*exaggerated to be difficult for a settled worker to meet*”.
54. The Claimant submitted that this was irrational because there are many settled workers who have MBAs or equivalent management qualifications. Whilst that is no doubt true, it does not render the decision irrational. It does not touch the question whether the requirement was exaggerated, but only seeks to counter the suggestion it was difficult for a settled worker to meet. As to the latter point, requiring such a qualification can properly be said to have raised the bar and inevitably narrowed the pool of settled workers who could apply and so, in that sense, made it more difficult for settled workers to meet the criteria.
55. The Claimant’s better point was that no reason for suggesting that the requirement was exaggerated had been given by the Defendant in the decision letter. In the hearing, the Defendant noted that one of the five candidates short-listed did not have an MBA or equivalent management qualification and suggested that this showed that, even if such a qualification could have been identified as “*desirable*”, it was an exaggeration to classify it as “*essential*”.
56. I accept the Claimant’s submission that there was no rational foundation for the assertion that the requirement of an MBA or equivalent management qualification was exaggerated. It was a matter for Exmoor Surgery to determine whether, having regard to their business aspirations, and their view of the benefits of employing a BDM with such a management qualification, they considered such a qualification to be necessary.
57. The requirement for such a management qualification could only properly have been said to have been exaggerated if it was not a *bona fide* requirement. The only reason

given by the Defendant for suggesting that it was not necessary was that, having identified it as essential, the Defendant then proceeded to short-list a candidate who had management experience, but no such qualification. I accept the Claimant's submission that it will often be the case that when considering, in the abstract, what is required, an employer may take the view that applicants must meet certain criteria and then, when considering a specific application, the employer may determine that an exception should be made in light of an applicant's particular experience. In my judgment, the mere fact that an exception may subsequently be made does not indicate that the employer exaggerated what was required when drafting the person specification.

***(iii) Accountancy and payroll tasks***

58. The decision letter of 13 December 2016 relied on the fact that Exmoor Surgery "*has a dedicated accountant and outsources its payroll*" in support of the conclusion that "*the role of Business Development Manager is not believed to be a genuine role within your organisation*". The Defendant's reasoning on this aspect appears to have been that the job description allocated various financial tasks, including managing "*the accounting system*" and overseeing "*all other financial aspects of the business including the payroll*", to the BDM, whereas these tasks were in fact outsourced. However, these tasks are designated in the job description as ones for which the BDM "*will have overall responsibility*", but which are delegable.
59. There is considerable force in the Claimant's contention that reliance on this point suggests a lack of understanding of ordinary business structures. In my judgment, this aspect of the reasoning in the decision letter was irrational.

***(iv) Standard occupation classification (SOC) 3545 or 1241***

60. Paragraph 25.1 of the Guidance advises employers that when assigning a certificate of sponsorship they must choose the SOC code which "*contains the job description that best matches the role you want to recruit for*". So in the first instance it is for the employer to determine the SOC code.
61. Paragraphs 25.1 and 25.2 further advise employers that they should be able to find "*the correct SOC code by searching the codes of practice for job titles or key words*", but that they may find, if they search for job titles, that the SOC code containing the job title does not match the duties that the migrant will perform. If this happens, employers are advised to "*search further, for example using key words, for a job description that matches the migrant's duties*". It is clear from this that the "*correct*" SOC code is the one that best matches the tasks the employee is required to perform, as set out in the job description.
62. In the decision letter of 13 December 2016, UKVI stated that the Occupation Information Team at the Office of National Statistics (ONS) had "*confirmed that they would allocate SOC code 1241 to the job description*". As SOC code 1241 is skilled to NQF level 4, the Defendant was not satisfied that the position Exmoor Surgery wished to fill was skilled to a sufficient level (NQF level 6) for it to be permissible to appoint a non-settled worker.

63. It is true that the ONS had initially said on 8 December 2016, in response to a request from the Defendant for advice as to the most appropriate SOC code for the role, that “*we would allocate SOC 2010 code 1241 to this job description*”.
64. Nevertheless, in my judgment, the unqualified statement in the decision letter that ONS had confirmed they would allocate SOC code 1241 was inaccurate for the following reasons:
- (1) This statement was expressly made subject to the caveat that the Standard Occupation Classification “*was designed to base the unit group code on a job title*”, which ONS noted that UKVI had not provided.
  - (2) In response, UKVI informed ONS that “*the sponsor states the job title is a Business Development Manager (SOC 3545) NQF level 6*” and asked ONS whether this would alter the assessment of the allocated SOC code. ONS replied by return in these terms:

*“If we had received this job title with the below job description, we would have replied to the customer as follows:*

*We code according to a set of rules. We firstly check if the occupation title is in our Index of Occupations therefore based on the information provided we would usually advise unit group 3545.*

*However the skills, tasks and qualifications outlined suggested that the role may fit better in 1241.” (emphasis added)*

The Defendant submitted that she took the email to mean that ONS first looked at the job title, which was indicative, and based on the job title alone they would normally advise unit group 3545. However, the skills, tasks and qualifications outlined in the in the job description suggested that the role may fit better in 1241. In other words, the Defendant submitted that when referring to the “*information provided*” the ONS meant the job title alone (even though the information which had been provided to the ONS consisted of the job title and job description). Even if this understanding were right, it would not provide a proper basis for saying in the decision letter that the ONS confirmed they would allocate SOC code 1241. Far from confirming that “*they would allocate SOC code 1241*”, the ONS said that applying their rules, based on the information provided, “*we would usually advise unit group 3545*”, albeit that based on partial information (the job description alone) they had suggested SOC code 1241 may be a better fit. Moreover, given that the ONS had been provided with the both the job title and the job description, it would be more natural to read the ONS’s reference to “*the information provided*” as encompassing both pieces of information.

- (3) In addition, UKVI had inadvertently failed to provide the complete job description. As a result, the ONS’s view that, leaving aside the job title, the identified skills, tasks and qualifications might fit better into SOC code 1241, was based on an incomplete understanding of the required skills, tasks and qualifications.

65. On this point, the decision letter was flawed. In public law terms, the Defendant took into account an inaccurate view of what the ONS had said, failed to take into account or understand the view in fact expressed by the ONS, and ignored the relevant consideration that the ONS's view was based on an incomplete copy of the job description.
66. Were these flaws remedied by the Defendant's response to the letter before claim? With its response, the Defendant complied with its duty of candour by disclosing the email communications between UKVI and the ONS, and informing the Claimant that when the job description had been sent to the ONS, part of it had been omitted.
67. The Defendant stated:

*“Having reviewed the job description further, in light of your client's representations and the response from the ONS, it is maintained that the reason for refusal should be upheld. It is submitted that by omitting the above section from the job description, it would not make a material difference to the response from the ONS and the job would still be classified under SOC code 1241 as opposed to SOC code 3545”* (emphasis added).
68. What the Defendant meant by “*the response from the ONS*” has to be understood in the light of the fact that earlier in the same letter the Defendant maintained that the ONS “*have confirmed that they would allocate Codes of Practice for Skilled Workers Standard Occupational Classification (SOC) Codes reference 1241 to the job description provided by your client*”.
69. In other words, the Defendant took it as her starting point that the ONS had confirmed that SOC code 1241 applied, and the Defendant proceeded to consider whether providing the ONS with the omitted parts of the job description would have made any material difference to the ONS's view.
70. In my judgment, the response to the letter before claim did not remedy the flaws in the decision letter. First, the foundation for the Defendant's decision continued to be a misconception as to what the ONS had in fact advised. Secondly, the omissions from the job description as provided to the ONS were not insignificant. In particular, when seeking the ONS's advice UKVI had omitted from the tasks allocated to the post-holder, the duty to “*tender for new services and business opportunities*”. For Exmoor Surgery, this was one of the main duties, and a key reason for their decision to seek a higher level (and higher paid) Business Development Manager rather than a GP Practice Manager. In paragraph 25.1 of the Guidance the emphasis is on identifying the SOC code for the role that the employer “*want[s] to recruit for*”.
71. Subsequent attempts were made, first by the Claimant and then by the Defendant to obtain the ONS's view based on the actual job description. In my view, these responses do not alter the position. They were not before the Defendant when the decision was made (or effectively amended in the response to the letter before claim). Nor are the responses unambiguous or contained in a witness statement provided by the ONS.
72. Accordingly, for the reasons given above, I have concluded that the Defendant's decision that Exmoor Surgery had not recruited Ms Palanisamy into a skilled occupation at or above NQF Level 6 was flawed.

## **Conclusion**

73. I have found that the Defendant's decision was flawed in several respects. Nevertheless, on the first question whether the Claimant had demonstrated (applying the resident labour market test) that no settled worker with the requisite qualifications and experience was available, I have found the Defendant's conclusion was justified and not irrational. UKVI was entitled to conclude that it was not satisfied that Exmoor Surgery could offer Tier 2 employment that *could not be filled by a settled worker* and therefore to refuse the sponsor application in accordance with Annex 1(o) to the Guidance. Accordingly, the Claimant's application for judicial review is dismissed.

## **An Apology**

74. At the conclusion of the hearing I had indicated to the parties that I would give judgment within two weeks. In the event, a considerably longer period has elapsed before I have been able to hand down judgment. The reason for the delay was that shortly after the hearing my father's health rapidly deteriorated and he died in late November. In the circumstances, I was only able to finalise my draft judgment in early January. I apologise to the parties, and to all those affected by the decision, for this delay.