Neutral Citation Number: [2020] EWCA Civ 1525

Case No: C6/2019/2952

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND APPEAL CHAMBER)
UPPER TRIBUNAL JUDGE ALLEN
JR/7887/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2020

Before :

LORD JUSTICE FLOYD
LORD JUSTICE MALES
and
LORD JUSTICE LEWIS

- -

Between :

THE QUEEN (on the application of TOPADAR)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Michael Biggs (instructed by **Hubers Law**) for the **Appellant.**
Lisa Giovannetti Q.C. and William Hansen (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : 3 November 2020.

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Friday, 13 November 2020.

Lord Justice Lewis:

INTRODUCTION

1. This is an appeal against a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 18 July 2019 dismissing the Appellant's claim for judicial review of a decision of the respondent refusing to grant the appellant leave to remain in the United Kingdom as a Tier 2 (General) Migrant.

2. In summary, the appellant came to the United Kingdom with leave to enter as a Tier 4 (General) Student. He made an application seeking to vary his existing leave and be granted leave to remain as a Tier 2 (General) Migrant. That application was refused on 27 September 2018. An administrative review of that decision was concluded on 31 October 2018 and the decision upheld. The appellant submitted that the application was not finally determined until the administrative review was complete. He contended that he was entitled to vary the application at any time until it was finally determined and had done so on 18 October 2018 by making a human rights claim. In those circumstances, he submitted that he continued to have leave to remain by virtue of section 3C of the Immigration Act 1971 ("the 1971 Act") until the application (as varied to include the human rights claim) was decided.

3. Secondly, the appellant submitted that the respondent determined his application in a way that was procedurally unfair. The respondent had sought further information from the sponsor of his Tier 2 application without also notifying the appellant that further information was required and telling him that if it were not provided the application might be refused.

4. The respondent submitted first that the application was decided on 27 September 2018 when it was refused. Any variation of that application had to be made before it was decided, i.e. before 27 September 2018. The appellant could not vary that application by making a human rights claim on 18 October 2018. Further, the respondent submits that the human rights claim was not in any event a valid variation as it was not in the prescribed form, no fee was paid and mandatory requirements were not satisfied. Secondly, the respondent submitted that there was no unfairness in the way that she dealt with the application and, in particular, procedural fairness did not require her to notify the appellant that she had made a request to the appellant's sponsor for further information.

THE FACTUAL BACKGROUND

5. The appellant is a national of Bangladesh born on 9 December 1987. He was granted leave to enter the United Kingdom as a Tier 4 (General) Student on 19 November 2009. That leave was valid until 31 August 2011. He was subsequently granted further periods of leave to remain up to 6 July 2016.

The Application for Leave to Remain as a Tier 2 (General) Migrant

6. On 6 July 2016, the appellant applied using form FLR (O) to vary his existing leave. On 22 August 2016, he applied for leave to remain as a Tier 2 (General) Migrant. On 24 August 2016, he submitted a letter to the respondent varying his FLR (O)

application to an application seeking further leave to remain as a Tier 2 (General) Migrant.

7. Applicants for Tier 2 (General) Migrant leave are required to score 50 points for certain attributes. This in effect required the applicant to submit a certificate of sponsorship showing that he had been offered a job which met certain criteria and paid a certain level of salary.

8. The appellant's application recorded that he had a certificate of sponsorship from his proposed employer, Orchid Money Transfer Ltd. It stated that the job was as an accounts manager with a salary of £21,000 a year. The sponsor provided a letter dated 22 August 2016 indicating that it was pleased to sponsor the appellant conditionally upon him being granted a successful extension of his leave to remain. It confirmed that it had a certificate of sponsorship for the appellant. A further document provided (in two paragraphs) a summary of the role and the skills required.

9. On 7 August 2018, the respondent wrote to the sponsor indicating that she had received applications from the appellant and a second person for Tier 2 (General) Migrant leave to remain in the United Kingdom in order to work for the sponsor as an accounts manager and sales manager respectively. The letter explained that specified information was required before the respondent could proceed further with the applications. The letter then requested the sponsor to provide information about the jobs including full job descriptions listing the duties of the proposed employees and an explanation as to why the sponsor required an accounts manager and a sales manager. The letter also requested other information including the sponsor's business bank account statements for the last 12 months, a full staff list, the latest company accounts, HMRC reference numbers, a chart of all employees, CVs for the appellant and the other applicant and marketing material and website details. It requested the sponsor to answer various questions. It stated that the information was required by 14 September 2018 and that:

> "Failure to send in the information by the required date may result in the refusal of all the applications."

10. The respondent did not notify the appellant that it had sought further information from the sponsor nor that failure to provide the information might lead to his application being refused.

11. The sponsor did not send in the information requested by 14 September 2018. It did not seek an extension of time for doing so. It made no reply to the e-mail request of 7 August 2018.

12. On 27 September 2018, the respondent refused the application for leave to remain as a Tier 2 (General) Migrant and notified the appellant in writing of the decision and the reasons. The decision noted that the respondent had considered whether the vacancy was a genuine vacancy within the meaning of the Immigration Rules. It noted that the sponsor had been asked to provide further information. It continued:

> "We were unable to complete the above assessment because to date we have not received any of the information requested.

> "Based on the evidence we have and the job description provided on your Certificate of Sponsorship and the fact that the sponsor has failed to respond to a request for information; we are not satisfied that your Sponsor would require an Accounts Manager on £21,000 per annum and we are satisfied that it is an inappropriate vacancy.
>
> "The Secretary of State is therefore refusing your application because there are reasonable grounds to believe that the job described on your Certificate of Sponsorship is not a genuine vacancy, when assessing, on the balance of probabilities, paragraph 245HD(f) with reference to Appendix A paragraph 77H and the additional information or evidence requested under paragraph 245HD(f) with reference to Appendix A paragraph 77J of the Immigration Rules."

The Administrative Review

13. On 9 October 2015, the appellant requested an administrative review of the refusal. He said that the refusal was unfair as, if the respondent had contacted him, "he could have definitely pursued his employer to get the issues being sorted".

14. On 11 October 2018, the director of the sponsor company wrote to the respondent saying it had been informed that the appellant's Tier 2 application had been refused because the sponsor, as employer, had failed to provide some additional documents requested by the respondent. The letter said that the information covered various areas of the sponsor's business and as a result more time was needed to prepare them. It said that:

> "I would like to confirm you that the job offered to Mr Topadar is completely genuine and we will send all the relevant document request by your office as soon as they are available as support of this claim."

The Letter of 18 October 2018

15. On 18 October 2018, solicitors for the appellant wrote to the respondent. The letter said, amongst other things, that it was a human rights claim within the meaning of section 113 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and that there was no requirement to make the claim by way of a fee paid application. It stated that the appellant had established a private life in the United Kingdom and that leave to remain should be granted under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

The Decision on Administrative Review

16. On 31 October 2018, the appellant was informed that his request for administrative review had been unsuccessful and reasons were given for that decision.

The Claim for Judicial Review

17. By a claim form issued on 4 December 2018, the appellant sought judicial review of what the claim form described as the decision of the respondent dated 27 September 2018 that refused to grant the appellant leave to remain under the Tier 2 (General) rules, upheld on administrative review on 31 October 2018. The remedies sought were an order quashing the decision of 27 September 2018 and the administrative review and a declaration that the appellant had leave to remain under section 3C of the 1971 Act.

18. The grounds of claim were that the respondent had acted in a way that was procedurally unfair by not warning the sponsor that unless it provided the information by a specified date the application would be rejected and by not warning the appellant of those matters.

19. The grounds further contended that the appellant had made an application for leave to remain as a Tier 2 (General) Migrant which was not finally determined until the conclusion of the administrative review on 31 October 2018. Before that date had been reached, the appellant had varied the application by making a human rights claim on 18 October 2018. Leave to remain would continue in force by virtue of section 3C of the 1971 Act until the application for leave (as varied by the human rights claim) was determined.

The Decision of the Upper Tribunal

20. The Upper Tribunal held that the appellant could only apply to vary an application before it had been determined. In the present case, the application had been determined on 27 September 2018. The process of administrative review was not an extension of the decision-making process. It was a review of the decision. Consequently, it was not open to the appellant to seek to vary the application on 18 October 2018 as the application had been determined by that time. Further, the Upper Tribunal did not consider that, on the facts, the letter of 18 October 2018 did amount to an application to vary the earlier application.

21. The Upper Tribunal further held that there was no procedural unfairness in the way in which the respondent dealt with the application. The Immigration Rules provided that the respondent may request additional information and evidence from the sponsor and may refuse the application if the information or evidence is not provided. The sponsor was asked to provide information and was given a period of 25 business days to do so (longer than the ten business days referred to in the Immigration Rules). The Upper Tribunal concluded that the primary onus was on the appellant to provide all the necessary information. There was no obligation on the respondent to inform the appellant that information had been sought from the sponsor or to remind the sponsor of what was clearly set out in the letter of 7 August 2018 that the consequence of a failure to provide the information might be the refusal of the application.

THE LEGISLATIVE FRAMEWORK

The 1971 Act

22. The 1971 Act sets out a framework governing immigration control for those seeking to enter and remain in the United Kingdom. Section 3 of the 1971 Act provides so far as material that:

> "(1) Except as otherwise provided by or under this Act, where a person is not a British citizen
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under this Act;
> (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;

(c) if he is given leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely

…..

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

23. Section 3C of the 1971 Act deals with the circumstances in which a person who has leave to enter or remain, and applies to vary that leave (for example by seeking a further period of leave on the same or a different basis) continues to have leave to remain until that application is determined. The section provides that:

"**3C Continuation of leave pending variation decision**

(1) This section applies if—

(a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,

(b) the application for variation is made before the leave expires, and

(c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when—

(a) the application for variation is neither decided nor withdrawn,

(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),

(c) an appeal under that section against that decision [, brought while the appellant is in the United Kingdom,]4 is pending (within the meaning of section 104 of that Act),

(ca) an appeal could be brought under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations"), while the appellant is in the United Kingdom, against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),

(cb) an appeal under the 2020 Regulations against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of those Regulations), or

(d) an administrative review of the decision on the application for variation—

(i) could be sought, or

(ii) is pending.

(3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.

(3A) Leave extended by virtue of this section may be cancelled if the applicant—

(a) has failed to comply with a condition attached to the leave, or

(b) has used or uses deception in seeking leave to remain (whether successfully or not).

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).

(6) The Secretary of State may make regulations determining when an application is decided for the purposes of this section; and the regulations–

(a) may make provision by reference to receipt of a notice,

(b) may provide for a notice to be treated as having been received in specified circumstances,

(c) may make different provision for different purposes or circumstances,

(d) shall be made by statutory instrument, and

(e) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(7) In this section— *"administrative review"* means a review conducted under the immigration rules; the question of whether an administrative review is pending is to be determined in accordance with the immigration rules."

24. Section 4 of the 1971 Act is headed "Administration of control" and makes further provision for the way in which the power to grant or vary leave to remain in the United Kingdom conferred by section 3 may be exercised.

The Immigration Rules

25. The Immigration Rules provide for a points based system for the grant of leave to remain for certain categories of persons including those seeking leave to remain as a Tier 2 (General) Migrant. Paragraph 245HD of the Immigration Rules sets out the requirements that an application must meet. Paragraph 245HD(f) provides that:

> "if applying as a Tier 2 (General) Migrant, the applicant must have a minimum of 50 points under paragraphs 76 to 79D of Appendix A."

26. Those paragraphs in Appendix A require applicants to provide a certificate of sponsorship and for points to be scored in respect of that certificate. Paragraph 76A of Appendix A provides that the points available are shown in Table 11A the material parts of which provide as follows:

Certificate of Sponsorship	Points	Appropriate Salary	Points
Job offer passes Resident Labour Market Test	30	Appropriate Salary	20

27. Paragraph 77H and 77J of Appendix A provide, so far as material, as follows:

> "77H. No points will be awarded for a Certificate of Sponsorship if the Entry Clearance Officer or the Secretary of State has reasonable grounds to believe, notwithstanding that the applicant has provided the evidence required under the relevant provisions of Appendix A, that:
>
> (a) the job as recorded by the Certificate of Sponsorship Checking Service is not a genuine vacancy ……
>
> "77J. To support the assessment in paragraph 77H(a)-(c), the Entry Clearance Officer or the Secretary of State may request additional information and evidence from the applicant or the Sponsor, and refuse the application if the information or evidence is not provided. Any requested documents must be received by the Entry Clearance Officer or the Secretary of State at the address specified in the request within 10 business days of the date the request is sent".

28. Applications for leave to remain, and for variations of such applications, must be in the prescribed form, the relevant fee must be paid and satisfy the mandatory requirements. Applications in either case are invalid and will not be considered if they fail to meet the prescribed requirements. See paragraph 34, 35A and 34E of the Immigration Rules.

Administrative Review

29. The provisions governing administrative review are contained in an appendix to the Immigration Rules. AR2.1 and AR.2.2 provide:

> "AR2.1 Administrative review is the review of an *eligible decision* to decide whether the decision is wrong due to a *case working error*.
>
> AR2.2 The outcome of an administrative review will be:
>
> (a) Administrative review succeeds and the *eligible decision* is withdrawn; or
>
> (b) Administrative review does not succeed and the *eligible decision* remains in force and all of the reasons given or the decision are maintained; or

(c) Administrative review does not succeed and the *eligible decision* remains in force but one or more of the reasons given for the decision are withdrawn; or

(d) Administrative review does not succeed and the *eligible decision* remains in force but with different or additional reasons to those specified in the decision under review."

30. The decisions eligible for administrative review are defined in section AR3. They include at A3.2(b):

> "A decision on an application where the application is made on or after 2nd March 2015 for leave to remain, as:-
>
> (1) a Tier 1, 2 or 5 Migrant under the Points Based System….."

31. AR2.9 defines when an administrative review is pending for the purposes of section 3C2(d) of the 1971 Act. It includes a period:

> "When an application for administrative review has been made until:
>
> …..
>
> (iii) the notice of outcome at AR2.2(a), (b), or (c) is served in accordance with Appendix SN of these Rules."

THE APPEAL AND THE ISSUES

32. There are four grounds of appeal. As appears from the grounds, the skeleton arguments and the oral submissions, the following issues arise:

(1) May an application falling within section 3C(1) be varied at any time up to the conclusion of an administrative review of the decision refusing the application and, if so, did the letter of 18 October 2018 amount to a valid variation of the appellant's application? (Grounds 1 to 3 of the Grounds of Appeal)

(2) Did the respondent act in a way which was procedurally unfair by not informing the appellant that she had requested further information from the sponsor and that the application might be refused if that information was not provided? (Ground 4 of the Grounds of Appeal).

THE FIRST ISSUE - WHEN AN APPLICATION FOR LEAVE TO REMAIN IS DETERMINED

Submissions

33. Mr Biggs for the appellant submitted that, where a person makes an application to vary existing leave to remain, he may make a further variation of the application at any time until the application is determined. The application is only finally determined when the process of administrative review is completed. A decision refusing the application is an initial, inchoate, or provisional decision and the final determination is only made on the outcome of the administrative review. He

submitted that the provisions governing the process of administrative review must necessarily be read as an extension of the process of deciding the application. There would otherwise be no legal basis for a formal system of administrative review leading to a fundamentally different decision from the decision refusing the application. He submitted that that was consistent with the approach of the Vice-President of the Upper Tribunal (Immigration and Asylum Chamber) refusing permission to apply for judicial review in *R (Sukhwinder Singh) v Secretary of State for the Home Department* JR/1361/2015. In considering whether the claim was brought out of time, the Vice-President considered that the process of administrative review was different in character from the informal process of reconsideration of decisions previously undertaken. The final decision was the decision reached on the administrative review.

34. Mr Biggs submitted, therefore, that in this case the application seeking to vary the appellant's existing leave and to be granted leave to remain as a Tier 2 (General) Migrant was not determined until the administrative review process of the refusal of that application was complete. The application was refused on 27 September 2018 but the administrative review was not completed until 31 October 2018. Consequently, the appellant could vary that application at any time before 31 October 2018. The appellant continued to have leave to remain by virtue of section 3C of the 1971 Act until the application, as varied to include the human rights claim, is determined.

35. Mr Biggs submitted it was open to the appellant to vary an application by including a human rights claim without complying with any particular formality. It was not necessary for such a variation to be made on any prescribed form or to require payment of a fee or the provision of mandatory information. He submitted that that was consistent with paragraph 99 of the judgment of Underhill L.J. in *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 W.L.R. 4647.

36. Ms Giovannetti Q.C., for the respondent, submitted that variations of an application could only be made before the application was determined. That occurred when a decision was taken granting or refusing the application and the applicant was notified of the decision. The process of administrative review was a review of a decision that had been taken and was not an extension of the decision-making process. Consequently where, as here, the application had been refused by a particular date, 27 September 2018, the application had been determined and there was nothing left to vary.

37. Further, Ms Giovannetti submitted that the letter of 18 October 2018 did not amount to a valid variation in any event. A distinction needed to be drawn between an application for leave to remain on the basis that refusal would be incompatible with the right to family or private life under Article 8 of the Convention and a decision to remove a person who did not have leave to remain. The former was required to be made on a prescribed form, with payment of a fee, and the provision of relevant information as required by paragraph 34E of the Immigration Rules. In relation to the latter, the respondent would be unable to remove a person without leave where he or she claimed that to do so would be incompatible with his or her rights under the Convention and such a claim could be made without any prescribed formality. That, Ms Giovannetii submitted, was what was decided by the Court of Appeal in *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 W.L.R. 4647, having regard to paragraphs 97 to 102; and in *R (Shrestha) v Secretary of State for the*

Home Department [2018] EWCA Civ 2810. In so far as the letter of 18 October 2018 was said to be a variation of an application, it was invalid as it did not comply with the requirements of the Immigration Rules.

Discussion

38. The starting point is the wording of section 3C of the 1971 Act. The section applies if a person has limited leave to enter or remain in the United Kingdom and applies for variation of that leave *before* the leave expires *and* the leave expires without the application having been decided: see section 3C(1)(a)-(c). In those circumstances the existing leave is extended for the periods permitted by section 3C(2) of the 1971 Act. Thus, where a person such as the appellant has leave to remain as a Tier 4 (General) Student and applies to vary that leave and be granted leave as a Tier 2 (General) Migrant, he continues to have leave to remain in the United Kingdom until the application is determined. Furthermore, the applicant may vary the application by substituting a different basis for seeking to vary the existing leave: see section 3C(5) of the 1971 Act. A variation may only made before the application is determined. Once the application is determined there is nothing to vary. That is recognised by the Court of Appeal in *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] Imm A.R. 3. Richards L.J., with whom Wall and Laws LJJ. agreed, held at paragraph 35 of his judgment that:-

> 35. The key to the matter is an understanding of how s.3C operates….The section applies, by subs.(1) , where an application for variation of an existing leave is made before that leave expires (and provided that there has been no decision on that application before the leave expires). In that event there is, by subs.(2) , a statutory extension of the original leave until (a) the application is decided or withdrawn, or (b), if the application has been decided and there is a right of appeal against that decision, the time for appealing has expired, or (c), if an appeal has been brought, that appeal is pending: I paraphrase the statutory language, but that seems to me to be the effect of it. During the period of the statutory extension of the original leave, by subs.(4) no further application for variation of that leave can be made. Thus, there can be only one application for variation of the original leave, and there can be only one decision (and, where applicable, one appeal). The possibility of a series of further applications leading to an indefinite extension of the original leave is excluded. However, by subs.(5) it is possible to vary the one permitted application. If it is varied, any decision (and any further appeal) will relate to the application as varied. But once a decision has been made, no variation to the application is possible since there is nothing left to vary."

39. An application is decided, as a matter of ordinary language, when a decision is reached granting or refusing the application. The question in the present case is whether the process of administrative review is intended, or must as a matter of law be understood, to be part of the process of deciding the application so that the application is only decided when the administrative review is concluded.

40. First, as a matter of interpretation of the provisions dealing with administrative review, it is clear that the review is separate from, not part of, the process of deciding an application. Administrative review is defined in AR2.1 as "the review" of an eligible decision (here a decision refusing leave to remain as a Tier 2 (General) Migrant). The purpose is to decide whether "the decision is wrong due to a case-working error". It is clear that the process envisages a difference between "the decision" which is the refusal of the application and the "administrative review"

which checks whether that decision was wrong. That is further reflected in the provisions at AR2.2 which sets out the possible outcome of the administrative review. The decision to refuse the application is either withdrawn or "remains in force" either for the same or different reasons. The same distinction between the decision to refuse the application and an administrative review of that decision, is reflected throughout the provisions governing an administrative review.

41. Secondly, section 3(2) of the 1971 does confer power to provide for such a system of administrative review. Section 3(2) provides power to make rules "as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom". Rules providing for an administrative review to determine whether decisions refusing applications to vary an existing leave to remain should be withdrawn or remain in force are rules as to the practice to be followed in the administration of the 1971 Act for regulating stay in the United Kingdom.

42. Thirdly, the provisions of section 3C(2) of the 1971 Act expressly contemplate that a system of administrative review may have that effect and may draw a distinction between the decision refusing the application and a review of that decision. Section 3C(2)(a) provides for leave to be continued while the application seeking to vary an existing leave remains undecided. Section 3C(2)(d) also expressly provides for leave to continue when "an administrative review of the decision on the application" could be sought or is pending. In other words, the provisions of section 3C themselves draw a distinction between a decision on the application and an administrative review of that decision.

43. Further, if the appellant were correct, and if the process of administrative review were an extension of the process for deciding the application, it would not be necessary to include section 3C(2)(d) in the 1971 Act to allow for leave to continue pending the administrative review. On the appellant's hypothesis, leave to remain would continue under section 3C(2)(a) because the application is not decided until the process of administrative review is complete.

44. In the light of those considerations, it is clear that an application seeking to vary an existing leave is decided within the meaning of section 3C(2)(a) of the 1971 Act when the application is refused. Any further variation of that application must be made before the decision refusing the application is made and notified to the applicant. The system of administrative review operates as a review of that decision. It is not an extension of that decision-making process.

45. I do not, therefore, accept Mr Biggs' submission that section 3(2) of the 1971 Act does not provide power to make rules providing for administrative review of that nature and that the provisions must therefore be interpreted differently in order to avoid them being *ultra vires*.

46. Nor do I consider that the position is altered by the decision of the Vice-President of the Upper Tribunal in the *Sukwhinder Singh* case. The Tribunal Procedure Rules, like the provisions of CPR 54.5, provide a time limit for bringing claims for judicial review. In the case of the Upper Tribunal, the rules provide that a claim must be received by the Upper Tribunal no later than "3 months after the decision, action or omission to which the application relates" (see rule 28 of the Tribunal Procedure (Upper Tribunal) Rules 2008). CPR 54 requires that a claim for judicial review issued

in the Administrative Court must be brought promptly and, in any event, no later than 3 months after the date when the grounds of claim first arose. In addition, judicial review is a remedy of last resort and should not be generally be pursued where there is an adequate alternative remedy available.

47. The courts have considered the relationship between the rules on time limits for bringing claims and the emphasis on the use of alternative remedies. In that context, the courts have held that the time for bringing a claim is to be understood as beginning when the alternative remedy had been exhausted, or the courts have treated the use of an alternative remedy as a reason for extending the time limit for bringing a claim, or have permitted a claim to be brought against the decision on appeal or review on the grounds that it failed to correct the error in the initial decision. The decision in *Sukhwinder Singh* was concerned with identifying when the time limit began to run and to reconcile that with the requirement that alternative remedies should generally be used before resorting to judicial review. Its reference to the review decision as the final decision is to be understood in that context. The review decision was the final decision for those purposes as "that is the decision from the date of which the passage of time for judicial review is to be measured". It was not seeking to interpret and apply the provisions of section 3C of the 1971 Act.

48. For those reasons, any variation in the present case had to be made before the 27 September 2018 when the decision refusing the application was made. No such variation was made by that date. The appellant continued to have leave to remain whilst the administrative review of the decision was pending by virtue of section 3C(2)(d) of the 1971 Act. Once the outcome of that review was notified to the appellant on 31 October 2018, his leave ceased to continue in force as the administrative review was no longer pending as defined in AR2.9

49. In the light of that conclusion, it is not necessary to address the question of whether the letter of 18 October 2018 was a valid variation of the application. Grounds 1 to 3 of the Grounds of Appeal are not made out.

THE SECOND ISSUE – PROCEDURAL FAIRNESS

Submissions

50. Mr Biggs submitted that procedural fairness in the present case required the respondent to notify the appellant that she had requested the sponsor to provide further information and, if that information was not provided, the application might be refused. Mr Biggs submitted that the situation was analogous to that in *R (Pathan) v Secretary of State for the Home Department* [2020] UKSC 41. There, at least four members of the Supreme Court held that procedural fairness required the respondent to notify the applicant of a fact which was fatal to the application and which was known to the respondent but not the applicant. If the appellant had been informed of the request in this case, he might have supplied the relevant information, or taken steps to encourage the sponsor to do so, or taken steps to find other employment or make an application for leave to remain on a different basis. Further, the respondent here was treating the failure by the sponsor to provide information as a basis for inferring that the accounts manager post was not a genuine vacancy. Procedural fairness required that an individual adversely affected by adverse inferences of that nature be given the opportunity to respond before a decision was taken based on those

inferences. In that regard, Mr Biggs relied upon *In re HK (An Infant)* [1966] 2 Q.B. 617, *Gaima v Secretary of State for the Home Department* [1989] Imm A.R. 527 and *R v London Borough of Hackney ex p. Decordova* (1994) 27 H.L.R. 108.

51. Ms Giovannetti submitted that the requirements of procedural fairness depended upon the context and the facts. In the context of a points based system intended to ensure the efficient processing of a high volume of applications for leave to remain, there was nothing unfair in placing the obligation on an applicant to demonstrate that he or she satisfied the requirements for the grant of leave to remain. In that context, the respondent had requested the sponsor, in accordance with the rules, to provide specific information and said that failure to do so might result in the application being refused. Procedural fairness did not impose any obligation on the respondent to notify the appellant of the request to the sponsor for information. The situation in *Pathan* was different and involved a specific act by the respondent, the revocation of the sponsor's sponsorship licence, which meant that the application for leave would inevitably fail. Here the situation involved a failure by a sponsor to provide the information requested and which led to the refusal of the application.

Discussion

52. The requirements of procedural fairness depend upon the facts and the context in which a decision is taken including the nature of the legal and administrative system within which the decision is taken. See generally the observations of Lord Mustill in *R v Secretary of State for the Home Department ex p. Doody* [1994] A.C. 531 at 560d-g.

53. In the present case, the context is the operation of the points based system for determining applications for leave to remain. That is recognised as a system which is intended to simplify the procedure for applying for leave to enter and remain in the cases of students and certain classes of economic migrants. The system is intended to enable high volumes of applications to be processed in a fair and efficient manner. The system operates by specifying what evidence must be submitted by applicants. The requirements of procedural fairness are to be understood in that context. See generally, the observations of Sales L.J., as he then was, with whom Briggs L.J., as he then was, agreed at paragraphs 28 to 30 of his judgment in *EK (Ivory Coast) v Secretary of State for the Home Department* [2015] Imm A.R. 367.

54. The specific context in this case was an application by the appellant to vary his existing leave and be granted leave to remain as a Tier 2 (General) Migrant. He was required to supply a certificate of sponsorship from his prospective employer in order to obtain sufficient points to be eligible for that leave. That certificate was intended to demonstrate that the job vacancy was a genuine one and the respondent could effectively refuse the application if she had reasonable grounds for believing that it was not a genuine vacancy. Paragraph 77J of the Immigration Rules specifically provided that, in order to consider that matter, the respondent "could request additional information and evidence from the applicant or the Sponsor" and could refuse the application if the information or evidence was not provided.

55. In that context, there was nothing procedurally unfair in the respondent asking the sponsor for additional information and evidence. That was inherent in the system and specifically provided for in the Immigration Rules. The sponsor was told that failure

to provide the additional information and evidence might result in the application being refused. In the event, the sponsor did not provide the additional information or evidence requested and, in those circumstances, the respondent could not be satisfied on the evidence available that the job vacancy was genuine. There was nothing procedurally unfair in the way in which the respondent acted.

56. Further, none of the matters referred to by the appellant demonstrate that any procedural unfairness had occurred. The information sought was information from the sponsor about, for example, why the organisation required an accounts manager and what the duties would be. The additional evidence related to the sponsor's bank accounts, staff list, company accounts, tax details and the like. Those were matters that the sponsor was in a position to provide not the appellant and there was nothing unfair in asking the sponsor to provide the information.

57. The appellant suggests that if he had known that a request for information had been made, he could have chased the sponsor to provide the information and evidence. But the system operates on the basis that the applicant will obtain a certificate of sponsorship from a sponsor for a genuine job vacancy and the respondent can request further information from either the applicant for leave or the sponsor to assess that. Procedural fairness in this context does not require the respondent to give the appellant the opportunity to chase the sponsor for information. If the employer intends to employ the appellant, and has provided a certificate of sponsorship, it is incumbent on the employer to provide any additional information sought by the respondent. Furthermore, requiring the respondent to notify the appellant so that the appellant can chase the sponsor would not be consistent with the operation of the points based system in general, or the rules in respect of applications for leave as a Tier 2 (General) Migrant in particular. Procedural fairness does not require the respondent "to have to distort the ordinary operation of the [points based system] to protect an applicant" (adapting the words of Sales L.J. at paragraph 35 of his judgment in *EK (Ivor Coasty)* against the possibility that a sponsor may not respond to requests for information. Nor is the purpose of a request for information to give the appellant time to find an alternative employer, or a different basis for seeking leave, in the event that the employer cannot, or fails for whatever reason to, provide the information requested. It is to enable the respondent, as paragraph 77J of the Immigration Rules provides, to assess whether the requirements for grant of leave as a Tier 2 (General) Migrant have been satisfied.

58. The situation here is different from the situation in *Pathan*. There the applicant was a person who was already employed by the sponsor and applied to renew his leave to remain on the basis of an apparently valid certificate of sponsorship. The respondent revoked the sponsor's licence and, as a consequence, the certificate was no longer valid and the application for leave was bound to fail. The applicant knew nothing about the revocation of the sponsor's licence. Three months passed before a decision was taken to refuse the application for leave. It was in that context that Lord Kerr and Lady Black considered, at paragraph 104 of their judgment, that "the rules of natural justice may require a party to be afforded time to amend his case in a way that cures an otherwise fatal defect of which he had, without fault on his part, previously been unaware". Lord Kerr and Lady Black considered the various ways in which Mr Pathan could have benefitted if he had been notified of the revocation of his sponsor's licence as soon as it had occurred. Lady Arden, who agreed with the majority on this

issue, also referred to procedural fairness requiring that an applicant working for his sponsor and who had a valid certificate of sponsorship at the time of application, should have notice of the revocation of the sponsor's licence: see paragraph 56 of her judgment.

59. The majority of the Supreme Court was not intending, in my judgment, to establish an absolute or universal requirement that the respondent must give the appellant prior notice of something that might affect the consideration of an application with a view to the applicant being able to take steps to address that matter. Rather, as the judgments of the majority of the Supreme Court recognise, the requirements of procedural fairness are flexible and are not set in stone. They are necessarily influenced by the context and the facts. See paragraph 55 of the judgment of Lady Arden and paragraph 104 of the joint judgment of Lord Kerr and Lady Black. Lord Wilson also recognises that the requirements of procedural fairness will vary and the court will imply into a prescribed procedure so much but no more than is required: see paragraph 203 of his judgment. In those circumstances, I do not consider that the majority decision of the Supreme Court requires the imposition of a duty to notify an appellant of a request for additional information and evidence sent to a sponsor of an applicant for leave as a Tier 2 (General) Migrant.

60. Nor is this a case where the respondent was making adverse findings against an individual and where fairness requires that the individual concerned be told of the possibility of adverse findings and be given the opportunity to respond to the matters giving rise to the adverse findings. This was a case where the Immigration Rules provided that the information could be required to enable the respondent to assess whether a job vacancy was a genuine vacancy. In the absence of that information, she could not make the assessment and could not be satisfied that the vacancy was a genuine one. The case is unlike *In re HK* where the immigration officer considered that an immigrant was over 16 years old and so did not qualify for admission to the United Kingdom as the child under 16 of a person ordinarily resident in the United Kingdom. Procedural fairness required the immigration officer to inform the individual of his suspicions and give him an opportunity to address those matters. Similarly, in *Gaima*, the respondent considered that a claimant for asylum was not credible because of certain things she was alleged to have done. Those matters were never put to the claimant and the Court of Appeal held that procedural fairness did require that matters relied upon as undermining her credibility should be put to her and she should be given the opportunity to comment. In *Decordova*, a local housing authority was minded to disbelieve a person's account as to why she did not accept an offer of accommodation, namely that she did not want to live in the area as her stepfather who had abused her lived nearby. Procedural fairness required that where a housing authority was minded to disbelieve the account of an individual on a matter that was critical to the issue of whether she should be offered accommodation in a particular area, they were bound to put that matter to the individual and give her the opportunity to comment.

61. Those situations are very different from the present. Here, there was a decision-making process where, in accordance with the relevant rules, the sponsor was required to provide evidence of certain matters to enable the respondent to assess whether a job vacancy was a genuine vacancy. The rules provided that, if the information was not provided, the application for leave to remain might be refused. The sponsor was asked

to provide the information. It did not do so. The respondent could not therefore be satisfied that the sponsor did require an accounts manager paid £21,000 a year. There was nothing unfair in that process. This was not a case where the respondent was making adverse findings, still less adverse findings on matters within the knowledge of the appellant. It was for the sponsor to provide the information to enable an assessment of whether the vacancy was genuine. It did not provide the information. In those circumstances, there was no allegation or issue that need in fairness to be put to the appellant for comment before the application for leave was refused.

62. In my judgment, Upper Tribunal Judge Allen was right to hold that the claim of procedural unfairness was not made on the facts of this particular case. Ground 4 of the Grounds of appeal fails.

CONCLUSION

63. Applications within section 3C(2)(a) of the 1971 Act may be varied at any time until the application is decided. That occurs when the application is refused and the applicant notified of the refusal. Variations cannot be made after that time. An administrative review is a review of the decision refusing the application not part of the decision-making process. Variations cannot be made after the applicant is notified of the decision and while the process of administrative review is being conducted. There was no procedural unfairness in the way in which the respondent dealt with the application. For those reasons, the appeal should be dismissed.

Lord Justice Males

64. I agree

Lord Justice Floyd

65. I also agree.

Appeal Court Ref: C6/2019/2952

IN THE COURT OF APPEAL, CIVIL DIVISION

ON APPEAL FROM

THE UPPER TRIBUNAL (UTJ ALLEN)

IMMIGRATION AND ASYLUM CHAMBER (JR/7887/2018)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

MT

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ORDER

UPON hearing Counsel for the Appellant and Counsel for the Respondent

IT IS ORDERED THAT:

1. The appeal be dismissed.

2. The Appellant do pay the Respondent's costs of the appeal to be subject to detailed assessment if not agreed.

3. Permission to appeal to the Supreme Court refused.

Dated 13 November 2020.