Neutral Citation Number: [2022] EWCA Civ 550

Case No: CA-2021-001204

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Upper Tribunal (Immigration and Asylum Chamber)
(HHJ David Cooke sitting as a Judge of the Upper Tribunal)
JR/5944/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 May 2022

Before :

LORD JUSTICE BAKER
LADY JUSTICE NICOLA DAVIES
and
LADY JUSTICE ELISABETH LAING

- -

Between :

THE QUEEN on the application of ULLAH & ORS	**Appellants/ Claimants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent/ Defendant**

- -
- -

Alex Burrett (instructed by **Appellants**) for the **Appellants**
Robert Harland (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date : 30 March 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 11 o'clock on 4 May 2022.

Lady Justice Elisabeth Laing :

Introduction

1. The Appellant ('A') is a national of Pakistan. He appeals from a refusal of the Upper Tribunal (Immigration and Asylum) Chamber ('the UT') to give him permission to apply for judicial review. Only the first page of the claim form appears to be in the bundle. The grounds for judicial review challenge decisions of the Secretary of State dated 29 August 2019 ('decision 3') and 30 September 2019 ('decision 4'). In decision 3 the Secretary of State refused A's application for leave to remain as a tier 2 general migrant. In decision 4, the Secretary of State upheld decision 3 after an administrative review.

2. On 30 March 2020, the UT refused permission to apply for judicial review of decisions 3 and 4 ('the Decision on the papers'). A renewed his application to an oral hearing. After a hearing on 16 March 2021, the UT again refused permission to apply for judicial review ('the renewal Decision').

3. On 29 September 2021, Nicola Davies LJ directed the Secretary of State to make a respondent's statement, addressing A's arguments, and, in particular, the delay between 19 November 2018 and 29 August 2019. On 12 January 2022, Nicola Davies LJ gave permission to appeal, on grounds 1-2 and 4. She refused permission to appeal on ground 3. I say more about the grounds of appeal below, in paragraph 36.

4. On this appeal, A has been represented by Mr Alex Burrett, and the Secretary of State by Mr Robert Harland. I thank counsel for their written and oral submissions.

The facts

5. A entered the United Kingdom in 2010 with leave to enter as a student. In December 2012, he was awarded a degree (Master of Science in Refugee Studies) by London South Bank University. He married on 23 December 2015, and he and his wife had a child on 10 July 2016. On 29 May 2015, A was given leave to remain as a Tier 2 migrant.

6. Before his leave expired, A applied to extend it ('application 1'). On 24 July 2018, the Secretary of State refused application 1 ('decision 1') on the grounds that A did not meet the relevant requirements of the Immigration Rules (HC 395 as amended) ('the Rules'), because the salary which A's sponsor proposed to pay him was not high enough.

7. A applied for administrative review of decision 1. In paragraph 3 of his submissions, he said that it was plain that the sponsor needed his services, and 'would have considered increasing the salary of [A] to an appropriate rate had he been advised by the Home Office advice line that the was required to pay the employee at a rate of £33,300 per annum. The employer has now agreed to increase the salary of the employee to £33,600 per annum and has issued him with a fresh [CS]…in accordance with Appendix A of [the Rules]'.

8. The Secretary of State refused A's application for an administrative review of decision 1 on 21 August 2018. The Secretary of State noted that A had, in the meantime, obtained

a new certificate of sponsorship ('CS'). If A wished to rely on that, he should make a fresh application, and pay another fee, as the Secretary of State could not, on application for administrative review, consider new evidence.

9. A did so, under cover of a letter dated 30 August 2018. The covering letter said that A wanted to make a fresh application within 14 days of the refusal of his application for administrative review ('application 2'). The letter added that further documents were enclosed to satisfy the salary requirement. The letter quoted paragraph 39E of the Rules. The letter said that the documents listed in the attached document check list were enclosed. The check list is missing from the bundle for this appeal. The BRPs (that is, the Biometric Residence Permits) and passports had already been submitted, the letter said.

10. The Secretary of State asked for information by an email dated 2 October 2018. The Secretary of State asked for the list of documents A had submitted, 'the tracking reference number, the method you used to send the documents and the address'. If A had not submitted documents, he was asked to do so within 3 days. If the Secretary of State received nothing, she would make a decision on what she had.

11. A claims that the documents he relied on included a letter from the sponsor in which the sponsor explained that when, in March 2018, it had provided the first CS, it had made a mistake about A's salary. It should have been, and was, '£33,500'.

12. In the bundle for this appeal there is a letter dated 8 August 2018 from the sponsor, signed by Hamera Bano, who is described as a 'Director HKS Consultancy Group'. She had looked at A's unsuccessful application and had seen that the sponsor issued a CS in March 2018. She apologised: 'there was an error made by us in terms of the salary entered which was at the entry level which you are not, and should have been at a higher level as you are a [sic] experienced member of staff therefore your salary is £33,5000 per annum, Please note we have already agreed to pay you £33,500 as a qualified and experienced member of staff. We have also issued you with a new [CS]'.

13. On 10 October 2018 ('decision 2') the Secretary of State refused application 2 on the grounds that the proposed salary was not high enough. It is common ground that the Secretary of State mistakenly relied on the first CS, and not on the second CS. A applied for an administrative review of decision 2. On 19 November 2018 the Secretary of State accepted that she had made a mistake, and withdrew decision 2.

14. In response to this Court's order dated 29 September 2021, the Secretary of State served a Respondent's statement ('the Statement'). Paragraph 5 of the Statement refers to the Secretary of State's GCID notes, that is, the notes from her digital database. The note for 19 November 2018 recorded that the caseworker had made a mistake by considering the first, and not the second, CS. The decision maker was returning the case for reconsideration. The note continues: 'It should also be noted that probably there are GVR concerns' due to the sudden increase of £11,600 in A's salary after the refusal of application 1. Mr Harland told us during the hearing that 'GV' stands for 'genuine vacancy'. He added that he would try to find out what the 'R' stands for. In an email after the hearing, his solicitor explained, on instructions, that 'GVR' stands for 'Genuine Vacancy Rule'. That is a succinct reference to the requirement of paragraph 77H(a) of the Rules ('the Rules') (see paragraph 49, below).

15. The notes record a full analysis of the information about the sponsor which was available to the Secretary of State on 22 January 2019. This occupies about a page of the notes. It also records the caseworker's decision to ask for more information from the sponsor. The information was detailed. It occupies one and a half pages of the notes. At that stage, the last compliance visit had been on 18 November 2014.

16. On 22 January 2019, the Secretary of State wrote to the sponsor, asking for further details of A's salary. The Secretary of State asked for a reply by 5 February 2019. The sponsor asked for more time to reply because the relevant member state of staff was on leave until 28 February 2019. On 27 February, the Secretary of State gave the sponsor an extension of time until 29 March 2019. On 22 March 2019, the Secretary of State received a response. The sponsor said it was emailing its accounts, and 12 months' wages slips for A. The email, which is pasted into the notes, then gave a long but somewhat vague description of A's job. A 'hierarchy chart' was attached. The email ended with an invitation to 'come to the office and visit us too'.

17. The application seems to have been assigned to a new caseworker on 8 May 2019. The caseworker had emailed another official who had 'carried out GVR inquiries'.

18. On 20 May 2019, application 2 was being reconsidered. The GCID note says that its author had made further inquiries of the sponsor. The GCID note observes that the sponsor had three directors and 19 employees. It listed their job titles. Seven further employees did not appear on an organogram but were listed separately. 20 staff were on a total salary of £327,165. The sponsor wanted to recruit A on a salary of £33,600. The company seemed to have a top-heavy management structure, and a lot of roles which sounded similar. The sponsor had issued 21 CSs. It already employed five Tier 2 migrants, and wished also to employ A.

19. The turnover in the 2018 income statement was £4,324,659. There was over £300,000 cash in hand to pay salaries. The sponsor's accounts showed that, while 'on the surface' the sponsor seemed to be operating, it was not doing so 'very productively given the huge amount of debt owed'. That sum was £2,048,650. The decision maker had a concern 'whether this company genuinely needs another individual in a management role given that company has so many already'. When the sponsor's Director was asked about the salary increase, she said that the company policy was to pay incremental increases 'but because the company criteria was not met and the pay rise in her view is indispensable for keeping him and to pay the market value. Furthermore they have fully trained him and therefore would be a loss to the company'.

20. Mr Harland told us, on instructions, that a compliance visit was planned for 2 July 2019. It turned out that the sponsor's office had moved, and the visit was re-scheduled for 4 July 2019.

21. The note for 12 August 2019 records that 'According to notes, during the compliance visit the sponsor told the compliance officers the post was no longer required'. The author of that note observed that this statement was ambiguous. That, I infer, is because the author of the note thought that the statement could either mean that the post was not required at all, or was not required in the sense that it was earmarked for A. The note continued that there was no written confirmation about the post of Account Manager.

The author of the note had emailed the sponsor for confirmation and asked for '[f]resh SCs'. Mr Harland told us during the hearing he did not know what 'SCs' meant. He added that he would try to find out. In an email after the hearing, his solicitor explained, on instructions, that it means 'security checks'. The note for 14 August 2019 adds that its author had been asked not to make a decision until told to by compliance officers. The note ends with the words 'Case on hold'.

22. The note for 27 August 2019 further records that the compliance officer had by then sent an email saying that the sponsor's licence had been suspended. 'The sponsor also confirmed that the job is no longer available. Emailed PDC mailbox for direction – Refuse or give opportunity for new COS?' Mr Harland told us, again on instructions, that the sponsor's licence was suspended on 22 August 2019. After the hearing, we were emailed the letter from the Secretary of State suspending the licence. It is dated 22 August 2019. Personal information has been appropriately redacted from it, but it is clear that the Secretary of State suspended the licence because she had concerns about other applicants, and the general approach of the sponsor to its duties as a sponsor. We were told that in due course the Secretary of State revoked the licence.

23. The Secretary of State refused application 2 on 29 August 2019 ('decision 3'). Decision 3 referred to the second CS. It said that the sponsor 'has informed us in writing that they had to re-structure their business and that they decided to withdraw the [CS]. The CS, therefore, 'is no longer valid'. No valid CS had been submitted. The Secretary of State was not satisfied that A had 'provided a valid [CS] reference number alongside [his] application for leave to remain'. 'In line with Appendix A [of the Rules] we have, therefore, been unable to award points for the Sponsorship'. The GCID note for 29 August says: 'Application refused on no COS – Sponsor withdrew COS. No new COS was supplied at time of refusal. (sponsor has been suspended - not mentioned in the RFRL)'.

24. A applied for administrative review of decision 3. In decision 4, the Secretary of State said that she was not obliged to consider the Convention rights of A or of his family in this context. She recorded A's arguments that he had been prejudiced by the time it had taken the Secretary of State to consider application 2, and that application 2 should have been granted, and an argument that the Secretary of State should have considered the factual position at the date of the application, rather than at the date of her decision. A, who apparently knew of the suspension of the sponsor's licence when he applied for administrative review, also argued that he should have been given 60 days in which to find a new sponsor. The Secretary of State's response was that she was obliged to refuse application 2, as A no longer had a CS. She acknowledged that the sponsor's licence had been suspended. She referred to paragraph 188 of the Tier 2 Policy Guidance ('the Guidance'), which required her to refuse an application if the CS had been withdrawn or cancelled. The Secretary of State said that as A did not have leave to remain, he could not be given 60 days in which to find a new sponsor.

The grounds for judicial review

25. A's first ground was that the Secretary of State had acted unreasonably and contrary to her common law duty of fairness. The particular point was that if the Secretary of State 'had acted efficiently and within her standard timeframes, this application would have been successful'. The Secretary of State took about 40 days to consider application 2,

and about two months to consider application 1. Yet it took the Secretary of State nine months to reconsider application 2; an 'unconfigurable delay'.

26. This was unfair.
    i. The Secretary of State knew that A had a new CS.
    ii. The Secretary of State had advised A to make a new paid application.
    iii. Unaccountably, the Secretary of State took into account the wrong CS.
    iv. She therefore refused application 2.
    v. It is 'clear and obvious' that if the Secretary of State had considered the right CS, she would have granted application 2.
    vi. A timely decision would have led to a grant.
    vii. Timeliness is to be judged by reference to the times the Secretary of State took to consider and decide application 1 and application 2.
    viii. Since the Secretary of State does not suggest that the CS was invalid when application 2 was made, decision 1 and decision 2 are contrary to public law principles.
    ix. A change in circumstances 'in the sponsorship arrangements' during the period of the delay led to the refusal of application 2.

27. Ground 2 was that the Secretary of State had acted unreasonably and contrary to the Guidance. The argument seems to have been that A should have been given 60 days to find a new sponsor. The Guidance provides for 'a delay of only 4 weeks' if inquiries are made. A should have been given notice that the sponsor was being investigated. The nine-month delay has not been explained.

28. Ground 3 was that decisions 1 and 2 and the delay were contrary to A's human rights and those of his dependants. The delay in decision making left them with no leave to remain and subject to the hostile environment. 'A is not allowed to work or remain in the UK with his family, a situation directly linked to [the Secretary of State's] failures'.

The Decision on the papers

29. The Secretary of State had not filed an acknowledgement of service by the time the UT considered the application for permission to apply for judicial review on the papers. According to the Secretary of State, this was because she had not been properly served with the application for judicial review.

30. The UT summarised the facts. The UT said that the contention that the Secretary of State had acted unfairly was not arguable. The requirements of fairness depend on the context. Law, policy and circumstances may change, with adverse consequences for those who are waiting for decisions to be made in their cases. The relevant date for consideration of an application under the Rules is the date of the decision, not the date of the application. As at the date of the decision, the sponsor had withdrawn the CS.

31. The UT also dismissed the argument that A should have been given time to find a new sponsor. A's leave to remain expired on 27 May 2018. He had no leave to remain when he made application 2. He had no leave to remain when the sponsor withdrew the CS on 12 August 2019. He could not therefore qualify for a further 60 days' leave in which to find a sponsor.

32. The Secretary of State's approach was within the range of reasonable responses open to her. It was not irrational or unreasonable. Decisions 3 and 4 could not even arguably be impugned on public law grounds.

The acknowledgement of service

33. The Secretary of State's acknowledgement of service is dated 4 March 2021. Paragraph 5 of the acknowledgement of service explained that the Secretary of State had not been correctly served with the application for judicial review and had not therefore lodged an acknowledgement of service sooner. The Secretary of State contended that her acknowledgement of service was not due until 9 March 2021.

34. The Secretary of State relied on the UT's Decision on the papers. She made two points in particular.
    i. She was entitled to consider application 2 on the facts as they were at the date of decision 3. The sponsor had withdrawn the CS by the time of decision 3. The Secretary of State was therefore correct to refuse application 2.
    ii. A did not have leave to remain when he made application 2. The Secretary of State was correct to conclude that A could not qualify for a further 60 days' leave to remain in which to find a new sponsor, as the UT had pointed out in the Decision on the papers.

The renewal Decision

35. The UT said that there was no arguable case of unlawful delay in making a decision on the reconsideration of application 2. The Secretary of State was entitled to enquire into the apparently large jump in salary and not to make a decision until the information was verified. There was no evidence that that could or should have happened at an earlier date. There was no arguable unfairness in not telling A that there were 'circumstances of concern'. The decision to reconsider noted that further investigation was needed and 'if further elaboration had been given there is no evidence to support the assertion that he could in some way have amended his application to overcome the issue'.

The grounds of appeal

36. There were four grounds of appeal.
    i. The UT was wrong to hold that the delay was justified.
        1. There was no evidence of any verification process. The CS was 'valid at the date of the application up until it was withdrawn' more than 12 months later.
        2. If there was a verification process, it should not have taken 9 months. The Secretary of State's policy suggests it should take weeks.
        3. The delay was likely to have caused the withdrawal of the CS, contrary to the intentions of the Tier 2 scheme.
        4. The issue in the case was simple.
    ii. The UT was wrong to hold that the Secretary of State was not obliged, as a matter of procedural fairness, to give A notice of her investigation. *Pathan v Secretary of State for the Home Department* [2020] UKSC 41

recognises that applicant should not be taken by surprise. A was entitled to know what the reason for the delay was.

iii. The UT did not pay adequate regard to A's inconsistent treatment by the Secretary of State. I say no more about this ground, as A was refused permission to argue it.

iv. The issue is important because A was given no time to rectify his application and therefore was left with no leave to remain and no basis to make a further Tier 2 application as he was no longer covered by paragraph 39E of the Rules.

The Respondent's notice

37. The Secretary of State's answer to A's arguments about delay is that the UT was right to hold that, when reconsidering decision 2, the Secretary of State was entitled to inquire into the reasons for the large increase in salary. While those investigations were in train, the sponsor withdrew the CS. Application 2 was then bound to fail. The time taken to investigate was not 'so excessive as to be manifestly unreasonable and to fall outside any proper application of the policy' (per *FH v Secretary of State for the Home Department* [2007] EWHC 1571 (Admin)). The GCID notes were provided by the Secretary of State as part of her response to this Court's order of 29 September 2021. They 'set out the chronology'.

38. The Secretary of State's response to ground 2 is that the UT was right to hold that there was no arguable unfairness in not notifying A about her concerns: see *Topadar v Secretary of State for the Home Department* [2020] EWCA (Civ) 1525. That was also a case in which the Secretary of State had made inquiries about a sponsor. At paragraph 59 of his judgment Lewis LJ said that the decision of the Supreme Court in *Pathan* did not require the Secretary of State to tell an applicant about such inquiries. *Pathan* did not, in any event, overrule earlier cases like *EK (Ivory Coast) v Secretary of State for the Home Department* [2018] EWCA (Civ) 1517. It does not help those whose applications fail, not because of unilateral action by the Secretary of State, but because of actions of the sponsor. Finally, and in any event, *Pathan* has no impact on those who are already overstayers when their applications are refused (*Raza v Secretary of State for the Home Department* [2016] EWCA (Civ) 38 and *Pathan and Islam v Secretary of State for the Home Department* [2018] EWCA (Civ) 2103).

A's submissions

39. In his oral submissions, Mr Burrett accepted that the effect of the relevant provisions of the Rules and of the Guidance was that a CS could not be used to launch an application unless it had been issued less than three months before the relevant application was made (see, in particular, paragraphs 77C(c) and 77C(d) of the Rules, summarised in paragraph 49, below). If the application was made within that three-month period, the date on which the CS was issued ceased to matter. He also accepted that A was an overstayer when the Secretary of State refused application 1, and throughout the period after that. In answer to questions from Baker LJ, he also accepted that there was no unlawful delay down to 20 May 2019, the stage at which the decision maker was expressing concerns about the sponsor's structure. He submitted that, by 20 May, the Secretary of State had all the information she needed to make a decision on application 2. She should have made a decision shortly after that date.

40. The fundamental point was that the delay and the process had been unfair to A. The context was important. A had already been given leave to remain under Tier 2. He had been invited to make a fresh application using the second CS. On its face, application 2 met the requirements of the Rules. Mr Burrett nevertheless accepted that the Secretary of State was not bound to grant it for that reason.

41. He also accepted that one reading of the sponsor's explanation for increasing A's salary was that if the sponsor had realised that it needed to pay A more in order for A to get leave to remain, it would have offered him more in the first place. He accepted, therefore, that the Secretary of State had grounds for investigating the position.

42. Nevertheless, two and a half months of the delay were the Secretary of State's fault, because she had initially refused application 2 on a mistaken basis. He accepted, however, that if the Secretary of State had refused application 2 sooner than she in fact did, the only remedy A would have had would have been to apply for judicial review.

43. Baker LJ asked Mr Burrett how the delay made the Secretary of State's treatment of A more unfair. Mr Burrett submitted that, the longer the delay, the more likely it was that the circumstances would change in a way that was adverse to A; for example, the sponsor might withdraw the CS. There was an element of jeopardy for any applicant. The sponsor might withdraw the CS, or the Secretary of State might cancel the sponsor's sponsorship licence. That was why it was important that there should be no delay. When Baker LJ suggested that delay was not the main point in the case, Mr Burrett saw the force of that suggestion.

44. Mr Burrett then submitted that whether the delay was lawful or not, there was an overlap between that and his other argument. He repeated the point that the longer the delay, the more likely it was that circumstances would change. That was why these cases were supposed to be dealt with quickly. He was asked what authority there was to support that proposition. The three-month period for the CS was part of the context. Mr Burrett accepted that nothing in the Guidance required an application to be decided within a particular period. He did not, as I understood his argument, expressly submit that the delay in this case was 'so excessive as to be regarded as manifestly unreasonable' (per Collins J in paragraph 30 of *R (FH) v Secretary of State for the Home Department*).

45. His second argument was that A should have been told about the Secretary of State's investigation of the sponsor, and/or the sponsor's decision to withdraw the CS and/or the Secretary of State's decision to suspend the sponsor's licence. A expected his application to be successful. Mr Burrett was asked what purpose would be achieved by telling A about the investigation. His answer was that A could have sought to vary his application, or could have taken steps to leave the United Kingdom. The Court should not second guess what A might have done. Mr Burrett accepted that there would be difficulties with getting a second CS. A could have spoken to the employer. If the question was whether the vacancy was genuine, he could have helped with that. He could have given chapter and verse of what he had done. The Secretary of State could have looked at A's employment history. This was a continuation of A's previous role 'albeit at a higher salary'.

46. Mr Burrett submitted that his argument was supported by the decision of the Supreme Court in *Pathan*, supra.

The law

The statutory framework

47. Section 1 of the Immigration Act 1971 ('the 1971 Act') provides that those who are expressed in the 1971 Act to have a right of abode may live and come and go from the United Kingdom as they please. Those who do not have that right may 'live and settle in the United Kingdom by permission and subject to such regulation and control…as imposed by this Act (section 1(2))'. Section 1(4) requires the 'rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode' to include various kinds of general provision. Statements of those rules and of any changes to them must be laid before Parliament (section 3(2)). The Rules (see paragraph 6, above) are those rules.

The relevant provisions of the Rules

48. The Tier 2 provisions have now been removed from the Rules. At the relevant time, paragraph 245H of the Rules, under the heading 'Tier 2 (General) Migrants, Tier 2 (Minister of Religion) Migrants and Tier 2 (Sportsperson) Migrants' explained that 'These routes enable UK employers to recruit workers from outside the EEA to fill a particular vacancy which cannot be filled by a British or EEA worker'. Paragraph 245HD listed the requirements for leave to remain. They included, in relation to the General category, that the applicant had at least 50 points under paragraphs 76-79D of Appendix A (paragraph 245HD(f)) and that he must not be in the United Kingdom in breach of the immigration laws, except that, where paragraph 39E applied, any current period of overstaying would be disregarded.

49. It is evident from the relevant provisions of Appendix A that a person who does not have a valid CS cannot score the number of points which are required for his application to succeed: see also the Guidance, to which the Secretary of State referred in decision 4 (see paragraph 24, above). Paragraph 76 of the Rules requires an applicant to score 50 points for attributes. Paragraph 76 refers to Table 11A. Points may only be scored for one entry in the CS column (paragraph 77). Paragraph 77C provides for the circumstances in which a CS number will be considered valid. They include that the sponsor assigned the reference number to the applicant no more than three months before the application for leave to remain is made (paragraph 77C(c)) and that the application for leave to remain is made no more than three months before the start of the employment specified in the CS (paragraph 77C(d)). Paragraphs 77D-G impose further requirements. No points will be awarded for a CS if the Secretary of State 'has reasonable grounds to believe,' notwithstanding evidence provided by the applicant, that the job is 'not a genuine vacancy' (paragraph 77H(a)). Paragraph 77J permits the Secretary of State, when making that assessment, to ask for further information and evidence from the applicant or the sponsor, and to refuse the application if the information is not provided. Any documents must be received by the Secretary of State within 10 business days of the date of the request. Paragraph 78 stipulates what must be shown to enable a job to pass the resident labour market test.

The authorities

50. The appellant to the Supreme Court in *Pathan* had leave to remain as Tier 2 Migrant, sponsored by his employer. He applied for further leave before the expiry of his current leave, relying on a CS from his employer. The Secretary of State put his application on hold while she investigated his employer. A's leave expired before the investigation ended, but section 3C of the 1971 Act operated to extend it pending a decision on his application. The Secretary of State decided to revoke the employer's sponsorship licence. That invalidated the CS and the appellant's application was therefore bound to fail unless he varied it, for example, by relying on a CS from a different employer. A was not told of the revocation until, three months later, the Secretary of State refused his application.

51. The appellant applied for judicial review of the refusal decision. He argued that the Secretary of State had a duty to tell him that his sponsor's licence had been revoked and to give him a reasonable period in which to react to the revocation. The UT heard his application with that of another applicant (Mr Islam) because the cases raised a common issue of principle. The UT dismissed both applications. Mr Islam and Mr Pathan both appealed to this Court, which dismissed their appeals. Both then applied for permission to appeal to the Supreme Court. Only Mr Pathan's application was granted, and Mr Pathan alone appealed to the Supreme Court. A majority of the Supreme Court held that Mr Pathan's appeal must be allowed, and that the Secretary of State had a duty to tell the appellant promptly of the revocation of the licence, but that she had no duty to give him any time after that notice in which to make a further application or otherwise react to the revocation (see paragraph 143 of the judgment of Lord Kerr and Lady Black, in which they describe the 'core of the decision of the court'). That was because it was 'fair procedurally' to give such notice as it could not be suggested that there was nothing which he might have done in the three-months between the revocation of the sponsor's licence and the decision on his application, had he known of the revocation promptly (paragraphs 131-136).

52. Mr Harland referred us to the judgment of this Court when dismissing Mr Islam's appeal. As I have just said, his case was not considered by the Supreme Court in *Pathan*. Moreover, there is nothing in the reasoning of the majority in the Supreme Court which casts doubt on the decision of this Court in his case. Mr Islam, like A, was an overstayer who had made a further application in accordance with paragraph 39E of the Rules. His CS was valid when he made his application but it was invalidated when the Secretary of State later revoked his sponsor's licence, without notice to him. This Court referred to *R (Raza) v Secretary of State for the Home Department* [2016] EWCA (Civ) 36; [2016] Imm AR 618. That case was about a Tier 4 student, who, like Mr Islam, was an overstayer when he made his application for leave to remain. This Court held in *Raza* that fairness did not require the Secretary of State to give the appellant a further opportunity to vary his application for leave to remain. In *Pathan and Islam*, this Court held that the essential reasoning in *Raza* applied to Mr Islam's case (see paragraphs 51-52 of the judgment of Singh LJ, with whom Coulson LJ and Sir Andrew McFarlane P agreed). This Court did not accept that the reasoning in *Raza* could be distinguished on the grounds that it was a Tier 4 case.

53. Mr Harland also referred to *R (Topadar) v Secretary of State for the Home Department* [2020] EWCA (Civ) 1425. The appellant in that case entered with leave as a Tier 4

student. He applied to vary that leave to leave to remain as a Tier 2 Migrant. The Secretary of State refused that application. While his application for an administrative review of that refusal was pending, he made what he contended was a further application to vary his leave to remain, to leave to remain on human rights grounds. He contended that his existing leave to remain was continued by section 3C of the 1971 Act. He also contended that the Secretary of State had acted unfairly by asking for information from the sponsor of his Tier 2 application.

54. The Secretary of State told the sponsor that it should provide the information by a specified date and that, if it did not do so, the appellant's application might be refused. The sponsor did not reply to the Secretary of State's inquiry by the specified date or at all. The Secretary of State then refused the appellant's Tier 2 application, concluding, in brief, that she was not satisfied that the sponsor had a genuine vacancy for the appellant. The appellant applied for administrative review, contending that the refusal was unfair. If the Secretary of State had contacted him, he could have 'definitely pursued his employer to get the issues being sorted'. The sponsor also contacted the Secretary of State and said it needed more time to respond to the inquiry. It assured her that the job offered to the appellant was 'completely genuine'.

55. This Court rejected a submission that the appellant's application was not decided until his application for administrative review was determined. The application was decided when the Secretary of State refused it, not when the Secretary of State refused the application for administrative review. The application could not, therefore, be varied while the application for an administrative review was pending (judgment of Lewis LJ, with whom Males and Floyd LJJ agreed, paragraphs 38-49). The Court also rejected a submission that the Secretary of State had acted unfairly in not telling the appellant that she had asked the sponsor for information about the vacancy.

Discussion

56. I shall consider, first, whether the GCID notes, which were provided by the Secretary of State as part of her response to this Court's order of 29 September 2021, and which were not before the UT, are admissible on this appeal. Their production was not ordered by this Court. Mr Burrett did not object to their use on the appeal. I have referred to them in my summary of the facts, so that the reader of this judgment can see what they say.

57. The question for the UT was whether it was arguable that decision 3 or decision 4 is unlawful, on the grounds relied on in the application for judicial review. I do not consider that that question can or should be resolved by examining the GCID notes. There was no suggestion in A's grounds for judicial review or in Mr Burrett's submissions on this appeal that the reasons advanced in decisions 3 and 4 were not the true reasons for either decision. This is an appeal against the UT's refusal to grant permission to apply for judicial review of decisions 3 and 4, on the basis of the grounds for judicial review. It is not the role of this Court on such an appeal to attempt, on the basis of incomplete evidence, to reconstruct the events which led to, or were in the background to, decision 3 and decision 4. The application for judicial review did not challenge the accuracy of the reasons given in decisions 3 and 4. Those reasons stand or fall on their own terms. When a decision maker has given contemporaneous reasons for a decision, a court does not usually admit secondary evidence to supplement those

reasons (see the decision of this Court in *R v Westminster City Council ex p Ermakov* [1996] 2 All ER 302).

58. The appeal potentially raises several substantive issues. I have described the facts and arguments at some length, so can consider those issues relatively shortly. A's appeal rests on at least four assumptions.

59. The first assumption is that, if the Secretary of State had not delayed for 9 months before deciding application 2 by reference to the second CS, application 2 must have succeeded. The first assumption is essential to A's argument because, unless his application was bound to succeed when it was made, and (on A's argument, up until 20 May 2019, and for a reasonable time after that), the delay has not caused A any prejudice. It is self-evident, and I do not need to rely on the GCID notes for this conclusion, that a sudden jump in salary of about 50%, which (a) is not apparently associated with any new responsibilities, (b) coincides with the refusal of an immigration application on the grounds that the salary A was being paid is not enough, (c) happens to make up the deficit which led to the refusal, and (d) was explained in the way that it was in this case (see paragraphs 7 and 12, above) might give a reasonable decision maker pause for thought. Once that is accepted, it follows that the Secretary of State was entitled, rather than simply accepting the second CS at face value, to investigate further. Indeed, Mr Burrett accepted that the Secretary of State was entitled to investigate application 2. I accept Mr Harland's submission that a reasonable decision maker could not have granted application 2 if it had doubts about the position and salary offered to A. Once the Secretary of State began to investigate the sponsor, she could not reasonably have granted application 2. Nor could she reasonably have granted application 2 once she had suspended the licence. This conclusion is independent of the point I make in the next paragraph.

60. Mr Harland referred in this context to paragraph 301 of the Guidance. Paragraph 301 applies in terms to applications which are submitted while a sponsor's licence is suspended, and not to applications which have been submitted before the suspension, and have not yet been decided. It says that such applications will not be considered, unless there are other grounds for refusing them. Otherwise, they will be held until the suspension ends, when a decision will be made. I consider that it is and was open to the Secretary of State to apply this approach, by analogy, to a case in which the application was received before the suspension.

61. A linked assumption is that A had an expectation that his application would succeed. I accept Mr Harland's submission that A's only expectation was that his application would be decided lawfully, with regard to the facts, law and policy as they were at the date of the decision. This was one of the points which the UT, rightly, made in the Decision on the papers (see paragraph 30, above). It is supported by much authority, including by paragraph 36 of *Shah v Secretary of State for the Home Department* [2013] EWHC 2206 (Admin) (Mitting J), to which Mr Harland referred.

62. The second assumption is that the delay between a date which is a reasonable time after 20 May 2019 and 29 August 2019 was unlawful. Mr Burrett acknowledged that there was no authority which showed that such a relatively short period of delay was unlawful. He also acknowledged that nothing in the Guidance supported his argument. I accept Mr Harland's two submissions about the authorities on administrative delay.

They show, first, that the purpose of judicial review is not to correct inefficiency or maladministration, but to correct unlawfulness, and, second, that the delay is only unlawful if it is 'so excessive as to be regarded as manifestly unreasonable' (per Collins J in paragraph 30 of *R (FH) v Secretary of State for the Home Department*). On A's case, the delay is about three months long, or five, if the period from application 2 to the Secretary of State's correction of decision 2 is included. As I have already indicated, I do not understand Mr Burrett to have submitted that that test is met on these facts. He was right not to, as it is not. It is unfortunate that the Secretary of State added to the delay by making a mistake in her initial consideration of application 2. But she corrected that mistake relatively promptly when it was pointed out to her in A's application for administrative review. That admitted mistake does not somehow taint her later consideration of application 2. I do not consider that the Secretary of State was obliged to act 'expeditiously' or that the earlier mistake meant that she should have acted with particular speed when she reconsidered application 2 on the correct basis. She was not obliged to make a decision on 20 May, at a stage when she was still reflecting on the evidence. She was entitled to defer making a decision on A's case until she had investigated the sponsor to the extent that she considered appropriate.

63. The third assumption is that the decision of the Supreme Court in *Pathan* supports the argument that A should have been told promptly, either that the sponsor was being investigated, or that the sponsor's licence had been suspended. *Pathan* does not support that argument.

64. First, *Pathan* concerns a decision which adversely (and subject to a successful application for judicial review) irrevocably affected the appellant's position (see paragraph 131 of the judgment of Lord Kerr and Lady Black). It concerned the revocation of a sponsor's licence, not its suspension, still less an investigation of the sponsor. The revocation of his sponsor's licence was an act by the Secretary of State which had an immediate impact on the appellant's position, because it meant that his CS was no longer valid, and because it therefore entailed the failure of his application. Neither an investigation nor the suspension of a licence has that immediate effect.

65. Second, part, at least, of the reasoning of the majority in the Supreme Court was based on the fact that the appellant in that case was not an overstayer when his sponsor's licence was revoked. I reject the submission that procedural fairness requires the Secretary of State to tell an overstayer that his sponsor is being investigated, or that his sponsor's licence has been suspended. It could be said that the decision of the majority, as Lord Briggs observed in his dissenting judgment, stretches the concept of procedural fairness beyond its customary boundaries. There is no reason to stretch that concept any further so as to require the Secretary of State to tell an overstayer that she is investigating his sponsor, or that she has suspended his sponsor's licence.

66. Further, I consider that this Court is bound by the reasoning of this Court in dismissing Mr Islam's appeal in *Pathan and Islam*. The appellant in that case was an overstayer whose sponsor's licence was revoked. This Court held that fairness did not require the Secretary of State to tell the appellant that the licence had been revoked. In this case, part of the current complaint is that A was not told about the investigation of the sponsor, or about the suspension of his sponsor's licence, neither of which would have caused the application to fail. This case is a weaker case, therefore, from A's point of view, than *Islam*.

67. On examination, this case is also weaker, from A's point of view, than *Topadar*. The reasoning of this Court (in particular the references to section 3C of the 1971 Act), suggests to me that this Court in *Topadar* considered that the appellant in that case was not an overstayer. This Court, nevertheless, expressly distinguished the reasoning in *Pathan* and held that the Secretary of State was not obliged to tell the appellant that she had asked the sponsor for information and that the sponsor had not provided it within the time stipulated by the Secretary of State. This Court is also bound by the reasoning in *Topadar*; and to the extent that it is not so bound, that reasoning is, in any event, highly persuasive.

68. Finally, Mr Harland was right to submit that there is a further ground for distinguishing *Pathan*. This is that the reason why the application failed was not any action by the Secretary of State; not the investigation, nor the suspension of the sponsor's licence, but the fact that the sponsor withdrew the CS.

69. The fourth assumption is that A should have been given an opportunity to look for a new sponsor when the Secretary of State refused application 2. That assumption is not supported by *Pathan*, on which A relied, for two reasons. First, the appellant in *Pathan* was not an overstayer. Second, and in any event, while the majority in the Supreme Court did hold that the appellant should have been notified promptly of the revocation of his sponsor's licence, it expressly rejected the argument that he should have been given a further period of 60 days in which to find a new sponsor. I reject the submission that a person in A's position, who is an overstayer, should be in a materially better position, if his sponsor is under investigation or his sponsor's licence is suspended, than a person who has leave to remain and whose sponsor's licence is revoked.

70. Although I have already indicated that I do not consider that the GCID notes are relevant to the issues on this appeal, I should, since the Court has now seen them, ask whether they reveal anything which affects my conclusions. I will consider three notes, in particular.

71. The note for 14 August 2019 (see paragraph 21, above) causes me no disquiet. It was not unlawful for the decision maker to defer making a decision while the compliance officer considered the outcome of the compliance visit. Indeed, once the decision maker knew that there had been a compliance visit and that the sponsor had made an ambiguous statement about the CS (see paragraph 21, above), the decision maker would have been irrational to decide application 2 without knowing the considered position of the compliance officer, and without waiting to see if the ambiguity had been clarified.

72. It might be suggested that the note for 27 August suggests that, contrary to my conclusions, A should have been given an opportunity to find a new sponsor. I am not surprised that the decision maker asked for advice about what to do. I do not consider, however, that this question in any way undermines the legal position, which, as I have described, is that the Secretary of State was under no obligation, whether imposed by the Rules, or by procedural fairness, to give A a period of further leave to remain.

73. Does the note for 29 August cast any doubt on my approach? The reason for decision 3 was that the sponsor had withdrawn the CS, and that the CS was, therefore, no longer valid. That, as we know from the GCID notes, is factually accurate. But in the absence

of any GCID notes, we would, because there is no evidence from A contradicting that statement, have been bound, in any event, to accept that it was accurate. The note acknowledges the suspension of the sponsor's licence, and that that has not been mentioned in the text of decision 3. I accept Mr Harland's submission that the suspension of the licence is irrelevant to decision 3, as it was not the reason why the Secretary of State refused application 2. The failure to mention the suspension of the licence in decision 3 does not make decision 3 unlawful. I also consider that it would have been inconsistent with the spirit, if not with the letter, of the Guidance, for the Secretary of State to have refused application 2 because the sponsor's licence had been suspended (see paragraph 60, above).

Conclusion

74. For those reasons, I would dismiss this appeal.

Lady Justice Nicola Davies

75. I agree.

Lord Justice Baker

76. I also agree.