Neutral Citation Number: [2019] EWHC 761 (Admin)

Case No: CO/3224/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2019

Before :

CHARLES BOURNE QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

The Queen **on the application of** **SRI LALITHAMBIKA FOODS LIMITED**	**Claimant**
- and -	
SECRETARY OF STATE FOR **THE HOME DEPARTMENT**	**Defendant**

- -
- -

Ms Carine Patry (instructed by **KTS Legal**) for the **Claimant**
Ms Julia Smyth (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 12-13 and 21 February 2019

- -

Approved Judgment

CHARLES BOURNE QC:

Introduction and legal background

1. This is a challenge to a decision by the Defendant on 6 April 2017, revoking the claimant's Tier 2 (General) and Intra-Company Transfer Sponsor Licence.

2. The Defendant has responsibility for the maintenance of the UK's immigration controls. Tier 2 is part of the "Points Based System" which regulates the admission to the UK of non-EEA nationals. The different "tiers" apply to different categories of such individuals. Tier 2 applies to skilled workers. Its essentials were described by Haddon-Cave J (as he then was) in *R (Raj and Knoll) v Secretary of State for the Home Department* [2015] EWHC 1329 (Admin) (a decision upheld by the Court of Appeal in a judgment to which I return below) in these terms:

> "**The Tier 2 Scheme**
>
> 15. The 'Tier 2' route for entry and leave as a non-EEA worker came into effect in 2009 under the 'Points-Based System' ("PBS"), contained within the Immigration Rules. This was introduced by an amendment to *Statement of Changes in* Immigration Rules, HC 395 by HC 1113 which replaced the previous 'work permit' scheme. The aim of the new scheme as set out in the Explanatory Notes to HC 1113 was to enable UK employers to recruit individuals from outside the EEA "to fill a particular skilled job that cannot be filled by a British or EEA worker".
>
> 16. Central to the 'Tier 2' scheme is the role of the UK sponsor/employer. As a prerequisite to obtaining leave to enter or remain under the PBS 'Tier 2' route, a non-EEA worker must obtain a Certificate of Sponsorship ("CoS") from a licensed sponsor. Employers can only issue a CoS if they are a licensed sponsor, *i.e.* they have been approved and placed by the SSHD upon the Register of Licensed Sponsors.
>
> 17. A CoS confirms that the non-EEA worker in question has been offered employment within an eligible category and includes a summary job description and the relevant 'Standard Occupational Classification' ("SOC") Code for the particular job contained in the applicable UKBA's Codes of Practice *for Skilled Workers*. The CoS is held electronically on the 'Sponsorship Management System ("SMS") and accessed electronically.
>
> **The Guidance**
>
> 18. Guidance on the PBS system in relation to the Tier 2 route is provided by the UKBA in *"Guidance For Sponsors: Tier 2 and 5 of the points-based system"* and took effect on 13th December 2012."

3. In a further passage quoted by the Court of Appeal ([2016] EWCA Civ 770, para 23), Haddon-Cave J continued:

"20. The principles applicable to 'Tier 2' and 'Tier 4' Points-Based Systems are similar: the watchword for both is 'trust'.

21. The following common principles can be derived from the recent case law:

(1) The essence of the system is that the Secretary of State imposes *"a high degree of trust"* in sponsors granted ('Tier 2' or 'Tier 4') licences in implementing and policing immigration policy in respect of migrants to whom it grants Certificate of Sponsorship ("CoS") or Confirmation of Acceptance ("CAS") (*per* McGowan J in *London St Andrews College v Secretary of State for the Home Department* (supra) (2014) EWHC 4328 (Admin) at [12]) (and see Silber J in *R (Westech College) v Secretary of State for the Home Department* (2011) EWHC 1484 (Admin)).

(2) The authority to grant a certificate (CoS or CAS) is a privilege which carries great responsibility: the sponsor is expected to carry out its responsibilities *"with all the rigour and vigilance of the immigration control authorities"* (per McGowan J *in London St Andrews College v Secretary of State for the Home Department* (*supra*) at [13]).

(3) The Sponsor *"must maintain its own records with assiduity"* (per McGowan J in *London St Andrews College v Secretary of State for the Home Department* (*supra*) per McGowan J at [13]).

(4) The introduction of the Points-Based System has created a system of immigration control in which the emphasis is on *"certainty in place of discretion, on detail rather than broad guidance*" (per Lord Hope in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, reported at [2012] 1 WLR 2208 at [42]).

(5) The CAS in the 'Tier 4' scheme (the equivalent of the CoS in the 'Tier 2' scheme) is very significant: the possession by a migrant of a requisite CAS provides strong, but not conclusive, evidence of some of the matters which are relevant upon the migrant's application for leave to enter or remain (*Global Vision* per Beatson LJ at [12], citing Lord Sumption SCJ in *R (New London College Ltd) v Secretary of State for the Home Department* [2013] UKSC 51).

(6) There is no need for UKBA to wait until there has been breach of immigration control caused by the acts or omission of a sponsor before suspending or revoking the sponsorship, but it can, and indeed should, take such steps if it has reasonable grounds for suspecting that a breach of immigration control might occur (per Silber J in *R (Westech College) v Secretary of State for the Home Department* (2011) EWHC 1484 (Admin) at [17-18]).

(7) The primary judgment about the appropriate response to breaches by licence holders is that of the Secretary of State. The role of the Court is simply supervisory. The Secretary of State is entitled to maintain a fairly high index of suspicion and a 'light trigger' in deciding when and with what level of

> firmness she should act (*R (The London Reading College Ltd) v Secretary of State for the Home Department* (2010) EWHC 2561 Admin per Neil Garnham QC).
>
> (8) The courts should respect the experience and expertise of UKBA when reaching conclusions as to a sponsor's compliance with the Guidance, which is vitally necessary to ensure that there is effective immigration control (per Silber J in *R (Westech College) v Secretary of State for the Home Department* (2011) EWHC 1484 (Admin) at [29(d)]). "

4. The Court of Appeal's judgment appears to endorse those principles, subject to two caveats. At paragraph 29 Tomlinson LJ stated that it was unnecessary to decide whether the Judge was right at paragraph 21(6) of his judgment to record that the Defendant can revoke a licence if he merely suspects that a breach of immigration control might occur. And, as regards the citation of the *Westech* case, Tomlinson LJ at paragraph 31 pointed out that Silber J had added the important qualification "*provided of course UKBA complies with its public law duties*" and that *Westech* was concerned with the Tier 4 scheme (for students) which is not identical to the Tier 2 scheme.

5. *Guidance for Sponsors* ("the Guidance") imposes important and extensive duties on sponsors and explains that non-compliance is liable to result in the revocation of the sponsor's licence. I return to the relevant duties below.

6. Some further details about the Tier 2 system were the subject of evidence in a witness statement by David Ramsbotham whose contents are agreed, in so far as they describe how the system works.

7. Sponsors' compliance with their duties is policed by means of regular inspections by the Defendant's officers, known as compliance visits. These are sometimes announced and sometimes unannounced. Some are random checks and some take place because of specific concerns or allegations. Following a compliance visit, the compliance officer completes a visit report which will include investigation of comments made during the visit and checking of information provided at, or following, the visit. The report is reviewed and signed off by a manager. It is then submitted to the caseworking team which assesses the case afresh. It may decide that the sponsor's licence will be maintained. Conversely it may recommend that the licence should be immediately revoked, or suspended, or downgraded to a B rating with an action plan. Such a recommendation, supported by reasoning, is considered by a manager before action is authorised by a Grade 7 officer and a decision letter is sent to the sponsor. If the decision is to suspend, the sponsor is told what the concerns are and is given a period of time in which to respond with representations and evidence. Any representations and evidence are then considered by a caseworker who makes a reasoned recommendation to a manager, who once again reviews the recommendation and evidence and submits it to a Grade 7 officer for authorisation. The final decision is notified to the sponsor by letter, at which point the sponsor licence is revoked if revocation is the decision.

8. During any period of suspension the sponsor cannot issue any new CoS but can continue to employ any migrant workers whom it is sponsoring and is expected to continue to comply with all sponsor duties and responsibilities.

9. The Guidance provides a framework for consideration of any failures to comply with sponsor duties. It provides in particular for the most serious category of breach which "will" result in revocation and for a less serious category which "may" result in revocation:

> "19.2 For information on the circumstances in which we will revoke your sponsor licence, see Annex 5 of this guidance.
>
> 19.3 If any circumstances in Annex 5 of this guidance arise, we will revoke your licence and may do so immediately. We will write to you to tell you that your licence has been revoked. There is no right of appeal and you will not be allowed to apply again for a sponsor licence until the end of the appropriate cooling-off period from the date your licence is revoked. If we do not revoke your licence immediately, we will suspend your licence pending further investigation. For more information, please see suspending a licence.
>
> 19.4 For information on the circumstances in which we may revoke your sponsor licence, see Annex 6 of this guidance.
>
> 19.5 We cannot define in which exceptional circumstances we may not revoke your sponsor licence but, when one of the circumstances listed in Annex 6 of this guidance applies, we view this as a serious matter. We will look for evidence that you have robust processes and procedures in place and have taken all reasonable steps to verify information that you are required to obtain and hold in connection with your duties under this guidance, as well as any information that you send to us.
>
> 19.6 If the circumstances in Annex 6 of this guidance arise and we believe that the evidence we have shows that you are breaching your duties and/or pose a threat to immigration control, we will suspend your licence. For more information, please see suspending a licence."

10. If a licence is revoked, the migrant workers sponsored by its holder are usually given 60 days' notice to seek another route by which they can remain in the UK, but if they cannot find another basis for having leave to remain, they are required to leave the UK. The sponsor, meanwhile, can apply for a new licence after a "cooling off" period which is currently 12 months, in which event its history and its attitude to previous breaches will be taken into account.

Factual and procedural background

11. The Claimant owns and runs a South Indian restaurant based in Harrow. It has held an A-rated Tier 2 (General) and ICT Licence since February 2014.

12. Officers of the Defendant carried out an unannounced compliance visit to the restaurant on 9 August 2016. The following day, there was a fire in the flat above the restaurant of which the Defendant was notified by email on 11 August 2016. At the visit the officers had requested sight of further documents, and more documents were provided by email on 16 September 2016. By a letter dated 9 February 2017 the Defendant informed the Claimant that its sponsor licence was suspended ("the suspension letter"). On 7 March 2017 the Claimant sent the Defendant written representations and supporting material. By a further letter dated 6 April 2017 the Defendant communicated his decision to revoke the Claimant's sponsor licence ("the revocation letter").

13. The suspension letter and the revocation letter both asserted that the Claimant was in breach of the Guidance in respect of 14 matters.

14. The Claimant sent a pre-action protocol letter on 31 May 2017, making further submissions. The Defendant responded on 29 June 2017, maintaining his decision. The claim was issued on 5 July 2017. Permission was granted on 18 January 2018. A substantive hearing was listed on 13 June 2018 but on that date the matter was not ready for trial and directions were given for amended statements of case and evidence. That timetable also slipped, and on 10 January 2019 Cockerill J gave further directions including an order which read:

> "The time for the Claimant to file and serve any evidence in reply is extended to 4 pm on Friday 11 January 2019. If the Claimant fails to strictly comply with this direction, the Claimant will be barred from filing such reply evidence or any further evidence in this case. "

15. The Claimant had originally served statements by five witnesses in July 2017 and served a further two statements in May and June 2018. Following the order of Cockerill J, and within the deadline set by it, the Claimant then served a 3-page witness statement by its solicitor, Mr Subramani on 11 January 2019. However, on 15 January 2019, four days after that deadline, the Claimant served a further three witness statements. The Defendant objects to the admission of those late statements in these circumstances.

The late witness statements

16. Ms Patry contends that, in order to comply with Cockerill J's order quoted above, the Claimant merely had to file some reply evidence by the deadline of 11 January 2019. Since the Claimant did so by filing one statement, it was not in breach of the order. It was therefore open to the Claimant to put forward further evidence after that date, unhampered by the barring provision in Cockerill J's order.

17. In my judgment, that is not what Cockerill J's order meant. The phrase "*any evidence in reply*" in the order showed two things. First, the Claimant was not obliged to file further evidence and could choose whether or not to do so without being in breach of the order. Second, if the Claimant did elect to file reply evidence, then the deadline of 11 January would apply to <u>any</u> reply evidence.

18. The effect of that order, therefore, was that the Claimant could not rely on any evidence filed after 11 January 2019, or at least it could not do so unless, despite the terms of Cockerill J's order, the Court was persuaded to make a further order permitting such reliance.

19. Ms Patry does ask me to admit the three late statements. In deciding whether to do so, I apply the three-stage approach set out in *Denton v TH White Ltd* [2014] 1 WLR 3926.

20. First, it seems to me that the breach (filing statements on 15 January having been given a final deadline of 11 January, four weeks before trial) was at least significant, though not the most serious of its kind. It had an impact on the rest of the timetable because the Claimant's skeleton argument was due on 14 January 2019. It occurred some 18 months into the lifetime of the claim, this being a claim for judicial review in which the Claimant's evidence would normally be served at the very beginning, and some seven months after the original trial date. It effectively ignored the urgency which Cockerill J had sought to express in the terms of her order.

21. Second, I consider why the breach occurred. Ms Patry told me that the evidence was served late because of a change of strategy after a conference which followed a change of counsel. A corollary of that explanation is that, before the change of counsel, there was an omission to obtain or file the evidence which new counsel now considered necessary. There had already been sufficient opportunity to prepare the Claimant's case. This was not an instance of new evidence being necessitated by some unforeseen turn of events. So although there was a concrete reason for the late service, it was not a meritorious reason. I should add that the Claimant did not make any formal application for more time and did not file any evidence to support a request for more time.

22. Third, it is necessary to consider all of the circumstances. In order to do this I have read the late witness statements *de bene esse*. In my judgment, they would not alter the outcome of the substantive case. They take issue with some facts on which the Defendant relies, but not in any way which could displace the rule (to which I return later) that in judicial review the Defendant's evidence of disputed facts will usually prevail. They make some further assertions of fact which were not before the Defendant at the time of the decision under challenge, and which are not such as to show retrospectively that the decision was irrational. It follows that neither admitting nor excluding these statements would have a fundamental effect on the Court's ability to do justice in the case.

23. For that reason the decision to admit or exclude the statements is less important than it otherwise would have been. Nevertheless my decision is that the statements should not be admitted. Cockerill J made it entirely clear that, at a late stage of this long running case, this was the very last opportunity to file evidence. Failure to meet such a deadline is highly likely to prevent or obstruct the efficient conduct of litigation. In the circumstances there is no sufficiently good reason to grant a further extension of that deadline.

The grounds of claim

24. The Claimant's pleaded case has evolved to a considerable extent between the issue of the claim and the final hearing. I shall concentrate on the grounds as they were advanced before me.

25. Ms Patry makes the general submission that the Defendant when making a revocation decision cannot act on suspicion alone and that allegations must be substantiated by evidence. She argues that this revocation decision overall was irrational in the *Wednesbury* sense, and that the Defendant failed sufficiently to consider whether alternative measures to revocation could be imposed. Her route to that overall conclusion is to challenge the Defendant's decision on each of the 13 allegations of breaches of the Guidance which remain in issue. Some are said to be insufficiently evidenced. In some cases it is said that irrelevant material was considered or relevant material was ignored. In others it is said that an irrational conclusion was reached. In most of the cases it is said that there was procedural unfairness. Collectively these alleged defects are said to vitiate the Defendant's decision to revoke the Claimant's sponsor licence.

26. Ms Smyth, for the Defendant, takes issue with all of the complaints that are made about the decision in respect of the 13 allegations in issue. Her case is that there was no procedural unfairness and that, overall, there were sufficient valid reasons justifying the Defendant's decision to revoke the licence.

Legal principles relevant to a challenge of this kind

27. It is agreed that the role of the Court is supervisory i.e. to conduct a review, whilst the primary judgment remains that of the Defendant. See *London St Andrew's College v SSHD* [2018] EWCA Civ 2496 at paragraph 29(7) per Haddon-Cave LJ, with whom Asplin LJ agreed (referring back to Haddon-Cave J's first instance judgment in *Raj and Knoll*, supra, as approved by the Court of Appeal in that case).

28. Decisions by the Defendant in this area are not easily challenged. I have not been told about any case in which such a decision has been held to be irrational.

29. That is at least in part because, as Courts have repeatedly ruled, the Defendant has a wide discretion in deciding how to react to any concern about a sponsor's compliance with the Guidance. That in turn is because, in order for the points-based system to work, the Defendant needs to be able to place a high degree of trust in sponsors.

30. This is expressed in, for example, the judgment of Neil Garnham QC (as he then was) in *R (London Reading College) v SSHD* [2010] EWHC 2561 (Admin) at paragraph 60:

> "It has to be remembered that the primary judgment about the response to breaches of a College's duty is the Defendant's, and the Court's role is simply supervisory. It has also to be remembered that the underlying principle behind this scheme is that the UKBA entrusts to Colleges the power to grant visa letters on the understanding, and with their agreement, that they will act in a manner that maintains proper immigration control. The capacity for damage to the national interest in the maintenance of proper immigration control is substantial if Colleges are not assiduous in meeting their responsibilities. In those circumstances, it seems to me that the Defendants are entitled to maintain a fairly high index of suspicion as they go about overseeing colleges and a light trigger in deciding when and with what level of firmness they should act."

31. The reference to "index of suspicion" has given rise to some discussion in other cases about whether the Defendant can revoke a licence where he merely suspects that there has been a breach of the Guidance. That question does not arise in this case. The Defendant pins his colours to the mast of identifying actual breaches.

32. The reference to "light trigger" has also stimulated discussion about the rationality of revocation in circumstances where a sponsor has been guilty of only some limited divergence from the Guidance. It seems to me that the question is always whether a rational decision-maker could have decided to revoke the licence as a response to the specific concerns. In answering that question, however, it is necessary to bear in mind the features of the PBS which led the Court of Appeal in *Raj and Knoll* to doubt that such decisions attract an enhanced standard of judicial scrutiny. See Tomlinson LJ at paragraph 32:

> "The mere fact that the decision-making in this area may have serious commercial consequences for licensed sponsors is not of itself a reason to impose heightened scrutiny. The circumstance that the SSHD has special expertise in and experience of decision-making in this field, and that the court possesses no particular institutional competence and can claim no special constitutional legitimacy militates against that submission – see per Lightman J in R (Cellcom) v DG of Telecoms [1999] ECC 314 at paragraph 26 and per Laws LJ in R (Law Society) v London Criminal Courts Solicitors' Association [2015] EWHC 295 (Admin) at paragraphs 32 and 33. It is also clear that the exercise in which the SSHD is engaged involves no fundamental right of the Appellant but on the contrary a right contingent upon adherence to the rules: cf per Lord Sumption, R (New London College Ltd) v Secretary of State for the Home Department, in the passage cited at paragraph 2 above."

33. Both parties now agree that there is no heightened level of scrutiny. The test is *Wednesbury* rationality: see *Taste of India v SSHD* [2018] EWHC 414 (Admin) per Richard Clayton QC at paragraph 62.

34. The parties agree that the rationality of the Defendant's decision will be assessed by reference to the facts and evidence which were known to the Defendant at the time of the decision. However, Ms Patry submits that when the Court assesses the procedural fairness of the decision or aspects of it, it can have regard to more recent evidence to show what would or might have happened if, for example, the Claimant had been given a better or a different opportunity to provide evidence to answer the Defendant's concerns. I agree that evidence is admissible for that purpose, and the effect of such evidence is fact-specific.

35. Where the facts are in dispute in a judicial review application, in the absence of cross-examination the facts stated by the Defendant's witnesses must be assumed to be correct unless there are documents or other objective material showing that they cannot be

correct. See the authorities summarised by Nicola Davies LJ in *R (Safeer and others) v SSHD* [2018] EWCA Civ 2518 at paragraphs 16-19.

36. With that introduction I now turn to the 13 areas of dispute.

Allegation 1

37. On 6 October 2014 the Claimant assigned a CoS to Mr Vikneshwaran Pannirselvam, enabling him to be employed as purchasing manager under SOC code 1133. This could not be done unless the Claimant had a genuine vacancy for such a person which could not be filled by a worker already in the UK. It was therefore necessary for the post to be correctly described by reference to a SOC code, and for the Claimant first to have tried and failed to recruit such a person in the UK (the Resident Labour Market Test, "RLMT").

38. See the reference to SOC codes in the quotation at paragraph 2 above from paragraph 17 of the High Court judgment in *Raj and Knoll*. This topic is addressed at length in the witness statement of David Ramsbotham. He explains that the Office of Qualifications and Examinations Regulation (Ofqual) regulates a system known as the Regulated Qualifications Framework (RQF). The RQF catalogues qualifications at 8 different levels, indicating the difficulty and complexity of the knowledge and skills associated with them. The levels range from level 1, covering the lower GCSE grades, to level 8, which is a doctorate. By means of the PBS, the Home Office supports the recruitment of migrants who are highly skilled workers. The majority of permissible jobs must be at RQF level 6 or higher, that level corresponding to a bachelor's degree (with or without honours). The focus is on whether the individual's work is in fact at that level, and not on what qualifications the individual actually holds. Appendix J of the Immigration Rules states what jobs meet these criteria, by reference to tables. In particular, Table 2 sets out the occupations which are skilled to RQF level 6 or above. Each is identified by a SOC code and description with some examples of typical job tasks, and in each case appropriate salary rates are stipulated.

39. The entry in Table 2 for Mr Pannirselvam's SOC code reads:

> "1133 Purchasing managers and directors
>
> Example job tasks
>
> • determines what goods, services and equipment need to be sourced;
> • devises purchasing policies, decides on whether orders should be put out to tender and evaluates suppliers' bids;
> • negotiates prices and contracts with suppliers and draws up contract documents;
> • arranges for quality checks of incoming goods and ensures suppliers deliver on time;
> • interviews suppliers' representatives and visits trade fairs;
> • researches and identifies new products and suppliers;
> • stays abreast of and ensures adherence to relevant legislation regarding tendering and procurement procedures.

> Related job titles:
> • Bid manager
> • Purchasing manager
>
> Salary rates:
> New entrant: £26,800
> Experienced worker: £35,700
>
> [Source: Annual Survey of Hours and Earnings 2016]"

40. Mr Ramsbotham explains that when a sponsor assigns a CoS to a sponsored migrant, they must choose the appropriate SOC code which best matches the role for which they wish to recruit. The Guidance reminds employers:

> "25. When you assign a certificate of sponsorship (CoS), you must choose the standard occupation classification (SOC) code which contains the job description that best matches the role you want to recruit for. The codes of practice in Appendix J of the immigration Rules contains information about each SOC code and sample job titles and duties that fit within each code. You should be able to find the correct SOC code by searching Appendix J for job titles or key words.
>
> 26. You may find that if you search for job titles, the SOC code containing that job title does not match the duties that the migrant will perform. This is because different employers use the same job title to describe different jobs, or use generic job titles that cover several different jobs. If this happens, you should search further, for example, using key words, for a job description that matches the migrant's duties."

41. If sponsored workers are not in fact carrying out the role specified on the CoS, they are in breach of the terms of their grant of leave to enter or remain in the UK and the sponsor is in breach of its sponsor duties.

42. Mr Ramsbotham further explains that some sponsors abuse this system, and in particular at paragraph 72 (ii):

> "… the Home Office sees more complex abuse, where a sponsor assign a CoS that does not match the job that in fact the migrant worker does. This commonly take place *within* the same type of job but at a significantly *lower* level – i.e. the worker is in fact at a lower skill level than the SOC code required;"

43. Abuse of SOC codes is said to be a "known area of risk" (paragraph 89). A job description which is copied directly from a SOC code may be questioned, because employers will sometimes simply copy the information from the SOC code, knowing that that information matches the requirements for Tier 2 sponsorship.

44. The Home Office is therefore experienced in probing employers' assertions about their employees' roles. As Mr Ramsbotham explains, compliance officers look for supporting evidence and ask open questions in order to see what material is forthcoming. A lack of information in response raises concern because, in the Home Office's experience, where an employee has been in a management post for some time, there is usually "an abundance of evidence" such as emails, paperwork, reports, draft reports and reviews (Mr Ramsbotham's statement, paragraph 87).

45. The unannounced visit on 9 August 2016 was carried out by a Compliance Officer, Ms Kelly Sehgal. She was accompanied by a colleague but conducted the interviews herself. She interviewed Mr Umesh Sivashanmugham. He was the Authorising Officer for the sponsor licence, this being defined in the Guidance as "*the most senior person responsible for the recruitment of sponsored migrants*". According to Ms Sehgal's statement, he told her that Mr Pannirselvam was away from the restaurant premises visiting the bank and then the cash and carry. She asked Mr Sivashanmugham questions about Mr Pannirselvam's role and, having obtained answers to her questions, did not consider that it was necessary to return on another occasion to interview Mr Pannirselvam.

46. Following the compliance visit, the suspension letter of 9 February 2017 said in respect of Mr Pannirselvam:

> "2. You assigned a certificate of sponsorship (CoS) under the Tier 2 Intra Company Transfer (ICT) sub category to Vikneshwaran Pannirselvam … to be employed as a purchasing manager under standard occupational classification (SOC) code 1144 purchasing managers and directors, on 6 October 2014. The job description on his CoS is copied almost directly from the SOC code and states his duties as follows:
>
> - Determine what goods, services and equipment need to be sourced for the restaurant business;
> - Devise purchasing policies, decide on whether orders should be put out to tender and evaluates suppliers' bids;
> - Negotiate prices and contracts with suppliers and draws up contract documents;
> - Arrange for quality checks of incoming goods and ensure suppliers deliver on time;
> - Research and identify new products and suppliers;
> - Stay abreast of and ensures adherence to relevant legislation regarding tendering and procurement procedures;
> - Supervise and train junior staff.
>
> 3. During your interview you were unable to provide our officer with any evidence of work undertaken by Mr

> Pannirselvam since he joined your company as a purchasing manager but confirmed his duties as follows:-
> - Buying food and ingredients;
> - Comparing prices before buying anything;
> - Check stock on shelves;
> - Check customer bookings;
> - Fill the shelves and check the dates for perishable items;
> - Get receipts and send to the accountant;
>
> 4. When our officer asked you why the restaurant needs a purchasing manager you stated:-
>
> '*We need to control cost cutting at the restaurant, know what to buy, what ingredients is needed, where to buy, how to buy, when to buy, going to the Cash and Carry for shopping, need experience in South Indian food, quality checking by looking at the lentils through the packages, checking the rate items from suppliers against shops'. (sic)*
>
> 5. You also stated that the role of purchasing manager is not a new role and was previously done by you and Mr Rajanikanth, the restaurant owner.
>
> 6. As you were unable to provide our officer with any evidence of the work undertaken by Mr Pannirselvam and there is a vast difference in the level of duties listed on the CoS assigned by you compared to those quoted in your interview, we do not believe that Mr Pannirselvam is employed as a purchasing manager and we therefore believe the post is not a genuine vacancy which meets the requirements of the Tier 2 ICT sub-category."

47. In response, the Claimant instructed solicitors who sent the written representations of 7 March 2017.

48. In respect of Mr Pannirselvam the written representations maintained that he had been fulfilling the duties stated in his CoS. In support of the first item (determining what needed to be sourced), the solicitors provided some invoices, order forms and purchase comparison charts. In respect of the second duty (devising policies), they provided a purchasing policy produced by Mr Pannirselvam. In respect of the third duty (negotiations and contracts) they provided contracts between the Claimant and BT, 707 Resource Management and Biffa Waste Services Ltd, and correspondence with Npower. In respect of the fourth duty (quality checks) they provided invoices showing that Mr Pannirselvam had dealt with incoming goods. In respect of the fifth duty (research new products) they provided invoices showing the purchase of a number of large items. The other two duties (stay abreast of procurement/tendering provisions, supervision and training) were not addressed. Finally the letter stated:

> "There are further extensive evidence that our client had held in the premises that were destroyed during the recent fire incident, but the enclosed evidences are quite substantial to prove that the migrant has been genuinely employed in that position."

49. The revocation letter of 6 April 2017, under this heading, first repeated what had been said in the suspension letter. It then referred to the written representations and briefly explained that that material did not dispel the concerns. For example, there was no evidence of quality checks on deliveries other than those which a warehouse operative might conduct, many documents were dated after the compliance visit despite Mr Pannirselvam then having been in post for nearly two years, and the purchasing policy was undated and unsigned and there was no evidence of any analysis used to create it. For several duties mentioned on the CoS (decide whether to put orders out to tender, arrange quality checks, research new suppliers, supervise and train junior staff) there was no evidence at all.

50. The Defendant decided upon revocation in accordance with Annex 5 of the Guidance, where it was said that revocation would follow if:

> "t. You use a Tier 2 or Tier 5 CoS to fill a vacancy other than the one specified on the CoS you assign for that role.
>
> …
>
> ee. You assign a CoS for a vacancy that was not genuine. For example, where:
>
> • it contains an exaggerated or incorrect job description to deliberately make it appear to meet the requirements of the tier and category you assigned it under when it does not
>
> • it is for a job or role that does not exist in order to enable a migrant to come to, or stay in the UK
>
> …
>
> g. The role undertaken by a migrant you have sponsored does not match one or both of the following:
>
> • the job description in Appendix J of the Immigration Rules containing the SOC code stated on the CoS you assigned to them
>
> • the job description on the CoS that you assigned to them"

51. Ms Patry argues that the decision was reached in a way which was procedurally unfair. Whilst she does not contend that unannounced visits are inherently unfair, she contends that the Defendant should make due allowance for the fact that a visit was unannounced and therefore that there may be legitimate reasons why evidence is not available at the

time of the visit. She argues that a decision which does not attach appropriate weight to evidence provided later may well be unfair. Ms Patry also points out departures from the Guidance relating to the interview records, such as a failure to record all the questions asked and answers given and an omission to inform the interviewees of their entitlement to a copy of the record. She also criticises the Defendant for proceeding to a decision without interviewing Mr Pannirselvam.

52. In my judgment there was no procedural unfairness. Unannounced visits are obviously a necessary means of policing sponsors' compliance with the Guidance. The interview notes provide a sufficient record of what was said during the visit. The concerns arising from the visit were clearly identified in the suspension letter, and the Claimant thereafter had an entirely sufficient opportunity to respond to them, including an entirely sufficient opportunity to plug any gaps arising from the fact that Mr Pannirselvam had not been available for interview at the time of the visit.

53. In relation to the rationality of the decision, the Claimant relies on the documents which were sent with the representations. They go some way to showing that Mr Pannirselvam did engage in at least some of the activities specified in his CoS. The problem is that much of that activity appears to have been mundane, not requiring the managerial skills of a graduate as contemplated in the job description and corresponding SOC code. Buying goods for the restaurant, and returning them if they were damaged, did not require a purchasing manager. The legal position in this regard was clearly stated by Andrew Thomas QC (sitting as a Deputy High Court Judge) in *R (Liral Veget Training and Recruitment Ltd) v SSHD* [2018] EWHC 2941 (Admin) at paragraph 46:

> "As a holder of a Sponsor Licence, the Claimant was required to be scrupulously accurate in the information to be provided in the COS submissions. There was no room for artistic licence whether in the attribution of job titles or otherwise. It is no answer for the Claimant to point to individual pieces of higher-level work when the COS submissions had failed to give an accurate impression overall of the role."

54. Producing a purchasing policy seems a more distinctively managerial task. In that regard the Claimant produced a single 5 page policy document. Because it is undated, the Defendant could not be sure when it had been created. Mr Sivashanmugham in a witness statement dated 17 July 2017 (after revocation) said (at paragraph 19): "*The policy is constantly updated by the migrant and the document we produced was the updated version.*" Even this post-decision evidence is not entirely reassuring. It seems highly likely that the policy document was produced electronically, thereby leaving a provable electronic record of its gestation and evolution, but no such evidence has ever been adduced. In my judgment, it was rationally open to the Defendant, after seeing a single undated policy document, to remain unconvinced that Mr Pannirselvam had a significant role in developing policies.

55. The Claimant also places significant reliance on the fact that there was a fire at the premises, and complains that the Defendant attached no or no sufficient weight to the fact of the fire when pointing to a lack of pre-visit documentation.

56. In my judgment, however, the Defendant was not bound to assume that this was a satisfactory explanation for a lack of documentary evidence. Electronic documents will have survived the fire. Documents from third parties, such as invoices, could probably be re-obtained in duplicate. But the real problem is that reliance on the fire has tended to be in fairly general terms. The Claimant did not identify specific missing documents and explain why they were missing and what their significance was. The main specific detail of what was lost in the fire was said to be HR documentation, and on the face of it this does not explain a lack of documentary records of the operational activity of the purchasing manager.

57. Nor was it for the Defendant, in my judgment, to request specific documents. The suspension letter clearly identified the concerns. It was for the Claimant to attempt to allay them in the written representations, and it clearly failed to do so. Some activities mentioned in the job description remained entirely unevidenced. Mr Pannirselvam did not supervise or train any junior trainee, and whilst the Claimant has said that this might happen in the future, and that not all activities in a job description necessarily take place at all times, the Defendant cannot be criticised for identifying a lack of correspondence between role and job description and for responding in the manner set out in his relevant policy.

58. Ms Patry argued that expectations of Mr Pannirselvam's activities must be tempered by the nature of the Claimant's business. So in a restaurant, one would not expect to see tendering processes or a purchasing manager having to keep abreast of procurement law. That may be true, but it does not lessen the necessity for the role undertaken by a sponsored migrant to match both the job description in the CoS and the corresponding SOC code. If the nature of the employer's business means that it does not, then the employer is in breach of the Guidance.

59. Belatedly the Claimant filed a witness statement by Mr Pannirselvam himself on 15 January 2019. I have ruled that that statement should not be admitted. For completeness, though, I note that it would not have altered the outcome. Even if it were possible in theory to deploy such a statement to undermine the rationality of the Defendant's decision despite post-dating that decision by such a long period, this statement does not in fact add any information about Mr Pannirselvam's role and job description which could have reassured a decision-maker if it had been provided at the time. It repeats the assertion that Mr Pannirselvam has been performing the duties mentioned in the CoS (other than training and supervision, which he says are anticipated to occur at some unspecified time in the future) but provides no new evidence to support the assertion.

60. Allegation 1 is therefore clearly made out. The Claimant was given an entirely sufficient opportunity to answer the charge and failed to do so. The Defendant made a rational and lawful finding of a significant breach of the Guidance. It being an Annex 5 breach, it could be expected (by itself, with or without any additional breaches) to lead to revocation.

Allegation 2

61. On 21 July 2015 the Claimant assigned a CoS to Mr Himal Prasai, enabling him to be employed as sales and marketing manager under SOC code 3545, another RQF level 6 post.

62. The entry in Table 2 for Mr Prasai's SOC code reads:

> ""3545 Sales accounts and business development managers
>
> Example job tasks
>
> • liaises with other senior staff to determine the range of goods or services to be sold, contributes to the development of sales strategies and setting of sales targets;
> • discusses employer's or client's requirements, carries out surveys and analyses customers' reactions to product, packaging, price, etc.;
> • compiles and analyses sales figures, prepares proposals for marketing campaigns and promotional activities and undertakes market research;
> • handles customer accounts;
> • recruits and trains junior sales staff;
> • produces reports and recommendations concerning marketing and sales strategies for senior management;
> • keeps up to date with products and competitors.
>
> Related job titles:
> • Account manager (sales)
> • Area sales manager
> • Business development manager
> • Product development manager
> • Sales manager
>
> Salary rates:
> New entrant: £25,100
> Experienced worker: £33,300"

63. At the unannounced visit Ms Sehgal interviewed Mr Sivashanmugham and Mr Prasai himself. These interviews and the Defendant's concerns arising from them are summarised in the suspension letter:

> "14. During your interview you were unable to provide our officer with any evidence of work undertaken by Mr Prasai since he joined your company some 18 months earlier. When our officer asked you why the restaurant needs a sales and marketing manager you stated:-
>
> '*To plan outdoor catering – this has not been planned yet, to plan to have more dishes and looking to open another branch, I need someone to do the marketing to develop and expand the business*'. (sic)
>
> You went on to say:-

'*So far research has been done about which new dishes are required, we are telling people that we will be doing outside catering, and created leaflets which people pick up at the restaurant.'* (sic)

15. When Mr Prasai was interviewed he was asked about his work experience to which he replied:-

'*I know how to do sales, I give customers discount so they bring more customers, as a waiter I understand customer's tastes'.* (sic)

16. Our officer then asked Mr Prasai what work he is doing now as a sales and marketing manager to which he replied:-

'*I have been here one and a half years and changed the décor. I advised the boss to sell South Indian curry and chef created new dishes. I advised boss to sell specialist food on different days which has been implemented. I take phone bookings and discuss menu with the customers, I sometimes take phone orders and receive money from customers at the cash counter. I deal with customers, waiters and chef as middle man, I am looking into outdoor catering*'. (sic)

17. Our officer also noted that Mr Prasai did not read the interview declaration and did not know where to sign and was shown twice. Mr Prasai could not fully understand the questions which had to be repeated in different ways to ensure the questions were understaood. Our officers also found it difficult to understand what Mr Prasai was saying.

18. Furthermore, Mr Prasai had no office to work from and on the day of our visit he was working at the restaurant, sitting next to the cash counter. The only office that Mr Prasai could work in was locked and only accessible by the Director.

19. As you were unable to provide our officer with any evidence of the work undertaken by Mr Prasai and there is a vast difference in the level of duties listed on the CoS assigned by you compared to those quoted in both your own and Mr Prasai's interviews, we do not believe that Mr Prasai is employed as a sales and marketing manager. Further credence is given to this belief as Mr Prasai's knowledge of the English language is very poor and he has no experience in a marketing or managerial position. We therefore believe the post is not a genuine vacancy."

64. In response, the written representations asserted that Mr Prasai was carrying out the duties listed in the CoS. It referred to, and enclosed, correspondence between Mr Prasai

and Google, a services agreement between him and iTech India, a special offers sales agreement with OpenTable, an invoice from Vistaprint for some marketing items, an advertisement in a local newspaper for franchise opportunities, correspondence between Mr Prasai and individuals about franchising the business, correspondence between Mr Prasai and Starprint relating to the business's website and correspondence between him and a shop about a promotional counter there.

65. The representations also referred to a report showing an increase in sales since Mr Prasai was employed, and added:

> "There are further extensive evidence that our client has held in the premises that were destroyed during the recent fire incident, but the enclosed evidences are quite substantial to prove that the migrant has been genuinely employed in that position."

66. Having repeated what was said in the suspension letter, the revocation letter responded to the documents which had been supplied. It noted that Mr Prasai had used the services of a company to prioritise advertising for the restaurant and that he "had some involvement in the content and modification of advertisements". It noted the supply of relatively small quantities of stationery but that the solicitors had "failed to demonstrate how these items have been utilised for marketing purposes". Documents showing that promotional space was provided in two supermarkets "are singular items and demonstrate no ongoing business". Save for one email there was no evidence to show that the plan for outdoor catering was being progressed. There was no evidence to show that Mr Prasai placed the franchise advertisement or was the point of contact for interested parties. The sales comparison document for 2014-16 were not thought to evidence Mr Prasai's role "as these predate his employment".

67. The revocation letter also pointed out a lack of evidence of a number of the duties outlined in the CoS. It noted Mr Prasai's answers in interviews stating "as a waiter I know how to do sales" and about Mr Prasai taking phone bookings, discussing menus with customers, taking phone orders and receiving money from customers and continued:

> "39. … As stated above these are not the duties we would expect a sales and marketing manager to undertake. Further doubt is cast on his role given that his work space appears to be at the counter beside the till, with no access to an office. We would expect him to have a designated work space away from a customer contact area. We also believe that his duties would include communication by telephone with current and potential clients of a confidential business nature and we do not believe his designated work area as stated by him, is viable for this purpose given the interruptions and distractions of customers. You have remained silent regarding this concern although it was raised during our visit of 9 August 2016 and our letter of 9 February.

> 40. Mr Prasai's own description of his duties leads us to believe that he is not undertaking the role for which his CoS was assigned but that he is undertaking a less skilled role …"

68. The revocation letter pointed out that there had been no response to the concern about Mr Prasai's language skills. It stated that, Mr Prasai having been employed for over 18 months, there should have been more than the "limited evidence" provided.

69. The Defendant therefore considered the Claimant to be in breach of Annex 5 of the Guidance. Curiously the paragraphs of the Guidance to which the letter (at paragraph 43) refers are those dealing with a failure properly to apply the RLMT. It appears that the Defendant should in fact have referred to the same paragraphs as were found to be infringed in Mr Pannirselvam's case (see paragraph 50 above). However, no point is taken on this apparent drafting error.

70. Ms Patry makes submissions which are similar to those relating to Mr Pannirselvam. She places reliance on the documents which were sent with the representations. She points out that emails sent by Mr Prasai are expressed in correct English. That is true (with some exceptions), but most of these communications are only a line or two in length. It is also true that, on a number of occasions, Mr Prasai is seen expressing a view, making a choice or signing an agreement connected with marketing. There are also some documents post-dating the compliance visit which show Mr Prasai placing an advertisement about franchising and emailing an individual who responded to such an advertisement. Ms Patry claims that the 2014-16 sales analysis shows Mr Prasai's work making a difference. The purchase of marketing stationery such as business cards, she says, confirms a marketing role. Meanwhile his reference in interview to being a waiter was a reference to past experience, as is confirmed by Mr Sivashanmugham's witness statement.

71. The Claimant filed a witness statement by Mr Prasai dated 17 July 2017 but this merely asserts that he carried out the duties, without exhibiting any further documents in support.

72. Mr Prasai is also the author of one of the late witness statements which I have decided not to admit. Its contents could not have shown that the Defendant's decision was unlawful, in any event. Essentially it makes points which can be advanced as submissions, e.g. the fact that Mr Prasai has a degree from Anglia Ruskin University which was taught in English, suggesting that his command of English is better than Ms Sehgal thought. The late statement did not exhibit any further documents.

73. As Ms Smyth submitted, there was overall a failure by the Claimant to respond sufficiently to the concerns expressed in the suspension letter. Those concerns arose from the interview record, and the accuracy of that record cannot be challenged in these proceedings given that there has been no application to cross-examine Ms Sehgal. In response, the Claimant has shown that Mr Prasai engaged in some marketing activities, but not that he was a sales and marketing manager performing all of the duties specified in the CoS. There was no duty on the Defendant to tell the Claimant how to fill these gaps. Moreover, the evidence supplied later in some respects undermines the Claimant's case. Mr Prasai at paragraph 5 of his July 2017 statement claims to carry

out a list of duties which is quoted from the CoS, including (for example) setting budgets. In interview, however, he was asked whether he sets budgets and answered "no". This contradiction remains unexplained.

74. In short, there was a rational basis for the Defendant's decision in relation to allegation 2. Again, it was to be expected that any Annex 5 breach would result in revocation.

Allegations 3 and 5

75. These are parasitic on allegations 1 and 2. The Defendant believed that Mr Pannirselvam and Mr Prasai were carrying out less skilled duties that did not meet the Tier 2 criteria. The Claimant therefore fell foul of Annex 5 (r) of the Guidance, which stated that the licence would be revoked if:

> "You employ a migrant in a job that does not meet the skill level requirements as set out in this guidance."

76. The Defendant's findings on allegations 1 and 2 therefore led to the conclusion that the Claimant's sponsor licence should be revoked on this further ground too. That is allegation 3. The Defendant's decision on that allegation is lawful for the same reasons as apply to allegations 1 and 2.

77. Meanwhile allegation 5 is that the Claimant knowingly provided false information on the CoS assigned to Mr Pannirselvam and Mr Prasai. That is a ground on which the Defendant, at paragraph 5(k) of Annex 5, states that it will revoke a licence. The revocation letter in this regard states:

> "64. Based on the information above we believe your client has knowingly provided false information on the CoS assigned to Mr Pannirselvam and Mr Prasai. This is a very serious breach of our trust and we believe they have acted dishonestly by issuing a CoS to these individuals to allow them to facilitate and extend their stay in the UK when the vacancies do not exist."

78. Ms Patry points out that since the Defendant can rely on allegation 3 as a mandatory ground for revocation, it is not necessary also to allege dishonesty against the Claimant. The finding could have further consequences if and when the Claimant makes a renewed application for a sponsor licence in future. She submits that such a finding cannot fairly be made without the allegation being put to the individuals concerned and then proved to a relatively high standard. In this case dishonesty was not put to any interviewee and, she submits, cannot fairly be inferred from the background facts.

79. Ms Patry relies on *RP (proof of forgery) Nigeria* (2006) UKAIT 00086. That was a decision of the Asylum and Immigration Tribunal, overturning a finding by a Home Office official that a document had been forged. The Tribunal ruled at paragraph 14:

> "Immigration Judges decide cases on evidence, and in the absence of any concession by the appellant, an Immigration

> Judge is not entitled to find or assume that a document is a forgery, or to treat it as a forgery for the purposes of his determination, save on the basis of evidence before him. In the present case the evidence was limited to the Entry Clearance Officer's assertion of his own view and the defect in the document identified in the notes on the application form – that is to say, the mismatch between the run date and the date stamp on one of the remittance documents. That evidence is wholly insufficient to establish that that document is a forgery. There is no reason to suppose that it is not a simple mistake."

80. That ruling is of no relevance to the present case. Here the question is whether, having found that an employee's duties do not correspond with those specified by the employer in a job description, it can be inferred that the employer knew of the difference and was dishonest in relying on the original job description.

81. In my judgment that question can be answered by the application of common sense. Having found that the difference between the stated duties and the actual duties was substantial, the Defendant was entitled to draw that inference. The position is essentially the same as in *R (Liral Veget Training and Recruitment Ltd) v SSHD* [2018] EWHC 2941 (Admin) where on not dissimilar facts Andrew Thomas QC (sitting as a Deputy High Court Judge) ruled:

> "57. In this case, I am satisfied that the evidence of the interviews gave rise to a genuine concern that the jobs were in reality significantly different from the descriptions given in the COS submissions, and moreover that the jobs were at a significantly lower level of seniority. The Claimant was given a fair opportunity to refute these concerns but failed to do so. I am satisfied that it was entirely proper to draw the conclusion that the job descriptions had been deliberately exaggerated."

Effect of Allegations 1-3 and 5

82. Before going any further, I note that the Defendant's lawful findings on the first 3 allegations provided ample ground for revocation of the licence. Where annex 5 breaches were found in respect of two employees, revocation was plainly the consequence to be expected.

83. I am nevertheless asked to review the lawfulness of the findings on all 13 allegations. That is partly because it is plainly right to review the Defendant's decision as a whole, even if any defects relating to later allegations would not have changed the outcome. It is also because any future application by the Claimant for a new licence will be affected by the Defendant's views on the previous history, and therefore any errors by the Defendant ought to be identified.

84. For those reasons I proceed to review the further allegations. However, to avoid lengthening this judgment unnecessarily, I do so more briefly where possible.

Allegation 4

85. This allegation again concerns Mr Pannirselvam.

86. Tier 2 (ICT) is a sub-category of Tier 2. It enables a worker to obtain a visa to transfer to the UK from an overseas entity which is directly linked with the UK employer in order to undertake specific work. In this case the Claimant relied on the existence of a joint venture agreement between itself and an Indian company, New Sri Balaji Bhavan Ltd ("Balaji Bhavan"). For the issue of a CoS to Mr Pannirselvam under this sub-category, the Claimant needed to establish that Mr Pannirselvam had worked for Balaji Bhavan for a minimum of 12 months.

87. At the compliance visit the Claimant was asked for Mr Pannirselvam's CV but this was not available. The Claimant did however provide a copy of a document containing the joint venture agreement.

88. The suspension letter pointed out that the joint venture agreement did not contain key details "such as the execution date, the purpose, term, duties, signatories and witnesses etc", and therefore the Defendant did not believe that it was genuine. The Defendant also complained of the lack of Mr Pannirselvam's CV and repeated its belief that the post of purchasing manager was not a genuine vacancy at NQF level 6.

89. With its written representations the Claimant provided a signed copy of the joint venture agreement, with some share certificates, and a CV for Mr Pannirselvam. That document stated that he had been "purchase manager" for Balaji Bhavan for a period of 5 years.

90. The revocation letter noted these further documents but noted also that the CV contained no dates or locations for his previous employments. Therefore the Defendant was not satisfied that the criteria had been met.

91. There is unfortunately a dispute as to whether two further documents were included with the representations. One of these is a letter from Balaji Bhavan dated 28 October 2014 which, it seems, was sent to the Home Office as part of Mr Pannirselvam's original visa application, and which states that he had worked for the company since May 2009. In a witness statement dated 12 June 2018 the Claimant's solicitor Mr Subramani says that this document was enclosed. In a witness statement dated 22 November 2018, one of the Defendant's officials, Hugh McCollam, says that it was not.

92. For the reasons given at paragraph 35 above, I must resolve this dispute in the Defendant's favour.

93. It follows that the Claimant failed to satisfy the Defendant about this issue. The 2014 letter may well have been sent to the Home Office with the visa application but, as Mr McCollam explains, it would have gone to an entirely different team, and it is a sponsor's responsibility to respond to concerns when they are raised.

94. In my judgment there was therefore no irrationality or unfairness in the Defendant's decision on allegation 4. However, that is not a finding that Mr Pannirselvam had not

in fact worked for Balaji Bhavan for the required time. It is instead a finding that the Claimant failed to prove the details of that work when asked to do so.

Allegations 6 and 7

95. Under the Guidance relating to Tier 2 ICT Long Term workers, the Claimant was required to pay Mr Pannirselvam a gross annual salary of at least £41,000. The CoS relating to Mr Pannirselvam specified that his salary would be £41,000 and that this included an accommodation and food allowance of £12,000.

96. At the compliance visit, Ms Sehgal noted that she had seen a payslip showing the correct gross monthly pay figure of £3,416,67. The Claimant was subsequently asked to provide three payslips for each migrant worker and did so on 16 September 2016. However, as the suspension letter said, Mr Pannirselvam's payslips and his form P60 for 2014-15 showed a monthly payment of £3,333.33, grossing up to only £39,999.96. This is the basis for allegation 6.

97. In respect of the accommodation and food allowance, the Claimant had also been asked to produce a rental agreement showing to whom the rent was payable, but had not done so. This is the basis for allegation 7.

98. With the written representations the Claimant's solicitors enclosed payslips for the last 3 months showing the correct gross figure of £3,416.67. They pointed out that this yielded a net figure of £1,569.83, which was in fact the net figure shown on the payslips previously provided. They claimed that "*the figure of £3,333.33 on the previously submitted payslips was an error*". In respect of the rent they sent a tenancy agreement for a property at 72 Northwick Avenue, Harrow "*which was being provided as accommodation to Mr Pannirselvam*".

99. The revocation letter stated that "*tax and NI can be variable for a number of reasons and therefore a net salary cannot be used in order to assess the gross salary that an individual is paid*". It further pointed out that a form P60 for the year to April 2016 also showed the lower salary of £39,999.96, and therefore the Defendant did not believe that the figure on the previously submitted payslips was an error.

100. The Defendant also was not satisfied about Mr Pannirselvam's accommodation. The tenancy for 72 Northwick Avenue named another individual as the tenant and included a covenant against sub-letting without permission. The monthly rent was £1,525 rather than the £1,000 which the Claimant's solicitors had said was being paid, whilst the deduction on his payslips for "accommodation and food" was only £916.67. Meanwhile the Defendant also noted that the Claimant had provided a rental valuation for one room at another address, 196A Kenton Road, where Mr Pannirselvam had lived before the fire. This specified a monthly charge of £600 rather than £1,000.

101. Ms Patry argues that no opportunity was given to respond to the point about the P60. The shortfall in the P60 figure has since been explained by Mr Sivashanmugham in his witness statement as being attributable to unpaid holidays taken by Mr Pannirselvam during the year. That explanation is unparticularised and, given the coincidence of the unpaid holidays reducing the pay by precisely the amount of the monthly shortfall which appears on the erroneous payslips, is not entirely convincing. Ms Patry however submits that even if the explanation is wrong, the conclusion would be that the P60

merely reflects and reproduces the error from the payslips, and that it would be unreasonable for the Defendant to base a decision on that.

102. In respect of the accommodation and food allowance, Ms Patry points to the Guidance provisions quoted in the suspension and revocation letters which require evidence of the value of allowances to be kept by the sponsor "*unless they are clearly shown … on the migrant's payslips*".

103. In this case the payslips show the figure of £1,000 for food and accommodation. So, if allegation 7 was just an allegation of failing to keep the necessary documents, that could be an answer to it. However, the revocation letter states clearly that the Defendant did not believe that the appropriate allowances were in fact being provided. The Defendant cited Annex 6 (f) of the Guidance which states that it may revoke a licence if "*You fail to comply with any of your sponsor duties*".

104. In my judgment, a fair opportunity was given to the Claimant to allay these concerns. The suspension letter told the Claimant that the Defendant required evidence to satisfy him that the salary and allowances were at the stated levels and explained why the existing evidence was not sufficient. It was for the Claimant to provide clear and sufficient evidence.

105. Similarly, it was open to the Defendant not to be convinced by the representations. Providing new, correct payslips did not explain the previous provision of incorrect payslips, and nor did the bland assertion of an unspecified "error". The water was muddied by the suggestion that the P60 figure was explained by unpaid holidays. In respect of the accommodation it should have been apparent to the Claimant that they needed to produce clear and explicit evidence proving where Mr Pannirselvam lived and at what cost. A tenancy agreement relating to the period after the visit (and the fire), not containing either Mr Pannirselvam's name or the figure attributable to him, without more, plainly left open the risk that the Defendant would not be satisfied.

106. As in the case of allegation 4 above, I am not making a finding that Mr Pannirselvam was not in fact provided with the appropriate salary and allowances. Rather, the Claimant failed to demonstrate that he was.

Allegation 8

107. This concerns alleged failures to carry out and/or sufficiently document the RLMT for a post of specialist Indian chef given to a Mr Venugopal.

108. The RLMT involves a set of requirements which are set out in Chapter 28 of the Guidance, with associated document retention requirements in Appendix D. These are summarised in paragraph 75 of Ms Smyth's skeleton argument (which I do not believe to be disputed):

> "Advertising in accordance with the methods set out in the Guidance, including advertising jobs for 28 days; placing 2 advertisements, providing specified information in the advertisement and advertising through the Jobcentre Plus Universal Jobmatch service.

Retention of documents, including:

1. Screen shots from any relevant website where the job is advertised.

2. All shortlisted applications in the medium received.

3. The names and total number of applicants listed.

4. Notes from the final interviews.

5. For each EEA national rejected candidate, notes explaining why."

109. At the compliance visit the Claimant was asked to provide copies of the advertisements and other documentation such as shortlist, CVs, interview notes and reasons for rejecting unsuccessful candidates for the post. The suspension letter noted that these were not provided at or after the visit. It stated that the Claimant was in breach of Annex 5(v) of the Guidance for failure to carry out the RLMT and/or of Annex 6 (l) for not "*using a process or procedure necessary to fully comply with your sponsor duties*".

110. With their representations the Claimant's solicitors then supplied a copy of an advertisement on Universal Jobmatch and CVs of shortlisted candidates. The solicitors added: "*Our client submits that copies of the manual interview notes were kept but were destroyed in the fire …*".

111. The revocation letter noted the point about the fire and said that the Defendant on this occasion would "*take no action regarding a number of missing documents*". It noted that a Universal Jobsmatch advertisement had been in place for the required 28 days. However, it appeared that the applications had been made through another website known as Indeed. No Indeed advertisement had been provided and therefore the Defendant could not establish that it was compliant. Also, no CV for Mr Venugopal had been provided, so the Defendant could not establish that he was the most qualified person for the role. Meanwhile the Claimant had provided a document referring to "UK Classifieds" but most of the document was illegible and therefore did not prove that a proper RLMT had been carried out. The same paragraphs as those cited in the suspension letter were relied on as reasons to revoke, although the paragraph numbers had now changed as a result of a reissue of the Guidance.

112. The Claimant's case is that the missing CV was in fact made available at the time of the compliance visit and that this can be seen from the interview record which referred to Mr Venugopal's qualifications and experience. That record also does not indicate that a request was made for the CV. Nor did the suspension letter specify a need for Mr Venugopal's CV although it asked for CVs generally.

113. According to Ms Sehgal's statement, she cannot remember whether she saw Mr Venugopal's CV but she thinks it probable that she did not. That is because if she had, she would have recorded it on the visit record under the heading "evidence seen", where it is not mentioned.

114. It is not necessary to resolve that issue of fact, because the Claimant did not provide sufficient material with its written representations to satisfy the Defendant. Although it sent CVs on that occasion, it did not include that of Mr Venugopal. In my view the Defendant was entitled to regard that as an important omission, even if the CV had been seen in the course of the compliance visit. Nor did the Claimant provide sufficient documentation to prove that there were two compliant advertisements.

115. Ms Patry argues that since the Claimant had proved that there was one compliant advertisement and had supplied CVs showing that candidates had responded to another advertisement, the Defendant should have responded to the written submissions by pointing out what was missing and giving the Claimant another chance to provide it.

116. In my judgment, however, the Defendant was under no duty to do this, and not doing this was not procedurally unfair. The Court of Appeal's decision in *Raj and Knoll* makes it clear that it is not for the Defendant to piece together the necessary information to prove a sponsor's compliance: see paragraph 35 per Tomlinson LJ. This case bears some similarity to *Raj and Knoll* as summarised by Tomlinson LJ at paragraph 41:

> "The Appellant has failed to grapple with the simple point that, for good reason, it was required to maintain the electronic equivalent of a paper trail and that it failed to do so. It does not advance its case to question the necessity for each element in the trail."

117. In these circumstances there was a proper basis for the Defendant to conclude either that performance of the RLMT requirements had not been proved or that there had been a failure to keep sufficient records.

Allegation 9

118. This again concerns alleged failures to carry out and/or sufficiently document the RLMT, this time for another post as chef given to a Mr Srinivasan.

119. A "change of employment" occurs when a migrant worker moves from one sponsoring employer to another. Before the second employer can assign a CoS to the worker, it must carry out a RLMT. A CoS was assigned to Mr Srinivasan on 22 July 2014, referring to a change of employment from a previous employer, Sri Durga Foods Ltd.

120. The suspension letter and written representations gave rise to some questions which are no longer material, about whether this was a change of employment case (it is agreed that it is) and about Mr Srinivasan's immigration status.

121. The suspension letter recorded that Ms Sehgal had requested details of shortlisted candidates, CVs, interview notes and reasons for rejection of shortlisted candidates but these had not been provided. The letter again made reference to Annex 5(v) and/or Annex 6 (i).

122. With its written representations the Claimant supplied copies of advertisements placed on two websites, JobCentrePlus and UKClassifieds.

123. However, the revocation letter stated:

> "127. Your client refers to an advertisement placed with UK Classifieds claiming that they have included this in the representations. As previously stated, they have provided a document where it is possible to interpret the words UK Classifieds, however the copy is of such a poor quality that the remainder of the document is illegible and therefore cannot be used in support of their claim that a full RLMT had been carried out.
>
> 128. We acknowledge that your client claims they are unable to provide interview notes as a result of the fire; however, they have failed to provide a copy of Mr Srinivasan's CV. This together with no clear advertisement for the role your client has employed him in leads us to doubt that an RLMT was conducted and as such we are not satisfied that this issue has been addressed."

124. Ms Patry relies on the fact that the missing CV has since been seen. However, its provision post-dated the Defendant's decision and is no answer to the complaint that it was not provided when it was asked for. In respect of the illegible advertisement Ms Patry argues that the Defendant should have written back to the Claimant, identifying this problem and inviting them to correct it. But again, the Defendant is under no such duty.

125. As with allegation 8, ultimately the Claimant failed to demonstrate compliance at the appropriate time and there was therefore a valid basis for the Defendant's decision.

Allegation 10

126. This concerned the question of whether a RLMT had been required before a CoS was assigned to Mr Prasai. Although it was one of the stated grounds for revoking the licence, the Defendant has since conceded that the point was incorrect.

127. However, the Defendant argues that his decision was manifestly sustainable on other grounds. As I said at paragraph 82 above, that is plainly the case. Indeed, the Claimant has not sought to persuade me that this claim could succeed on the basis of allegation 10 alone. As was said in a similar context in *R (Liral Veget Training and Recruitment Ltd) v SSHD* [2018] EWHC 2941 (Admin) by Andrew Thomas QC at paragraph 59, section 31(2A) of the Senior Courts Act 1981 would be applied if necessary.

Allegation 11

128. During the compliance visit Ms Sehgal saw contracts of employment for the sponsored workers but noted that these were not signed. Accordingly the suspension letter drew the Claimant's attention to Appendix D 3 c) of the Guidance which states that an employer must keep the following for its sponsored workers:

> "A copy of any contract of/for employment/services between the sponsor and the migrant which clearly shows all the following:
>
> - the names and signatures of all parties involved – normally, this will only be you and the migrant
> - the start and end dates of the contract
> - details of the job, or piece of work the migrant has been contracted to do
> - an indication of how much the migrant will be paid"

The failure to keep signed contracts was identified as an Annex 6 breach.

129. The written representations said:

> "Please find enclosed copies of the Statement of Terms & Conditions of Employment contracts for the sponsored workers. These have been signed by the relevant parties and demonstrate that our client does have agree written terms and conditions … Our client therefore submits that they are in compliance …"

130. In the absence of any explanation for the lack of signed (and dated) documents at the time of the visit, the Defendant in the revocation letter drew the conclusion that the documents had been signed and dated only since, and as a result of, the visit and therefore that there had been a breach.

131. One of the late witness statements, by Mr Sivashanmugham, asserts that signed contracts were on the file at the time of the compliance visit. Ms Sehgal "had only seen the draft contracts" but could have been shown the signed contracts if she had asked to.

132. However, Ms Sehgal in her witness statement confirms that signed contracts were not on the file at the time of her visit. Even if I had allowed Mr Sivashanmugham's late statement to be admitted, I would have had to resolve this factual issue in the Defendant's favour for the reasons already explained.

133. Ms Patry's only other submission is that the Guidance does not specify that signed contracts must be available at the time of a visit. However, it does specify that they must be kept, and in my judgment their non-provision at the visit was a simple and sufficient basis for the Defendant's conclusion that they had not been kept.

Allegation 12

134. Appendix D 1 e) of the Guidance requires sponsors to keep:

> "A history of the migrant's contact details (UK residential address, telephone number, mobile telephone number). This must always be kept up to date."

135. At the compliance visit it was noted that the address held for Mr Venugopal was in Manchester, despite his working in Harrow. When asked about this, Mr Sivashanmugham said that Mr Venugopal lived in Harrow but could not explain why the address had not been updated. This again was identified in the suspension letter as an Annex 6 breach.

136. In the written submissions the Claimant's solicitors explained that Mr Venugopal was temporarily living with a friend and said:

> "The temporary address was recorded on his HR file and the same was shown to the compliance officer. Please find enclosed the evidence again."

The latter reference was to a typed document showing a "present address" in Manchester, a "temporary address" in Harrow and a "permanent address" in India.

137. The Defendant's case, stated in Ms Sehgal's witness statement, is that this information was not on the file at the time of the visit. This again appears to be a bald dispute of fact which, for the reasons already explained, can only be resolved in the Defendant's favour.

138. There was therefore a sufficient factual basis for the Defendant's conclusion that there had been a failure to keep an up-to-date address record.

Allegation 13

139. The Claimant kept records of the UK visas held by its employees. That reflected the requirement at paragraph 15.13 of the Guidance to "stop employing any migrants who for any reason are no longer entitled to do the job".

140. At the compliance visit Ms Sehgal checked the visa details held on employee files. She found that the copy of Mr Prasai's visa was illegible and the file copy of Mr Pannirselvam's visa was out of date, with an expiry date of 17 April 2016. In the suspension letter the Defendant therefore expressed the view that the Claimant did not maintain adequate processes or procedures in place to monitor the immigration status of its sponsored workers. This engaged Annex 6 i) which said that the Defendant may revoke a licence if:

> "As a result of information available to us, we are not satisfied that you are using a process or procedure necessary to fully comply with your sponsor duties."

141. With the written submissions the Claimant's solicitors provided copies of the staff rota for 3 months preceding the visit, pointing out that it included the name of each employee, the date of any visa expiration and their total hours worked.

142. The Defendant's conclusion in the revocation letter was that the Claimant:

> "161. … have not demonstrated any kind of monitoring system is in place other than the staff rotas which they state that the sponsorwed workers complete themselves. It is your client's responsibility as a sponsor to ensure that they accurately monitor their sponsored workers right to work, we do not believe that depending on their employees to provide them with this information in a timely manner is a reliable method of monitoring.
>
> 162. Furthermore, as they have failed to demonstrate that they retain historical and current copies of these documents we are not satisfied that this issue has been addressed."

143. Ms Patry attacks this conclusion as irrational, in the absence of any suggestion of any error or omission in the 3 months' rotas which were provided, not least because the Guidance does not specify any method by which this information is to be monitored.

144. Ms Smyth summarises this allegation as consisting of a lack of correspondence between the rota and some documents i.e. an illegible visa and an out-of-date visa. She concedes that this is the least significant of the Defendant's complaints.

145. I do not need to decide the hypothetical question of whether revocation would have been justified if this had been the only allegation of a breach of the Guidance. I will therefore merely observe that where evidence showed that visa expiry dates were correctly recorded, the existence of two errors in the filed documentation would have provided a very flimsy basis for such a decision, especially where those errors are not said to infringe a specific express requirement of the Guidance but are cited merely as evidence of an overall lack of process or procedure.

146. I am however entirely confident that undermining this allegation would not begin to undermine the validity of the Defendant's decision overall. In fairness to Ms Patry, she does not suggest otherwise.

Breach 14

147. At the compliance visit Ms Sehgal asked how staff daily attendance is monitored and was told that there is a rota on which employees place their initials on arrival at work. She was shown a weekly rota and observed that there was no record of the hours worked. She asked to see rotas for the previous 3 months which were said to be with the Claimant's accountant.

148. In the suspension letter the Defendant complained that these had still not been provided, and there was no information about any processes for arranging annual leave or sick leave, in breach of Appendix D 1 h) of the Guidance which requires an electronic or manual record of absences to be kept.

149. Copies of rotas for 3 months were provided with the written representations. The Claimant's solicitors pointed out that these included weekly totals of hours but did not comment on the point about absences for annual leave or sick leave.

150. In the revocation letter the Defendant noted that the rotas did not in fact show any absences for sick leave or annual leave, and there was no evidence to demonstrate any monitoring systems. The Defendant believed that the Claimant might only be relying on self-certification by employees, which it did not consider to be a reliable method.

151. At the hearing it was confirmed that the rotas indeed do not show any absence for any worker during the 3 months. Ms Patry's instructions were that this was because there was no sick leave or annual leave during that period. If there had been, it would have been marked with the letters "H" for holiday or "SL" for sick leave. Her case is simple, namely that the Claimant is required to keep a record and does so.

152. On balance it seems to me that the Defendant can justify including this allegation among its reasons for revocation. It was for the Claimant to satisfy the Defendant that it had a sufficient process in place to perform its duty to keep records: see Annex 6 i). The rotas provided were not sufficient to satisfy the Defendant, first because a lack of any sick leave or annual leave among a group of 10 workers during a period of 3 months was surprising, and second because if there were no absences, then those rotas could not provide any evidence of how absences were dealt with. It seems to me that it was for the Claimant to spot that omission and remedy it in an appropriate way, e.g. with rotas for some other period and/or evidence to confirm the lack of absences during the 3 months.

153. This again is a case of the Claimant failing to prove its compliance rather than a clear case of non-compliance.

Conclusion

154. For these reasons the Claimant's challenge very clearly fails. There was a proper basis for the Defendant's decision on each point (save the conceded allegation 10). Having considered the way in which each of the concerns was identified and responded to, I do not accept that the Claimant was deprived of a proper opportunity to deal with any of them. Many of them, alone, could have justified revocation of the sponsor licence. Collectively they very clearly justify revocation. In those circumstances, and given the terms of Annex 5, I do not consider that the Defendant was in breach of any duty to consider taking some step other than revocation.

155. The case emphasises that, as has been observed in previous judgments, sponsor status is a fragile gift which depends on absolute compliance with the requirements of the Guidance. Those requirements are stringent but not complicated. Sponsors must keep records which are comprehensive, accurate and clear. Just as importantly, they must produce those records when asked to do so. A response to a suspension letter is likely to be the last effective opportunity to deal with any concerns. In such a response a Claimant must prove its case on every point, even where it believes that it has already done so at a compliance visit or in correspondence. If it fails to do so, then disputing the facts in judicial review proceedings is inherently unlikely to remedy the omission, because the Court primarily reviews a decision on the basis of the information available to the decision-maker and also because, for the reasons explained above, disputes of fact in judicial review must usually be resolved in the Defendant's favour.

156. The claim must therefore be dismissed.

Postscript

157. Following circulation of this judgment in draft, the parties provided rival draft orders with supporting submissions. It was agreed that the claim will be dismissed and that there will be a costs order in the Defendant's favour, including an order for a payment on account of £25,000 pursuant to CPR 44.2(8). The Claimant sought (1) permission to appeal to the Court of Appeal and orders (2) continuing the interim relief order dated 16 August 2017 (suspending the effect of the licence revocation) until the outcome of any further application by it for permission to appeal and (3) staying the order for a payment on account of costs until 28 days after the determination of any such application.

158. I refuse permission to appeal against the order refusing to admit late witness statements and the order dismissing the claim, as in my judgment neither appeal would have a reasonable prospect of success.

159. As to the former, the meaning of Cockerill J's order (see paragraphs 17-18 above) is a straightforward matter of construction. As it was not complied with, refusal to admit the late statements was comfortably within this Court's discretion. And, as I said at paragraph 22 above, admitting the statements would not have changed the outcome because their contents were clearly insufficient to demonstrate any error on the Defendant's part.

160. As to the latter, the Claimant's further submissions have not persuaded me that it has any reasonable prospect of persuading the Court of Appeal that there is any error in this judgment, most if not all of which deals with fairly straightforward assessments of fact by the Defendant and with legal principles which are now well established.

161. In these circumstances I also do not think it right either to continue the interim relief or to stay the requirement to pay a sum on account of costs.

162. If this were a new application for interim relief, it seems to me that it would be bound to fail because of the lack of merit in the Claimant's substantive case. Having regard to that, and to the public interest in maintaining immigration control and to the fact that, as the Defendant points out, the Claimant can apply for a new sponsor licence, this is clearly not a case where interim relief should be continued.

163. As to the payment on account of costs, the general rule is that that an appeal shall not operate as a stay of any order or decision of the lower court unless the appeal court or the lower court orders otherwise: CPR 52.16. I have to consider whether there is a risk of injustice to one or both parties if the court grants or refuses a stay. In particular the Claimant contends that without a stay, the financial consequences of the order for its business are such that its appeal will be effectively stifled.

164. Both parties have referred me to *Goldtrail Travel Ltd v Aydin* [2017] UKSC 57, [2017] 1 WLR 3014, in which the Supreme Court held that if an appellant has permission to bring an appeal, it is wrong to impose a condition which had the effect of preventing him from bringing it or continuing it.

165. This is not quite that situation because I have refused permission to appeal, but the Claimant argues that its further application to the Court of Appeal for permission

similarly should not be stifled. It is clear from *Goldtrail* that where the financial stifling effect is disputed, the Court will consider the available evidence and will resolve issues e.g. of whether the necessary funding will be forthcoming from a company's owner or any other source. The Claimant here relies on a witness statement by its Director and owner, Mr Viswanatha. He says that the company's business has suffered during the period of over 2 years in which it has been unable to employ additional migrant workers and that an appeal could not be funded if a lump sum has to be paid now. He exhibits the company's accounts for the year ending 31 October 2017, emphasising that these show rising expenses and only a narrow profit margin for that year.

166. In my judgment that evidence falls well short of establishing that the payment on account of costs would prevent the making of a further permission application. The accounts concern a period much of which pre-dates the matters with which I am concerned, and a snapshot at 31 October 2017 is now well out of date. In any event, I note that at that time the turnover of the business appeared to be rising although its overall profits were somewhat down on the previous year. Meanwhile, none of this evidence touches on any possible methods of raising funds for a permission application other than from the company's profits. Nor is there any explanation of how the company funded the substantial judicial review hearing this year in spite of financial pressures.

167. Against the financial risk to the company, I have weighed my assessment of the case as not meriting a grant of permission to appeal. I have also had regard to the risk that if further unsuccessful legal proceedings cause the Claimant's financial position to worsen, that may jeopardise the ability of the Defendant to recover its costs. Conversely, if the Claimant eventually succeeds and it transpires that the payment on account should not have been made, there is no question of the Defendant being unable to repay it.

168. I will therefore make an order in the terms sought by the Defendant.