In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR/177/2020

In the matter of an application for Judicial Review

The Queen on the application of
Noor Sultan Siddiqui

Applicant

versus

Entry Clearance Officer

Respondent

ORDER

BEFORE Upper Tribunal Judge Blum

HAVING considered all documents lodged and having heard Mr M Biggs of counsel, instructed by My Legal Solicitors, for the applicant and Mr Z Malik of counsel, instructed by GLD, for the respondent at a hearing on 12 October 2020

IT IS ORDERED THAT:

(1) The application for judicial review is granted in limited part for the reasons in the attached judgment.

(2) The respondent's reliance on paragraph 320(7A) of the immigration rules is unlawful because the conclusion that the appellant was dishonest was arrived at in a procedurally unfair manner and because, even though the respondent was "not clear" as to the reasons for the applicant's answers in his interview, she concluded that he had been dishonest in circumstances indicating she only suspected him of dishonesty, contrary to **Balajigari [2019] EWCA Civ 673** (at [42] and [129]).

(3) The respondent's assessment of whether Sufi Naat singing constitutes the performance of religious duties, by reference to paragraph 111(d) of Appendix A of the immigration rules, is unlawful as she failed to take the previous grant of entry clearance to the applicant into consideration in her assessment and because she failed to give any explanation, in circumstances where one was called for, for treating this aspect of the two applications differently.

(4) The respondent was lawfully entitled to conclude that the applicant did not genuinely intend to undertake his role recorded by the Certificate of Sponsorship Checking Service, with reference to paragraph 245ZO(i). This finding was not infected by any procedural unfairness and is separate from and independent of the unlawful elements of the decision identified above. For these reasons I decline to quash the decision.

(5) Having considered the written submissions made by Mr Malik and Mr Biggs on the issue of costs, both received on 2 February 2021, and the further oral submissions from Mr Biggs on 8 February 2021, I consider that both parties have been partially successful in the judicial review challenge and in these circumstances, and applying

the authorities considered in **M v Mayor and Burgesses of the London Borough of Croydon** [2012] EWCA Civ 595 and the principles enunciated in that authority and **Bhata & Ors v SSHD** [2011] EWCA Civ 895 and **R (Munyua) v SSHD (Parties responsibility to agree costs)** [2017] UKUT 78 (IAC), I consider it appropriate to make no order as to costs.

(6) Permission to appeal is refused because the Tribunal did not arguably err in law in concluding that the applicant had a procedurally fair opportunity to address the respondent's concerns in respect of the applicant's intentions, despite finding that there had been procedural unfairness in respect of the respondent's reliance on paragraph 320(7A), or in its decision not to quash the challenged decision. The respondent's assessment of the applicant's intentions under 245ZO(i) was separate from and independent of the unlawful elements of the decision. Given the absence of any probative evidence relating to the nature of Sufi Naat singing, the Tribunal did not arguably err in law in concluding that the respondent's assessment was one rationally open to her, subject to the unlawful elements of her decision summarised at (3) above.

Signed: *D.Blum*

Upper Tribunal Judge Blum

Dated: **8 February 2021**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 08/02/2021

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days**

of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of Noor Sultan Siddiqui

Applicant

v

Entry Clearance Officer

Respondent

Upper Tribunal Judge Blum

Application for judicial review: substantive decision

This decision follows a remote hearing in respect of which there has not objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

Having considered all documents lodged and having heard the parties' respective representatives, Mr M Biggs of Counsel, instructed by My Legal Solicitors, on behalf of the applicant and Mr Z Malik, of Counsel, instructed by the Government Legal Department, on behalf of the respondent, at a remote hearing at Field House, London on 12 October 2020.

Decision: the application for judicial review is granted in limited part

Background

1. The applicant, a male national of Pakistan born on 29 October 1981, challenges the respondent's decision of 22 October 2019 ("the Decision") refusing him entry clearance as a Tier 5 (Religious Worker) Migrant, a category within the Points Based System (PBS) part of the immigration rules.

2. On 6 October 2016 the applicant applied for entry clearance as a Tier 5 (Religious Worker) Migrant to work as a Sufi Naat singer employed by the International Naat Association, based in Manchester. The nature of Sufi Naat singing is a matter in dispute but it can generally be described as religious singing, and this was a term used by the applicant in his application. Entry clearance was granted on 19 October 2016, valid until 14 November 2018. The applicant entered the UK

pursuant to this entry clearance and returned to Pakistan on 23 February 2017. On 23 May 2018 the respondent curtailed the grant of leave to enter so as to expire on 8 July 2018. The applicant's leave was curtailed because he ceased to be employed by the International Naat Association.

3. On 7 November 2018 the applicant applied for entry clearance as a Tier 5 (Religious Worker) Migrant. He was interviewed on 5 December 2018 and the application was refused on 13 December 2018. The basis of the refusal included a finding that the applicant denied having a Facebook page in his December 2018 interview when it was believed he did have one. In his interview the applicant also stated that he never attempted to get married in the UK, but this was said to be inconsistent with chat logs seen on the relevant Facebook account (a public link was provided in respect of the relevant messages found on a Facebook page). In his interview the applicant was also asked whether he had ever declared employment in any other field, to which he said "no, I haven't." In a previous visit visa application made in 2016, which had been refused, the applicant declared his profession as "Project Development Manager". The respondent considered that the applicant had made misrepresentations and the application was refused under paragraph 320(7A) of the immigration rules.

4. On 15 January 2019 the applicant submitted a combined Pre-Action-Protocol Letter and request for Administrative Review challenging the 13 December 2018 decision. On 7 February 2019 the respondent agreed to reconsider the application. A further interview took place on 11 April 2019. The application was refused on 28 August 2019. The respondent noted that the applicant's Certificate of Sponsorship (COS) was issued in the Tier 5 (Religious Worker) category. The COS detailed his job title as "Sufi Naat Singer" and the relevant Job Type used in the application, as detailed in Appendix J of the immigration rules, was '3413 Actors, entertainers and presenters'. The respondent noted that paragraph 111(d)(i) of Appendix A of the immigration rules (dealing with the attributes for Tier 5 (Temporary Worker) Migrants, and in particular, the requirements for a valid COS reference number) required the COS to have been issued to perform 'religious duties', but the Job Type detailed in the application did not, in the respondent's view, relate to anything covered by 'religious duties'. Whilst the respondent accepted that Sufi Naat singing was devotional, given the job code and job description provided by the applicant's sponsor she was not satisfied that the work the sponsor intended the applicant to do could be described as "religious duties" as opposed to working as a cultural performer, which would require a COS issued in the Tier 5 (Creative) category.

5. The respondent additionally found that the applicant had not submitted any financial documentation in order to evidence that he had been in possession of funds equivalent to £945 for 90 consecutive days.

6. The respondent also maintained that, during the applicant's interview on 11 April 2019, the answers he gave regarding his proposed working hours were vague and he appeared to be unclear about his working pattern and location of work until his arrival in the UK. The respondent was not satisfied that the applicant demonstrated how he proposed to work his contracted 30 hours per week given his answer that there would be one program every 12 days. The

respondent expected that a genuine Tier 5 Religious Worker would have a wider knowledge of his working times and work locations before accepting the role. The respondent further noted that the applicant had been employed by Ascon Engineers in 2012, even though he stated in his 2019 interview that he had been employed by them from 2015 to 2016. The respondent found that the applicant had not been honest about his previous work history and this left the respondent in doubt that the applicant was accurately presenting his personal circumstances in Pakistan, and therefore his intentions concerning his entry to the UK.

7. The respondent then noted that in his 2019 interview the applicant said he had previously worked in the UK as a Tier 5 Religious Worker with the International Naat Association, that he worked for them for just 2 months and that when the work finished he returned to Pakistan and "… they were never back in touch with me." The applicant was then asked why the Association cancelled his visa. He answered, "I don't know I had no contact with them after that." He was then asked, "did you try and get in contact with them?" The applicant answered, "No I didn't try I had time and work here so I felt it wasn't necessary." The interviewer then asked, "so what happened after 2 months did you return after your own accord or did they tell you they no longer need you?" The applicant answered, "I returned from work as we do routinely then they never got back in touch with me." According to checks undertaken by the Home Office the International Naat Association made contact with the applicant and informed him of the reasons why they were not inviting him back to the UK. The respondent maintained that the applicant had been given opportunities in interview to explain the background to this but that he chose not to. The respondent considered the applicant's answers to be a false misrepresentation.

8. The respondent additionally considered there to be discrepancies between the job advert for the position occupied by the applicant and the applicant's employment contract with his new sponsor in respect of the annual salary, the nature of the advert (which indicated that the job was permanent and did not state that it was accepting applicants from overseas), and in respect of the job location (the advert indicated that the job location was in London but the contract indicated that the applicant would perform at "mosques all over the United Kingdom"). These discrepancies led the respondent to doubt the credibility of the proposed employment. The application was therefore refused under paragraph 245ZO(i) of the immigration rules (requiring an applicant to genuinely intend to undertake the role recorded by the COS Checking Service) because the respondent was not satisfied that the applicant was genuinely seeking to undertake the proposed role.

9. On 20 September 2019 the applicant served a combined Pre-Action-Protocol Letter and application for Administrative Review challenging this decision. On 22 October 2019 the respondent amended the reasoning in the 28 August 2019 decision, which was otherwise in the same terms as the decision dated 28 August 2019, by adding a sentence relying on paragraph 320(7A) of the immigration rules at the end of the paragraph dealing with the answers given by him in interview relating to his previous employment with the International Naat Association.

10. At the end of the Decision the respondent stated,

> If you believe that the decision made by the Entry Clearance Officer was incorrect you may apply for an Administrative Review of your case.

11. The Decision then provided information about the process of Administrative Review, the options available to the applicant and how to explore those options.

12. It is the respondent's position that her decision attracted a further right to Administrative Review. The applicant did not submit a further application for Administrative Review and instead served a Pre-Action-Protocol Letter on the respondent dated 24 November 2019 challenging the lawfulness of the Decision, and subsequently lodged this judicial review claim.

Summary of legal challenge

13. The applicant's legal challenge can be summarised as follows.

    (i) Ground 1: The Decision was procedurally unfair, both in respect of the respondent's reliance on paragraph 320(7A) and in respect of the respondent's conclusion that the applicant provided false information in evaluating the genuineness of his proposed employment generally.

    (ii) Ground 2: The respondent acted Wednesbury unreasonably and/or failed to provide legally adequate reasoning in concluding that the applicant fell for refusal without adequately considering whether the applicant was dishonest in providing incorrect information when relying paragraph 320(7A).

    (iii) Ground 3: The respondent misinterpreted or misapplied the relevant immigration rules (paragraph 245ZO(i) and paragraph 111(d)(i) of Appendix A), and acted Wednesbury unreasonably in concluding that the applicant was not entitled to any points for the Certificate of Sponsorship (COS) because the job code and description provided by his employer were for the creative sector and not in respect of religious duties.

    (iv) Ground 4: The respondent acted Wednesbury unreasonably by concluding that she was not "satisfied on the balance of probabilities that [the applicant was] genuinely seeking to undertake" his proposed employment for the reasons given in the Decision.

14. The applicant maintains that relief should not be refused in the Tribunal's discretion because Administrative Review was not an adequate alternative remedy.

15. In granting permission at the hearing of the renewed application for permission on 11 June 2020 Upper Tribunal Judge Keith stated,

> The respondent arguably erred in law in treating the applicant's application as not complying with paragraphs 245ZO(i) and paragraph 111(d)(i), based on her view that the role of a performer reciting devotional poems dedicated to the Prophet Mohammed could not properly fall within the Tier 5 (Religious Worker) scheme; and in arguably failing to put the issue of alleged deception to the applicant during interview. While there does not appear to be any 'sound recording' of the interviews, the respondent arguably erred in failing to provide him with evidence from her records, said to relate to correspondence from International Naat Association, without which he was arguably unable to meet the allegations, beyond a bare denial. I also regard as arguable, at this stage of permission, that the avenue of Administrative Review would not provide an adequate remedy where the applicant would be seeking to overturn a decision already made about deception; and in circumstances where the respondent has made no disclosure of its records relating to its investigations. While I have granted permission on all grounds, it remains open to the respondent to argue at the substantive hearing that administrative review was an adequate remedy. All grounds will be considered at the substantive hearing.

16. The Detailed Grounds of Defence were accompanied by a statement from Laura Barrett dated 29 July 2020. Ms Barrett is an Entry Clearance Officer. Her statement refers to a telephone call she had on 17 April 2019 with Mr Muhammad Khushtar of the International Naat Association, the applicant's former employer. Exhibited to her statement is a note of that telephone call. The note indicated that Mr Khushtar contacted the applicant after he returned to Pakistan following the first two months of his employment with the International Naat Association. Mr Khushtar informed the applicant that, as a result of his conduct, he was not welcome back and was asked to return his BRP card. Mr Khushtar said he sent the applicant a letter and told him about concerns that the applicant may be planning to marry in the UK.

17. The applicant was granted limited permission to amend his grounds to reflect the concerns of Judge Keith in granting permission to proceed with the judicial review challenge and to engage with the issue of the availability of an alternative remedy, and to serve a statement dated 17 August 2020. He was refused permission to the extent that the amended grounds challenged the lawfulness of the Administrative Review procedure as this could not be pursued in the Upper Tribunal[1]. In his statement the applicant asserted, *inter alia*, that he had indirectly received a message in 2017 from Muhammad Khushtar to return his BRP (Biometric Residence Permit) as this was required as part of the employers responsibilities, and he denied having ever been informed that his employment was being terminated due to concerns regarding his character and intentions. The applicant claimed that Muhammad Khushtar had lied in an effort to tarnish his reputation.

The applicant's submissions

18. I summarise the applicant's submissions, as detailed in Mr Biggs' skeleton

[1] Pursuant to paragraph 3(i) of the direction transferring judicial review to the Upper Tribunal dated 21 August 2013 (as amended on 17 October 2014), the Upper Tribunal has no jurisdiction to entertain a judicial review application that includes a challenge to the validity of the immigration rules.

argument and his oral submissions.

Alternative remedy

19. The applicant contends that the availability of Administrative Review was not an adequate/effective/suitable (all of which are used as synonyms) alternative remedy to judicial review (relying on, *inter alia*, **Ahsan v SSHD** [2017] EWCA Civ 2009, at [3], [35], [82], [91], and [95] – [98]; **R (on the application of Cart) & R (on the application of MR (Pakistan) (Appellant) v The Upper Tribunal & SSHD (Respondent)** [2011] UKSC 28, **Kay v Lambeth LBC** [2006] UKHL 10, and **R(SSHD) v First-tier Tribunal (IAC) (Litigation Privilege; First-tier Tribunal)** [2018] UKUT 00243 (IAC), at [26]). In evaluating whether an alternative remedy is 'adequate' or effective it is necessary to ask whether it provides a procedure for determining the disputed issues in a manner compatible with the applicant's common law constitutional entitlement to access justice, the demands of procedural fairness, and the procedural demands of any human rights in play. I was invited to consider whether an adequate remedy existed in respect of each of the substantive issues in contention. If some of the issues could be adequately considered by way of an alternative remedy, but others could not, I was invited to consider whether it would be appropriate in all the circumstances to allow all the issues to be determined in the judicial review proceedings.

20. In respect of the Administrative Review procedure, the applicant contends that it is a "limited and flawed system". He contends,

    a) that the system posits the respondent as judge in her own cause and therefore lacks sufficient independence;

    b) the Administrative Review decision maker has no legal training or knowledge and it is not appropriate for this decision-maker to determine issues that depend upon legal arguments;

    c) the grounds that must be satisfied before Administrative Review is granted are very limited and don't match the legal requirements of the judicial review grounds advanced in this case; although a "case working error" includes, in respect of paragraph 320(7A) in the instant case, the view that the initial decision was "wrong" and permits new evidence to be provided to address this, the definition excludes reliance upon procedural fairness, or indeed any of the other grounds of review advanced in this application. Administrative Review cannot accommodate the applicant's criticism of the dishonesty finding because there is no facility to obtain disclosure of the 'checks' and no facility to assess the fairness of the interview. There is also said to be no right to contend that the decision under Administrative Review is not in accordance with the law.

    d) Even when new evidence can be provided, it can only be advanced on paper. Administrative Review is not an adversarial procedure allowing the applicant to be represented and Article 8's procedural aspect calls for a procedure for hearing oral evidence when necessary

in order to provide an effective and procedurally fair remedy.

e) The time limit for applying for Administrative Review is short, usually only 14 days, or 28 days in this case, and there is no scope for supplementing submissions and evidence submitted within that time by further materials. Moreover, where an applicant requires disclosure of important materials in order to have a fair chance at success in the Administrative Review there is no time, nor procedure, for such materials to be requested and provided.

21. The applicant contends that he acted reasonably in not pursuing Administrative Review in light of his two previous applications. He was entitled in the circumstances to conclude that the respondent was not prepared to address this challenge to the Decision with an "open mind" and he had spent enough time, money and effort on the applications. The option of Administrative Review would not have cured the procedural unfairness that partly stemmed from the failure of the respondent to disclose the information upon which she relied to support her finding of dishonesty and her finding that the applicant's proposed employment was not genuine. If the Tribunal were to refuse relief or permission in this case it would be acting unlawfully by failing to respect the applicant's constitutional entitlement to effective access to justice, and to a procedurally fair decision-making process.

Ground 1

22. Mr Biggs relied on a number of authorities including, *inter alia*, **R v Hackney London Borough Council, ex p Decordova** (1995) 27 HLR 108, **R (Citizens UK) v SSHD** [2018] EWCA Civ 1812, **R v SSHD ex p Doody** [1994] 1 AC 531, and **Balajigari** [2019] EWCA Civ 673 to support his submission that the applicant was entitled to be addressed of the respondent's concerns relating to his honesty and his intentions. Fairness required the allegations of dishonesty to be put to the applicant in advance of the decision and for there to be adequate disclose of material upon which the respondent relied to enable the applicant to deal with those allegations. The applicant provided a response to the allegation of dishonesty in his witness statement dated 17 August 2020 and his explanation was plausible. Nor was such a duty confined to allegations of dishonesty (**re HK (An Infant**) [1966] 2 QB 617, **Gaima v SSHD** [1989] Imm A.R. 527). There was nothing impractical about giving the applicant notice in advance of the respondent's concerns as to his credibility and honesty. The availability of the Administrative Review procedure could not cure any procedural unfairness. Although new evidence could be provided in the Administrative Review procedure, this was insufficient to repair what would otherwise be a procedurally unfair decision and the ability to provide further evidence was illusionary given the absence of any provision to obtain disclosure. The applicant did not have a fair opportunity of responding to the reasons in the Decision without adequate disclosure of the evidence supporting those reasons, which were only provided belatedly.

23. Mr Biggs submits that the duty to provide the applicant with the gist of the case that he had to answer, including the concerns underpinning the respondent's

view that the applicant's proposed job was not genuine, extended in this case to the material disclosed with the Detailed Grounds of Defence, and in particular, the record of "Home Office checks". An Administrative Review would have been unable to cure the procedural fairness as the applicant was not provided with the information and/or documents necessary for him to fairly respond to the respondent's allegations in advance of the Decision or in time to apply for Judicial Review.

Ground 2

24. Mr Biggs contends that a finding of deception should mirror the "anxious scrutiny" approach applicable in respect of decisions concerning asylum and human rights, and that this approach is consistent with **R(Giri) v SSHD** [2015] EWCA Civ 784, at [32]. The sentence in the Decision immediately before the respondent's conclusion referring to paragraph 320(7A) indicated that she was unclear as to the reason for the provision of false information, and before that she irrationally expressed certainty as to facts the applicant was not able to challenge. If it was "not clear" why the applicant provided what was considered to be inaccurate information, it could not reasonably and lawfully be concluded that the reason was dishonesty.

25. Nor was it rational to conclude that the applicant behaved dishonestly on the basis that the "checks" had "confirmed" that the previous employer had contacted and informed the applicant of the reasons why he was not being invited back. A rational decision maker would have to conclude those "checks" did not *confirm* anything at all, not least because the applicant was given no opportunity to comment upon the information that was being implicitly refer to (i.e. the telephone conversation between Mohammed Khushtar and Laura Barrett, and presumably the enquiries that follow that conversation referred to in the 18 April 2019 CRS note). In reliance on **Balajigari** the applicant contends that it was an error of law and unreasonable for a decision-maker to proceed from concerns giving rise to a suspicion of dishonesty to the conclusion that there had been dishonesty without considering and determining why incorrect information may have been given.

26. Nor did the respondent make any specific findings that the applicant behaved dishonesty (applying **AA Nigeria v SSHD** [2010] EWCA Civ 773) in respect of the key matters supporting the refusal under paragraph 320(7A). The only reference to dishonesty related to the applicant's previous work history and there was no similar finding in respect of the other factors relied upon. There was therefore a failure to make an adequate and adequately reasoned finding in respect of the applicant's alleged dishonesty. Nor could the respondent rely on paragraph 320(7A) in respect of her concerns relating to the applicant's previous work history given the structure of the decision and the fact that the applicant's earlier work history in Pakistan was immaterial to the application.

Ground 3

27. The applicant contends that the respondent was "wholly unreasonable" to doubt that the applicant was a successful Sufi Naat singer and that she failed to

consider, as a material consideration, that the applicant was previously granted entry clearance as a Sufi Naat singer in the same Tier 5 category. The inconsistent treatment in contrast with the applicant's earlier successful entry clearance application needed to be explained. Given that the applicant was being employed by a mosque, which would have no reason to employ "a cultural performer", it was irrational to conclude that his role was not in respect of "religious duties". Any reasonable understanding of the nature of a Sufi Naat singer had to recognise that it is a form of devotional singing and fell within the definition of "religious duties". It was therefore unreasonable to say that the proposed work did not fall within the scope of the Tier 5 (Religious Worker) category. Moreover, properly interpreted and applying the principles enunciated in **Mahad** [2009] UKSC 16, the concept of "religious duties" under the immigration rules, with particular reference to paragraph 111(d) of Appendix A, encompassed Sufi Naat singing.

Ground 4

28. The respondent's conclusion that the applicant was not genuinely seeking to undertake his employment with the Hounslow Jamia Masjid and Islamic Centre was Wednesbury unreasonable as the "discrepancies" upon which the respondent relied were not significant and could not constitute sufficient grounds to render the other grounds of review immaterial. They provided no rational basis for the respondent's decision. The respondent's concerns relating to the alleged vagueness of the applicant's answers regarding his working hours, his working pattern and location, were adequately addressed in the 15 January 2019 Administrative Review application which resulted in the reconsideration of the application for entry clearance. The respondent, it is submitted, ignore these representations and therefore failed to consider material matters. The applicant's previous work history was also relevant to his intentions but this was not considered by the respondent. A similar point was made in respect of the applicant's answers in his first interview. In light of all the representations and all the material before the respondent there was said to be an inadequate basis for her conclusion as to the genuineness of the applicant's proposed employment.

29. The November 2019 Pre-Action-Protocol Letter explained that the sponsor complied with the resident labour market test by slightly increasing the advertised salary as this would incentivise potential employees within the resident labour market to apply for the position, and, as the advert was directed to the resident labour market, it was natural and correct to state that it was for a permanent position. These points were not considered in the Decision.

30. Neither the judicial review grounds nor Mr Biggs' skeleton argument dealt with the refusal of entry clearance based on the applicant's failure to achieve the points necessary to meet the maintenance requirements in Appendix C of the immigration rules. In his response to Mr Malik's submissions and in further written submissions he was permitted to make following the hearing Mr Biggs submitted that there was no need for applicant to demonstrate that he held £945 for 90 days in his bank account because his sponsor was A-rated and indicated in the application form that it would maintain the applicant, as permitted by

paragraphs 8 – 9 of Appendix C. For reasons that will become apparent it is not necessary for me to set out his submissions in any detail.

The respondent's submissions

31. I summarise the respondent's submissions, as detailed in Mr Malik's skeleton argument and his oral submissions.

Alternative remedy

32. The Tribunal should decline to entertain the judicial review claim without considering its merits on the grounds that an alternative remedy could have been pursued. The Decision was an "eligible decision" as defined in paragraph AR5.2(a) of Appendix AR (the Appendix of the immigration rules dealing with Administrative Review). It was therefore open to the applicant to apply for Administrative Review on the basis that the respondent made a "case working error" (paragraphs AR2.3 and AR2.11). A "case working error" included a situation where the immigration rules are incorrectly applied. Under paragraphs AR2.4(a) and AR2.11(a) it was open to the applicant to adduce further evidence in support of the Administrative Review application, and a successful application could have resulted in the withdrawal of the respondent's decision.

33. The respondent submits, in light of the Explanatory Memorandum that accompanied the introduction of Appendix AR into the immigration rules and the timing of its introduction, and in light of the abolition of rights of appeal against refusals of entry clearance and leave to remain (other than in respect of protection and human rights cases), and in light of the authority of **Cart v Upper Tribunal** [2011] UKSC 28, that it was "tolerably clear that administrative review was seen by the legislature as providing a remedy against refusals in cases of this nature in substitute of a right of appeal." The right to apply for Administrative Review was therefore sanctioned by Parliament as an alternative remedy to be used in cases of this nature, and as the applicant chose not to apply for Administrative Review, the Tribunal should decline to entertain his judicial review claim. This approach was supported by the analysis of the Vice President of the Upper Tribunal in **R (Sukwinder Singh)** (JR/13615/2015).

34. It is well settled that the issue as to the alternative remedy is to be assessed by reference to the situation at the date of the impugned decision. If there was an alternative remedy available when the impugned decision was taken, judicial review, in principle, is not available and an Administrative Review application could, in any event, be made under paragraph 34R(1)(c) of the immigration rules with an application for an extension of time.

Ground 1

35. The precise content of the duty to act fairly varies according to the particular decision-making context in which it falls to be applied (**E-K (Ivory Coast) v SSHD** [2014] EWCA Civ 1517, at [27]), and what the requirements of fairness demand when a decision has to be made affecting the rights of individuals depends on the character of the decision-making body, the kind of decision it

has to make and the statutory or other framework in which operates (see Lord Bridge's judgment in **Lloyd v McMahon** [1987] AC 625).

36. The respondent contends that reliance on **Balajigari** is misplaced as the Court of Appeal was dealing with a decision made under paragraph 322(5) of the immigration rules that related to a refusal of Indefinite Leave to Remain ("ILR"). Among the reasons for concluding that, as a matter of procedural fairness, an individual should be given an opportunity to respond to a suspicion that they have been dishonest before the SSHD concludes that there has been dishonest conduct, was that the consequences of the refusal of ILR could "be very serious indeed" [53]. The consequences, with reference to particular provisions of the Immigration Act 1971 and the Immigration Act 2014, were considered at [81] and included the person committing a criminal offence if they remained in the UK without leave, severe restrictions on their right to work and rent accommodation and to have a bank account, restrictions on holding a driving licence and access to medical treatment. Although this applicant may face a 10 year ban on respect of further entry clearance applications it was open to him to make a fresh application adducing any evidence relevant to the issue of dishonesty and this evidence would be fully considered.

37. Mr Malik distinguishes present case from **Balajigari** because the present applicant is not in the UK and the considerations set out by Underhill LJ do not apply. **Balajigari** made no reference to cases of entry clearance and there was no authority to suggest that the principles considered in **Balajigari** should be extended to cover an entry clearance application. Nor was there any obligation on the respondent to disclose the material on which a decision was based prior to or at the time that the decision is made. **Mehmood** [2015] EWCA Civ 744, at [72], indicated that the 'gist' of the evidence had to be provided in support of a decision, but there was no suggestion that the actual evidence required disclosure.

38. Mr Malik further submits that, unlike the appellants in **Balajigari**, the present applicant was able to adduce further evidence at the Administrative Review stage to show that the respondent's decision was incorrect. By analogy with **Ashfaq (Balajigari: appeals)** [2020] UKUT 226 (IAC), the ability of the applicant to adduce further evidence at the Administrative Review stage could correct any defect in the original decision-making process. There was no procedural unfairness in relation to the interview and it was conducted in compliance with guidance given in **R(Mushtaq) v ECO (ECO - procedural fairness) IJR** [2015] UKUT 224 (IAC) and **R(Anjum) v ECO (entrepreneur-fairness generally)** [2017] UKUT 406 (IAC).

Grounds 2, 3 and 4

39. The respondent contends that, applying a Wednesbury unreasonable approach, her decision was one she was reasonably entitled to reach for the reasons given. In particular, she was entitled to find the applicant answers in interview to be unsatisfactory and to find that they were vague and unclear as to his proposed working hours, working pattern and location of work. He was unable to demonstrate how he proposed to work for the contracted 30 hours per week,

and the discrepancies in respect of his employment by Ascon Engineers entitled her to doubt that he had accurately presented his personal circumstances.

40. The evidence set out in Laura Barrett's witness statement and the exhibited telephone note showed that the applicant's former employer informed him that his services were not required. This was inconsistent with the information given by the applicant in his interview that there was no such contact. The applicant's focus on the term "not entirely clear" had to read in its context; the respondent was saying that the applicant had misrepresented facts and there was deception, but the motivation for the deception was "not entirely clear".

41. There were material discrepancies between the job advert and the employment contract namely;

    a) The advert stated an annual salary of £21,000 whereas the contract stated an annual salary £19,500;

    b) The advert stated that the job was "permanent" and did not state that applications from overseas were accepted whereas the applicant, as recorded in the contract, was a resident of Pakistan; and

    c) The advert stated that the job location was "London" whereas the contract required the services to be provided "all over the United Kingdom".

42. It was rational for the respondent to conclude that the applicant was not genuinely seeking to work on the proposed role and that he made false representations in his interview. This conclusion was rationally open to the respondent even if her findings of dishonesty were not justified.

43. The respondent was rationally entitled to conclude that the SOC Code and the job description used in the applicant's application related to those intending to work in the creative sector and that the applicant should have made an application under the Tier 5 (Creative) category. There was no evidence that devotional singing amounted to "religious duties" and, given that it was incumbent on the applicant to demonstrate that he met the requirements of the immigration rules, there was no proper basis to make a decision in the applicant's favour in the absence of probative evidence such as that from an expert. This Tribunal did not have the precise evidence that had been before the ECO in respect of the applicant's earlier successful Tier 5 application and it was open to take a point in a later application that had not been taken in an earlier one. In respect to the principle of 'consistency', Mr Malik drew my attention to **Chirairo, R (on the application of) v SSHD** [2016] EWCA Civ 77.

44. Mr Malik submitted that the respondent independently refused the application on the basis that the applicant failed to meet the requirements for the scoring of points for maintenance under paragraph 245ZO(c) of the immigration rules, with reference to paragraphs 8-9 of Appendix C. In further written submissions that he was permitted to make following the hearing Mr Malik contended that the requirements that the applicant had to have a certain level of funds in his account over a particular period of time was obligatory for all applicants and

that he did not meet this requirements. For reasons that will become apparent it is not necessary for me to deal any further with this submission.

Relevant legislative framework

45. The applicant seeks entry clearance under Tier 5 of the Points Based System (PBS) as a Temporary Worker, within the particular subcategory of Religious Worker. Paragraph 245ZO(a) of the immigration rules requires that an applicant must not fall for refusal under the general grounds of refusal. Paragraph 245ZO(b) of the immigration rules requires an applicant to have been awarded a minimum of 30 points under paragraphs 105 to 112 of Appendix A, and paragraph 245ZO(c) requires an applicant to have been awarded minimum of 10 points under paragraphs 8 to 9 of Appendix C.

46. Paragraph 245ZO(i) reads, in material part,

> Unless the applicant is sponsored in the Seasonal Worker sub-category of the Tier 5 (Temporary Worker), the Entry Clearance Officer or Immigration Officer must be satisfied that: (i) the applicant genuinely intends to undertake, and is capable of undertaking, the role recorded by the Certificate of Sponsorship Checking Service; and (ii) the applicant will not undertake employment in the United Kingdom other than under the terms of paragraph 245ZP(f)(iii), […]

47. Paragraph 245ZO(j) states,

> To support the assessment in paragraph 245ZO(i), the Entry Clearance Officer or Immigration Officer may: (i) request additional information and evidence, and refuse the application if the information or evidence is not provided. Any requested documents must be received by the Home Office at the address specified in the request within 28 calendar days of the date the request is sent, and (ii) request the applicant attends an interview, and refuse the application if the applicant fails to comply with any such request without providing a reasonable explanation.

48. Paragraph 111(d) of Appendix A states, in material part,

> In addition, a Certificate of Sponsorship reference number will only be considered to be valid:
> …
>
> (d) where the Certificate of Sponsorship Checking Service entry shows that the Certificate of Sponsorship has been issued in the Religious Workers subcategory, if the entry confirms:
>
> > (i) that the applicant is being sponsored to perform religious duties, which:
> >
> > > (1) must be work which is within the Sponsor's organisation, or directed by the Sponsor's organisation,
> > >
> > > (2) may include non pastoral work, and
> > >
> > > (3) does not include work which falls under the role of a minister

of religion, as set out in paragraph 169(i) of these Rules

49. The COS provided by the applicant's sponsor in the Tier 5 (Religious Worker) category detailed his Standard Occupational Classification (SOC) code as 'Job Type 3413 Actors, entertainers and presenters'. The following is contained in Appendix J of the immigration rules, which sets out the skill level and appropriate salary rate for jobs, in respect of Job Type 3413;

> Example job tasks:
> • studies script, play or book and prepares and rehearses interpretation;
> • assumes character created by a playwright or author and communicates this to an audience;
> • performs singing, comedy, acrobatic, illusion and conjuring routines;
> • trains animals to perform entertaining routines and may perform with them;
> • introduces and presents radio and television programmes, reads news bulletins and makes announcements;
> • conducts interviews and prepares reports for news broadcasts, current affairs programmes and documentaries;
> • plays pre-recorded music at nightclubs, discotheques, and private functions.
>
> Related job titles:
> • Actor
> • Disc jockey
> • Entertainer
> • Presenter (broadcasting)
> • Singer
>
> Salary rates:
> New entrant: £20,400
> Experienced worker: £25,300

50. Paragraph 320 of the immigration rules contains a list of mandatory grounds of refusal of entry clearance, including paragraph 320(7A), which is in the following terms:

> Where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application.

51. Paragraph 320(7B)(d)(ii) of the immigration rules provides that, where an applicant has previously breached the immigration rules by using deception in an entry clearance application, they will be refused entry clearance unless the deception occurred more than 10 years previously.

52. According to the definitions in the immigration rules 'deception' in paragraph 320(7B) of the immigration rules means "making false representations or submitting false documents) whether or not material to the application), or failing to disclose material facts.

53. Appendix AR to the immigration rules sets out the provisions of the Administrative Review procedure. AR2.3 reads:

> The eligible decision will be reviewed to establish whether there is a case working error, either as identified in the application for administrative review, or identified by the Reviewer in the course of conducting the administrative review.

54. According to AR2.11(a)(i) a 'case working error' includes a situation where the original decision maker's decision to refuse an application on the basis of paragraph 320(7A) was incorrect.

55. AR5.2(a) indicates that, with certain exceptions that are not material to this challenge, an eligible decision is a refusal of an application for entry clearance made on or after 6th April 2015 under the immigration rules.

56. AR2.4 reads, in material part:

> The Reviewer will not consider any evidence that was not before the original decision maker except where: (a) evidence that was not before the original decision maker is submitted to demonstrate that a case working error as defined in paragraph AR2.11 (a), (b) or (c) has been made; […]

Was Administrative Review in this case an adequate alternative remedy?

57. There was no dispute between the parties as to the appropriate test for assessing whether an alternative remedy exists. In **R(C) v FSA** [2012] EWHC 1417 (Admin)[2], having considered a number of relevant authorities, Silber J stated, at [89]:

> These cases show (a) that judicial review will not be granted where there is an alternative remedy available as long as it is in Lord Widgery's words in the Royco case [R v Hillingdon LBC, ex p Royco Homes Limited [1974] QB 720, at 728] "equally effective and convenient" or in Taylor LJ's words in Ferrero [R v Birmingham City Council, ex parte Ferrero Limited [1993] 1 All ER 530] "suitable to determine" the issue and (b) judicial review can be brought where the alternative remedy is in Lord Denning's words in the Peachey case "nowhere near so convenient, beneficial and effectual."

58. In **R (on the application of Cart) & R (on the application of MR (Pakistan) (Appellant) v The Upper Tribunal & SSHD (Respondent**) [2011] UKSC 28 Lord Phillips stated, at [71]:

> The power of the High Court to conduct judicial review subsists alongside these statutory provisions for appeal. It is not, however, the practice of the Court to use this power where a satisfactory alternative remedy has been provided by Parliament.

59. In **Ahsan v SSHD** [2017] EWCA Civ 2009, which concerned individuals accused of dishonesty in obtaining TOEIC English language tests, the alternative remedy (which was an out-of-country right of appeal) needed to be 'adequate' (at [35]).

[2] Although Silber's J decision was overturned on appeal to the Court of Appeal, his distillation of the principles relevant to alternative remedies was not the subject of criticism

Then at [95] Underhill LJ stated:

> In my view Parliament cannot be taken to have intended that access to judicial review should be unavailable in a case where it is established that the statutory appeal procedure would not afford effective access to justice.

60. In **R (on the application of the SSHD) v First-tier Tribunal (Immigration and Asylum Chamber) (Litigation Privilege; First-tier Tribunal)** [2018] UKUT 00243 (IAC) the Tribunal referred, at [23] and [26], to the need for a "suitable alternative remedy."

61. The words "adequate" and "effective" and "suitable" have all been used in the above authorities and decisions to summarise the principle requirement of the alternative remedy. I accept Mr Biggs' submission, which was not challenged by Mr Malik, that these words are synonyms and do not disclose different tests. I will use the term "adequate" for the remainder of this decision.

62. Where an adequate alternative remedy exists the Tribunal or Court with a supervisory jurisdiction will not ordinarily allow an applicant to proceed by way of judicial review, save in exceptional circumstances (e.g. **R (Christopher Willford) v FSA** [2013] EWCA Civ 677, at [36]). In **R (on the application of the SSHD) v First-tier Tribunal (Immigration and Asylum Chamber) (Litigation Privilege; First-tier Tribunal)** [2018] UKUT 00243 (IAC) the Tribunal stated, at [24]:

> Whether or not to entertain an application for judicial review is a matter that falls within the Upper Tribunal's discretion, applying well-known principles that apply also in the High Court. Where there is an alternative remedy it would only be in the rarest of cases that the Upper Tribunal would consider exercising its jurisdiction to grant permission to bring judicial review proceedings.

63. Ultimately the Tribunal retains a discretion to entertain a claim for judicial review, but whether it will do so in any given case depends on the nature of the dispute and the particular circumstances in which it arises.

64. The Administrative Review procedure was introduced by HC 693, laid before Parliament under s.3(2) of the Immigration Act 1971, and came into force on 20 October 2014. It was established to mitigate the withdrawal of rights of appeal wrought by the Immigration Act 2014 in respect of a large number of immigration decisions and to allow for a quick and cost-effective method of reviewing those decisions. The Explanatory Memorandum that was part of HC 693, as laid before Parliament, at paragraph 7.2, provided:

> Administrative review will be available for persons refused leave to remain where they do not have a right of appeal. The new administrative review process will resolve case-working errors and will do so more quickly than the appeals process it replaces. The reviewer will be a different person from the original decision maker. The Home Office service standard is to determine an administrative review application within 28 days whereas the average time for a Points Based System appeal to be concluded is 12 weeks.

65. In **R (Sukwindr Singh) v SSHD** (JR/13615/2015) the Vice-President of the

Upper Tribunal considered whether Administrative Review, in general, constitutes an alternative remedy available to an applicant which he should exhaust before bringing judicial review proceedings. Although the decision was a refusal of permission to apply for judicial review rather than a substantive decision, the Vice-President certified that his decision related to a matter of general importance and may be cited. The Vice-President observed:

> While administrative review is pending there is an effect on the continuation of leave or of status under ss 3C and 3D of the Immigration Act 1971; and the Rules set out under four heads at paragraph 2.2 of Appendix AR the possible outcome decisions of an application for administrative review. The decision on review may maintain a refusal but for reasons different from those supporting the original decision.
>
> This process is in my judgment of a wholly different character from the informal process where an applicant invites the Secretary of State to reconsider a decision she has made. A request of that sort, often made as a preliminary to commencing a judicial review claim, has no specific structure or time limit, and indeed there is no clear entitlement to request it. If the request is made and the decision is left unchanged, there is no proper basis for saying that a new decision has been made.
>
> Administrative review under Appendix AR is different. It provides a process by which an applicant is entitled to raise the question whether the decision in his case was incorrect, and requires the Secretary of State to reach and communicate a view on that. It is clear that if an unsuccessful applicant for leave began judicial review proceedings before applying for, or before receiving the result of, administrative review, he would be met by the response that he had an alternative remedy available to him in the form of administrative review, which he should exhaust before bringing judicial review proceedings. That consideration, the fact that the effects of a pending administrative review are prescribed, and the fact that the outcome of a review may be adverse to the applicant but in terms different from those of the original decision all lead me to the conclusion that, where there has been a valid application for administrative review the original decision cannot be regarded as final. The final decision is that on the review. That is the decision that is the subject of any challenge by judicial review, and that is the decision from the date of which the passage of time for a judicial review claim is to be measured.

66. It is apparent from the extract set out above, and from paragraph AR5.2(a) of Appendix AR to the immigration rules, that the Decision was an "eligible decision" attracting a right of Administrative Review, and that it was open to the applicant to apply for Administrative Review of the Decision on the basis that the respondent made a "case working error" (paragraph AR2.3 of Appendix AR). Moreover, under paragraphs AR2.4(a) and AR2.11(a) it was open to the applicant to adduce further evidence in support of any Administrative Review application.

67. Although the Administrative Review is carried out by the respondent's own department it is not by the same person who made the decision and the scope for assesses whether there has been a case working error is sufficiently robust to ensure that a 'fresh pair of eyes' is brought to bear on the application. Parliament did not consider that an independent judge was necessary to review the initial

decision and judicial review is, in any event, available should issue be taken with the reviewer's assessment. It is unclear whether the person undertaking the Administrative Review has legal training or not, but proceeding on the basis that the person is not legally trained, this has insufficient bearing on the adequacy of the procedure provided that the person carrying out the Administrative Review is adequately trained or qualified. There was no evidence that the Administrative Review procedure was not manned by suitably qualified or trained individuals and Mr Biggs did not suggest otherwise, and the procedure enables the reviewer to consider submissions concerning the proper interpretation of the immigration rules. The reasons for the decision will, in the majority of cases, speak for itself and any unlawfulness in reaching the decision is amendable to a judicial review challenge. Whilst the Administrative Review procedure is paper based and the time limits are relatively short, there is no reason why an applicant could not instruct legal representatives to draft the representations and the time limits themselves are not, on their face, unlawfully short such as to deny an applicant with an adequate remedy given the stated purpose in the Explanatory Memorandum. So far as Mr Biggs relies on Article 8 ECHR procedural rights, the Administrative Review procedure is not designed to deal with human rights applications and, as accepted by Mr Biggs, Article 8 is not engaged in the present case.

68. There is however merit in Mr Biggs' submission that the Administrative Review procedure may be inadequate in circumstances where an applicant is contending that procedural unfairness is directly relevant to and impacts upon a finding of dishonesty and where the applicant is unable, due to the confines of the Administrative Review procedure, to effectively engage with the basis for the finding of dishonesty.

69. A material reason for the refusal of entry clearance was the applicant's alleged dishonesty in misrepresenting his contact with his previous UK employer following his return to Pakistan. The Decision referred to "Home Office checks" that "confirmed" that the applicant's previous UK employer contacted him and informed him of the reasons why he was not being invited back to the UK. The respondent maintained that the applicant was "given opportunities to explain the background on this" but that he chose not to do so. Regardless of the other reasons for the refusal of entry clearance, the respondent relied on this alleged false misrepresentation in refusing the entry clearance application.

70. A central issue that the Administrative Review needed to consider was whether the original decision-maker was correct in concluding that the applicant made a false misrepresentation in his 2019 interview. To determine this the reviewer would need to consider the circumstances in which the alleged false misrepresentation was made including the manner in which the interview was conducted, the particular questions he was asked, and the fact that the "checks" were not disclosed to the applicant. This however concerned issues of the procedural fairness of the Decision that the Administrative Review procedure was not adequately equipped to evaluate.

71. The Decision, at least in material part, relied on "checks" with the International Naat Association that were not disclosed to the applicant prior to or at the time

of the Decision and, significantly, in circumstances where there was no mechanism within the Administrative Review procedure through which the applicant could obtain their disclosure, or even to obtain more detailed particularisation of the alleged false misrepresentation. There is no facility within the Administrative Review procedure for the applicant to meaningfully engage with or respond to the respondent's conclusion based on "checks" that he had neither seen nor been informed about. The Decision was based on the applicant's answers in respect of general questions concerning his previous employment (question 37) that did not expressly put to him the content of the "checks". The applicant could not meaningfully offer further evidence in an application for Administrative Review if he did not know the details of the contact that his former employer said it made with him concerning the reasons for the termination of his employment. The definition of "case working error" in AR.2.11 does not include reliance on procedural fairness and the applicant would not have been able to contend that the conclusion in the Decision was "wrong" because it was arrived at through an unfair process, a particularly relevant consideration when assessing the existence of dishonesty.

72. In circumstances where there is a sufficient evidential basis to support an assertion of procedural unfairness in the context of an allegation of dishonesty, such as the present case where the respondent placed material reliance on "checks" the content or nature of which were not put to the applicant in interview or otherwise meaningfully disclosed to him, and in the absence of a mechanism in the Administrative Review procedure for obtaining either disclosure or a detailed summary of such evidence to enable meaningful submissions to be made by the applicant, I find that the Administrative Review procedure does not constitute an adequate alternative remedy.

73. Mr Malik relies on **R (G) v the Immigration Appeal Tribunal** [2004] EWCA Civ 1731 in support of the proposition that a 'review' is an adequate remedy in circumstances where Parliament has made clear its intention that the 'review' should be pursued in place of judicial review. The relevant statutory framework at that time gave a right to only apply for 'statutory review' of a decision by the Immigration Appeal Tribunal refusing permission to appeal a decision of an immigration adjudicator, but the 'statutory review' assessment was paper based and without an opportunity to have any oral hearing. Whilst the Court of Appeal accepted that the 'statutory review' procedure offered less comprehensive protection that the traditional judicial review route, it concluded that the procedure as a whole nevertheless satisfactorily assured that the rights of those entitled to asylum were upheld (at [23]). This was because asylum applicants had their cases initially considered by the Secretary of State for the Home Department and, if refused, they had a right of appeal before a properly qualified adjudicator and dismissal of the appeal would be considered by a legally qualified member of the Immigration Appeal Tribunal (supra). The same levels of protection do not apply in the present case and, unlike the 'statutory review' system, the Administrative Review procedure is not equipped to adequately deal with an allegation of dishonesty in the circumstances described above. Whilst the Administrative Review procedure will, as was observed in **R (Sukwinder Singh)**, constitute an adequate alternative remedy in the overwhelming majority of cases, on the particular facts of this case and for the

reasons given I find that it did not constitute an adequate alternative remedy for this applicant.

74. Both parties were in agreement that if I found that Administrative Review did not constitute an adequate alternative remedy in respect of one material element of the respondent's Decision then the judicial review should consider all the points raised by the applicant.

Procedural fairness

75. I will consider grounds 1 and 2 together as they both relate to issues of procedural fairness. The applicant contends that he was unlawfully deprived of an opportunity to comment on the respondent's conclusion that he made misrepresentations in his entry clearance application interview that were dishonest and in respect of her concerns about the genuineness of the applicant's intentions. The respondent, it is said, acted in a procedurally unfair manner by failing to disclose the evidence supporting her conclusion prior to the decision being made or, at the very least, failing to make the applicant aware of the basis of her suspicion or the 'gist' of the evidence supporting that conclusion and giving him an opportunity to give a meaningful response.

76. Both parties relied on the authority of **Balajigari**. It is necessary to consider that authority in some detail. It concerned the refusal of applications for ILR made by Tier 1 (General) Migrants because the SSHD believed their presence in the UK was undesirable based on their alleged dishonest conduct by either inflating their income for the purposes of immigration control or deflating their stated income in order to reduce their tax liability. The respondent relied on paragraph 322(5) of the immigration rules, part of the General Grounds for refusal in Part 9 of the immigration rules, which requires that leave to remain should normally be refused if the conduct or character of a person makes it undesirable to permit them to remain in the UK. The 'Domestic Public law Challenges' advanced by the appellants were concerned with, *inter alia*, the exercise of discretion and the requirements of procedural fairness.

77. With reference to paragraph 322(5) and within the context of earnings discrepancies made to the Home office and HMRC, Underhill LJ stated, at [42]:

> "A discrepancy between the earnings declared to HMRC and to the Home Office may justifiably give rise to a *suspicion* that it is the result of dishonesty but it does not by itself justify a conclusion to that effect. What it does is to call for an explanation. If an explanation once sought is not forthcoming, or is unconvincing, it may at that point be legitimate for the Secretary of State to infer dishonesty; but even in that case the position is not that there is a legal burden on the applicant to disprove dishonesty. The Secretary of State must simply decide, considering the discrepancy in the light of the explanation (or lack of it), whether he is satisfied that the applicant has been dishonest."

78. At [44] Underhill LJ noted that the allegations based on the discrepancies in the tax figures submitted by the applicants was "serious" and that it carried "serious consequences". At [51] an assertion of dishonesty was described as "a particularly serious allegation going to a person's character."

79. His Lordship considered the requirements of procedural fairness at [45] to [61]. He set out an extract from **R(Citizens UK) v SSHD** [2018] EWCA Civ 1812 which summarised the relevant principles:

> 68. That the common law will 'supply the omission of the legislature' has not been in doubt since *Cooper v Wandsworth Board of Works* (1863) 4 CB (NS) 180 (Byles J); see also the more recent decision of the House of Lords in *Lloyd v McMahon* [1987] AC 625. Accordingly, the duty to act fairly or the requirements of procedural fairness (what in the past were called the rules of natural justice) will readily be implied into a statutory framework even when the legislation is silent and does not expressly require any particular procedure to be followed.
>
> 69. The requirements of procedural fairness were summarised in the following well known passage in the opinion of Lord Mustill in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 560 in which he summarised the effect of earlier authorities:
>
> > 'From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'
>
> 70. In *R v Hackney London Borough Council, ex p Decordova* (1995) 27 HLR 108, 113, Laws J said, in the context of a housing decision but by reference to immigration law as well:
>
> > 'In my judgment where an authority lock, stock and barrel is minded to disbelieve an account given by an applicant for housing where the circumstances described in the account are critical to the issue whether the authority ought to offer accommodation in a particular area, they are bound to put to the applicant in interview, or by some appropriate means, the matters that concern them. This must now surely be elementary law in relation to the function of decision-makers in relation to subject matter of this kind. It applies in the law of immigration, and generally where public authorities have to make decisions which affect the rights of individual persons. If the authority is minded to make an adverse decision because it does not believe the account given by the applicant, it has to give the applicant an opportunity to deal with it.'

71. The origins of the duty to act fairly in the context of an immigration decision can be traced back to the decision of the Divisional Court in *In re HK (An Infant)* [1967] 2 QB 617, 630 (Lord Parker CJ).

80. Underhill LJ then considered the decision of the Court of Appeal in **R v Secretary of State for the Home Department, ex p. Fayed** [1998] 1 WLR 763 which he found "instructive" for several reasons including, as with the instant challenge, the fact that it involved a context in which the relevant individuals had no legal entitlement to a favourable decision and no pre-existing right which was adversely affected by a public decision [50]. At [53] his Lordship noted that the consequences of a refusal of ILR could be "very serious indeed" and referred in detail at [81] to the statutory consequences set out the Immigration Act 2014 commonly known as the "hostile environment." At [55] and [56] he stated:

> 55. For all of those reasons, we have come to the conclusion that where the Secretary of State is minded to refuse ILR on the basis of paragraph 322 (5) on the basis of the applicant's dishonesty, or other reprehensible conduct, he is required as a matter of procedural fairness to indicate clearly to the applicant that he has that suspicion; to give the applicant an opportunity to respond, both as regards the conduct itself and as regards any other reasons relied on as regards "undesirability" and the exercise of the second-stage assessment; and then to take that response into account before drawing the conclusion that there has been such conduct.
>
> 56. We do not consider that an interview is necessary in all cases. The Secretary of State's own rules give a discretion to him to hold such an interview. However, the duty to act fairly does not, in our view, require that discretion to be exercised in all cases. A written procedure may well suffice in most cases.

81. In response to a submission that the Administrative Review procedures satisfied the requirements of procedural fairness Underhill LJ held:

> 59. In the first place, although sometimes the duty to act fairly may not require a fair process to be followed before a decision is reached (as was made clear by Lord Mustill in the passage in *Doody* which we have quoted earlier), fairness will usually require that to be done where that is feasible for practical and other reasons. In *Bank Mellat v HM Treasury (no. 2)* [2013] UKSC 39, [2014] AC 700, Lord Neuberger (after having cited at para. 178 the above passage from *Doody*) said, at para. 179:
>
> > "In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute."
>
> 60. This leads to the proposition that, unless the circumstances of a particular case make this impracticable, the ability to make representations only *after* a

> decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness. The rationale for this proposition lies in the underlying reasons for having procedural fairness in the first place. It is conducive to better decision-making because it ensures that the decision-maker is fully informed at a point when a decision is still at a formative stage. It also shows respect for the individual whose interests are affected, who will know that they have had the opportunity to influence a decision before it is made. Another rationale is no doubt that, if a decision has already been made, human nature being what it is, the decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come. In the related context of the right to be consulted, in *Sinfield v London Transport Executive* [1970] Ch. 550, at p. 558, Sachs LJ made reference to the need to avoid the decision-maker's mind becoming "unduly fixed" before representations are made. He said:
>
> > "any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals - before the mind of the executive becomes unduly fixed."
>
> 61. More fundamentally, it is a central feature of the administrative review procedure, stated at paragraph AR2.4 of Appendix AR, that the reviewer will not consider any evidence that was not before the original decision-maker except in certain specified cases (broadly described as the correction of case-working errors). That means that the applicant would normally only be able to assert that he or she had not been dishonest but would not be permitted to adduce evidence in support of that assertion. That limited type of legal review is clearly inadequate here. It is precisely because the applicant had no notice of the Secretary of State's concerns that he or she had no opportunity to put evidence before the original decision-maker.

82. I have also considered **R (on the application of Pathan) (Appellant) v SSHD (Respondent)** [2020] UKSC 41 ("**Pathan**") and **Taj, R (On the Application Of) v SSHD [2021] EWCA Civ 19** ("**Taj**"), both of which were promulgated after the hearing before me. I did not consider it necessary to obtain the views of the parties on these two authorities in order to fairly determine the instant challenge. **Taj** concerned the issue of procedural fairness in respect of an application for further leave to remain made by a Tier 1 (Entrepreneur) Migrant where, following an interview and a 'site visit', it was decided that his small business, as detailed in his application, was not genuine. Although the SSHD had concerns with the truthfulness of the appellant's account, there was no assertion that he made false misrepresentations and no reliance was placed on paragraphs 320(7A) or 322(5). It was argued on behalf of the appellant (coincidentally, by Mr Malik) that the system by which the appellant's application was evaluated was procedurally unfair and that procedural fairness required inconsistencies or other 'concerns' upon which the respondent relied to be put to the appellant or to give him notice of the gist of those concerns, particularly if the concerns related to the truthfulness of the appellant's account (at [5] and [6]).

83. Green LJ, with whom Males LJ and Jackson LJ agreed, considered the Supreme Court's decision in **Pathan**, which concerned an application for leave to remain by a Tier 2 (General) Migrant whose sponsor had its licence withdrawn by the

SSHD after the appellant made his application and who was not informed of the revocation (which meant that he did not have a valid Certificate of Sponsorship and which prevented him from meeting the requirements for further leave) by the SSHD before the decision was made to refuse his application.

84. The principal issue in the appeal was whether the SSHD's failure to inform the appellant of the revocation of his sponsor's licence was reviewable upon the basis that principles of procedural fairness and natural justice required a person to have an opportunity to be heard on any material information which the decision-maker acquired and of which he was unaware. A majority held that the SSHD's failure to inform the appellant that his sponsor's licence had been withdrawn had been a breach of the principle of procedural fairness.

85. From [45] to [50] Green LJ dealt with the argument that there is a general obligation on the SSHD under the PBS to provide notice of concerns arising. The following conclusions, at [50], were drawn based on the Supreme Court's assessment, the authorities upon which the Supreme Court relied, and the decision in **Topadar v SSHD** [2020] EWCA Civ 1525:

> (i) ***PBS and procedural fairness***: The Doody principles of fairness apply to PBS, but the manner of their application will be fact and context specific: *Lloyd v McMahon* [1987] AC 625 at pages [702] – [703]; *Doody* page [560d-g] paragraph [52] per Lord Mustill; *Pathan* paragraphs [55], [104]; *Topadar v SSHD* [2020] EWCA Civ 1525 ("*Topadar*") at paragraph [59].
>
> (ii) ***The public interest behind procedural fairness requirements***: The principle of procedural fairness supports important public interest values: (a) a person's intuitive expectation of what a just system entails or the dictates of "*fundamental justice*" (*Pathan* paragraphs [49] [107], [124], [125], [126]; *Osborne v Parole Board* [2014] AC 1115 ("*Osborne*") paragraph [68]; *Secretary of State for the Home Department v AF* [2012] AC 269 paragraph [72]); (b) the promotion of the rule of law under which decision-makers hear from those who have something to say since this promotes congruence between the actions of decision makers and the law which should govern their actions (*Osborne* paragraph [71]; *Pathan* paragraphs [50]); and (c), the promotion of long term cost savings over short term expenditure. Procedures which involve an immediate cost, but which contribute to better long-term decision making, are in reality less costly than they at first appear (*Osborne* paragraph [72]; *Pathan* paragraphs [51], [52]).
>
> (iii) ***The absence of a pointlessness (materiality/utility) test***: Because of the broader, public interest, reasons for the principle of procedural fairness, the courts do not undertake any detailed analysis of whether had the breach not occurred, it would have made any difference. In *Pathan* the majority were unimpressed by the Respondent's arguments that to grant relief would be pointless. The majority considered that the breach did deprive Mr Pathan of, at the least, an opportunity to ameliorate his position. Lady Arden extolled the virtues of the policy considerations behind procedural fairness (paragraphs [48]-[52]) and she agreed (paragraph [72]) with Lord Kerr and Lady Black on this point. At paragraphs [118] - [130] Lord Kerr and Lady Black discuss the principle of pointlessness. They explain that had the Respondent given notice it might have made a difference. But they also highlight the great importance of the principle of procedural fairness *per se*. In paragraph [131], they state that the

duty to give notice to someone adversely affected by a procedural failure "… *cannot be defined solely by the consideration that it is pointless for that person to make representations with a view to reversing or avoiding the effect of the decision*." If observance of the principle (i.e. acting fairly) would or could or might have made a difference, then the Court will intervene but the converse if not true: the Court might still intervene even if it appeared that the breach had no effects such that to grant relief would be pointless, given the high public interest attached to the role that the principle of procedural fairness plays in the context of natural justice and the rule of law. In paragraphs [132] – [134] Lord Kerr and Lady Black thus explain why, on the facts, the failure to give notice did deprive Mr Pathan of the opportunity to take mitigating steps and they were of the view that the failure was not therefore pointless. However, they also observe (paragraph [134]) that a fairness analysis is not to be judged with the benefit of hindsight, *ex post facto*. This is because at that point in time there was "*no way to know*" whether Mr Pathan would have been able to take steps to mitigate his dilemma. If this is so, then speculation as to what might have happened, had the breach not occurred is not relevant. Further, in paragraph [135] they add that the failure was unfair "*in itself*" for another reason, namely because failing to give Mr Pathan notice of the revocation of the CoS licence accelerated the point in time at which he became an overstayer: "*To deny him the greater opportunity to avoid those consequences was in itself unfair*" and that this was a conclusion which did not depend upon any judgment as to whether Mr Pathan would have taken steps to avoid that outcome Lord Wilson agreed with Lord Kerr and Lady Black in relation to this part of their judgment (paragraph [201]).

(iv) ***Systemic and operational failings***: The principles apply to individual decisions taken by virtue of the operation of the system (operational failings) but also to administrative systems (systemic failings) (*Pathan* paragraph [44]).

(v) ***Procedural fairness is a standalone obligation***: A challenge based upon procedural fairness does not have to be linked to a substantive challenge, for instance a rationality challenge (*Pathan* paragraphs [32] – [35] and cases cited thereat).

(vi) ***Administrative convenience and cost do not amount to a justification for procedural fairness***: If a Court finds that there is procedural unfairness then the fact that remedying the breach might result in cost or administrative inconvenience to the decision maker is irrelevant *(R (Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481 at paragraph [8]; *R v Secretary of State for the Home Department ex P Fayed* [1998] 1 WLR 763 per Lord Woolf; *Pathan* at paragraph [47]).

86. The Court of Appeal then considered whether there was a duty to put an applicant on notice of general concerns (concerns which arise regardless of whether the applicant's account was considered to be truthful or not) about an application. In concluding that the PBS and the SSHD's decision were not procedurally unfair the Court considered, *inter alia*, the following points. The decision maker had to look to the substance of an application to ensure, for example, "… that odd discrepancies and errors in the paper work or in answers to questions posed in interview do not prevent an otherwise solid and acceptable application being accepted." [53]. **Pathan** was distinguished on the basis that the appellant in that case had not been at fault and his application had failed because of something done by the SSHD that was exclusively under her control. At [54] Green LJ stated:

> It is clear from the judgments that key determinants of fairness will focus upon (a) who has *access* to the information needed to support an application for LTR; and (b) who has *control* over that information. In my view access and control are key determinants and serve to distinguish between the facts of *Pathan* and the present case. Unlike in *Pathan,* here the Appellant had both access to and control over every fact relevant to the success or failure of his application.

87. Another relevant point, identified at [55], was that the PBS system was open and transparent; an applicant would be aware of the requirements that he needs to fulfil. It was not therefore unreasonable for the burden of proof to fall on an applicant as it was up to him to provide adequate information and evidence [56], and an applicant had every opportunity to prepare for their interview [58]. At [59] the Court held that basic system (at least insofar as it related to Tie 1 (Entrepreneur) Migrant applications) was intrinsically fair, and, at [61], it was held that, provided the PBS is systematically and operationally fair, the serious and potentially harsh consequences that could result from a negative decision were a consequence of the failure to obtain the required leave and did not render the decision unfair.

88. At [63] to [78] the Court considered whether there was a duty to put an applicant on notice of concerns about truthfulness. Green LJ found that the authorities upon which the appellant relied (which included **Citizens UK** and **Decordova**) did not assist him because they related to contexts that were far removed from the present and they did not, in any event, put down hard and fast principles, and because **Taj** was not at its core about the veracity of the appellant but about the paucity and inadequacy of the evidence submitted concerning his business [65]. Having considered a number of decisions Green LJ concluded that a duty to put evolving and potentially dispositive concerns about truthfulness was not an absolute but was fact and context sensitive and concluded, at [74]:

> In my judgment, the principles of procedural fairness as applied to the PBS in issue do <u>not</u> compel the decision maker to communicate evolving concerns about truthfulness.

89. And at [78]:

> For these reasons I reject the submissions that case law establishes a right to have concerns about truthfulness communicated to the applicant in the context of this particular type of PBS. I also reject any suggestion that on the facts it was operationally unfair of the decision maker not to put concerns as to truthfulness to the Appellant.

90. In determining whether there has been procedural unfairness in the present case I have applied the principles considered in above authorities including **Doody**, **Balajigari**, **Pathan** and **Taj**. The Decision was made in the context of the PBS. As pointed out in **Junied v SSHD** [2019] EWCA Civ 2293 the PBS is designed to achieved predictability, consistency, administrative simplicity and certainty and does so by being prescriptive, at the expect of discretion.

91. The respondent refused the application because, *inter alia*, she was not satisfied

that the applicant genuinely intended to pursue his employment as a devotional singer (paragraph 245ZO(i) of the immigration rules), and because he made misrepresentations in his application (paragraph 320(7A) of the immigration rules). I will first consider the lawfulness of the Decision with respect to paragraph 320(7A).

92. Unlike the appellant in **Taj**, but similar to the appellants in **Balajigari**, the present applicant was specially accused of acting in a dishonest manner such as to trigger the operation of the general grounds of refusal in Part 9 of the immigration rules. Although the applicant is not in the UK and would not, as a result of the decision, be exposed to the serious consequences resulting from the 'hostile environment' considered at [81] of **Balajigari**, I do not understand Underhill LJ to have restricted the serious nature flowing from a finding of dishonesty to those already in the UK. Exposure to the 'hostile environment' was an example of the serious consequences, but not a requirement. A refusal of an application under paragraph 320(7A) does have serious consequences. Firstly, it can have reputational damage on an application because he will tarnished as being an untruthful person, someone who has expressly acted dishonestly in respect of an important application. Secondly, the applicant will, as a consequence of the belief that he has been dishonest, be barred from making a similar application for a period of 10 years pursuant to Paragraph 320(7B)(d)(ii), and his dishonesty is likely to be a relevant factor in determining any other type of application he may make to enter the UK. That the applicant could make a later application for entry clearance and seek to deal with the earlier refusal under paragraph 320(7A) does not detract from the seriousness immediately flowing from a decision based on a finding that false misrepresentations or false information was used.

93. Although Green LJ found that the principles of fairness as applied to the Tier 1 (Entrepreneur) Migrant requirements did not compel a decision-maker to communicate evolving concerns about truthfulness, the Home Office decision under challenge in **Taj** did not involve a specific allegation of dishonesty and did not involve any external element to the decision that was not contained within the application. A material basis for the present Decision under paragraph 320(7A) rested on the content of an interview that was conducted on 17 April 2019, some 6 days after the applicant's second interview. The respondent's decision was based on external information that only came to light because of specific inquiries made by an Entry Clearance Officer. With reference to the assessment of Green LJ at [54] of **Taj**, only the respondent had access to and control of that information. These factors material distinguish **Taj** from the present case. Although the applicant was asked in the interview whether he had any contact with his previous employer after he returned to Pakistan he was not, contrary to the assertion in the Decision, given the opportunity to explain the background to the allegation of dishonesty because there was, at that time, no inconsistency in information available to the respondent and because, by reference to his statement, the applicant denied having been directly contacted by his former employer.

94. In finding that the applicant acted dishonestly the respondent placed material reliance on information that was not available to the applicant and in respect of

which he was unaware, information that did not form any part of his application and which was obtained after the applicant's interview, and information that was within the exclusive control of the respondent. Given the serious nature and consequences of the allegation of dishonesty, and bearing in mind the purposes and prescriptive nature of the PBS, it was not impractical for the respondent to make the applicant aware of the 'gist' of the information that materialised after the interview, either by disclosure of the record of the conversation, or in the form of a 'minded to' letter, or by way of a summary of the conversation that included all the material elements that the respondent maintains were contrary to the applicant's answers in his interview. I am consequently satisfied that the aspect of the Decision that was based on paragraph 320(7A) was arrived at in a procedurally unfair manner.

95. I have additional concerns regarding the respondent's conclusion that the applicant acted dishonestly by making false misrepresentations. In her decision the respondent stated:

> You were given opportunities at interview to explain the background on this however; you chose not to and therefore it is not clear why you misrepresented this fact at interview.

96. I consider there to be merit in the Mr Biggs' submission that the reference to "not clear" related to the reasons why the applicant gave information during his interview that was different to that given by his former employer. If the respondent was "not clear" as to the reasons why the applicant's answers in his interview were different to those of his former employer, she had, at most, suspicions concerning his honesty. Contrary to **Balajigari** at [42] and [129], she proceeded to reach a conclusion as to the applicant's honesty in circumstances that did not justify that conclusion, at least until an explanation for the provision of different information had been considered. I find, for this additional reason, that the Decision, so far it was dependent on a finding of dishonesty under paragraph 320(7A), was unlawful.

97. I am not however persuaded that the Decision, so far as it was based on paragraph 245ZO(i) of the immigration rules, was procedurally unfair. The respondent's conclusions in respect of the applicant's intentions concerning his employment were not based on any external information that the applicant could neither access nor control. The inconsistencies between the job advert provided by the applicant in respect of his employment and his contract with Hounslow Jamia Masjid and Islamic Centre, detailed at paragraphs 8 and 41 above, were apparent on the face of the papers that supported the applicant's application. The applicant must be taken to have been aware of the differences between the advertised position and his contract and there was no obligation, in the context of his PBS category, to bring to his attention clearly identifiable differences (although **Taj** deals with a different PBS category and is a decision in respect of an application for leave to remain, both Tier 1 and Tier 5 categories share 'genuineness' elements). Mr Biggs submitted that the respondent failed to take account of the representations made in the Administrative Review application dated 15 January 2019, but this application only made brief reference to the advert that was required in order to meet the resident labour market test,

and claimed that the advert did not specifically relate to the applicant. The advert however related to the position in respect of which the applicant made his application and the respondent was consequently entitled to take account of clear discrepancies between the advertised position and the applicant's contract. Further, the burden rests on the applicant to demonstrate that he fulfils all the requirements for entry clearance, including the provision of adequate evidence. If he has provided information that is prima facie inconsistent or vague but which has not been expressly put to him either in interview or by way of a 'minded to ' letter, that does not disclose any procedural unfairness but rather a failure by the applicant to provide adequate evidence. The applicant had sufficient opportunity to prepare for his interview, mindful of his proposed job, and was given the opportunity at the end of the interview to provide any further information.

98. In my judgment the principle of procedural fairness in the context of a Tier 5 (Temporary Worker) entry clearance application and as applied in the present case did not require any vagueness or lack of clarity in the applicant's interview answers relating to his proposed employment, or any inconsistency in the documentary evidence adduced by him in support of his application, to be expressly put to him.

Whether the applicant was being sponsored to perform "religious duties"

99. The respondent noted that the SOC identified in the Certificate of Sponsorship for the applicant related to those intending to work in the creative sector and, whilst accepting that Sufi Naat singing was devotional, the respondent was not satisfied that the performance of Sufi Naat singing could properly be described as the performance of "religious duties", as required under the Tier 5 (Religious Worker) category.

100. The applicant contends that the respondent misinterpreted or misapplied the immigration rules in light of all the evidence provided by him and available to the respondent, including the fact that he would be singing in mosques and Islamic centres and given that his proposed employer was an Islamic centre. It was submitted that his prospective employer had no reason to employ a 'cultural performer' rather than someone carrying out 'religious duties'.

101. I have considered the evidence that accompanied the applicant's application. The Employment Agreement described his job as the performance of "non-instrumental religious singing at various religious places/Islamic centres and Mosques all over the United Kingdom." The advert for the job referred to "Sufi religious singing" to be performed in live gatherings with an audience ranging from 1,000 to 7,000 in a variety of events, with the Sufi singer expected to be proficient in Urdu and Panjabi and with "a good melodious voice." In his April 2019 interview, when asked to give details of what he will be doing in his job, answered, "Nothing just reading naats in Urdu Punjabi other than this I don't know anything else." (question 8). When asked about his experience the applicant stated that he had been singing since childhood and had done this all over Pakistan and in other countries (question 27). In his first interview, conducted in December 2018, the applicant said he would be "singing

religious songs and prayers" and in his statement he stated that a Naat Singer was someone whose singing abilities were principally devoted to singing praise of the Prophet Muhammad.

102. There was no detailed or independent evidence before the respondent, or indeed before me at the hearing, describing the nature of Sufi Naat singing, or describing or explaining how that religious or devotional singing was an Islamic religious duty. Religious or devotional singing is a wide term, one that is potentially capable of including, by way of example, hymns or psalms, or even carols. There was a paucity of information before the respondent that the devotional singing that the applicant proposed to undertake constituted the performance of religious duties.

103. The applicant was previously granted entry clearance as a Tier 5 (Religious Worker) Migrant was as a "Religious Singer/Sufi Naat Singer" (question 72 of the applicant's October 2016 application). This is a relevant consideration when interpreting the immigration rules, but it cannot be determinative. It is possible, for example, that the earlier grant of entry clearance was made in error, without adequate attention being brought to bear on the nature of Sufi Naat singing.

104. The original grounds referred to the Home Office Policy Guidance 'Tier 2 & 5 of the Points Based System – Guidance for Sponsors – version 04/14', which stated, at 31.7:

> When recruiting a person who will be sponsored under Tier 2 (Minister of Religion) or Tier 5 (Religious Workers) you must conduct a Resident Labour Market Test. Although not all religious occupations are 'jobs' in the traditional sense, this does not mean that the test does not apply. Any migrant you sponsor must not displace a suitable settled worker.

105. Section 31.8 of the same guidance states that a sponsor must "only recruit migrants who will carry out skilled religious duties." The applicant contends that his singing constituted "skilled religious duties" and that the Policy Guidance recognises that jobs under the religious occupations do not always meet the standards to be considered as 'occupations' in the traditional sense of the word, and that the respondent consequently acted unlawfully in failing to accept Sufi Naat singing as the performance of religious duties. The fact however that the Guidance recognises that not all religious occupations are 'jobs' in the traditional sense does not mean that the respondent misinterpreted the immigration rules by excluding Sufi Naat devotional singing from the performance of religious duties, it simply reflects a necessary flexibility in the Guidance in dealing with a range of different religious duties.

106. In **Mahad v Entry Clearance Officer** [2009] UKSC 16 Lord Brown stated, at [10]:

> There is really no dispute about the proper approach to the construction of the Rules. As Lord Hoffmann said in **Odelola v Secretary of State for the Home Department** [2009] 1 WLR 1230, 1233 (paragraph 4):

> "Like any other question of construction, this [whether a rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy."

That is entirely consistent with what Buxton LJ (collecting together a number of dicta from past cases concerning the status of the rules) had said in **Odelola** in the Court of Appeal and, indeed, with what Laws LJ said (before the House of Lords decision in **Odelola**) in the present case. Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The respondent's counsel readily accepted that what she meant in her written case by the proposition "the question of interpretation is . . . what the Secretary of State intended his policy to be" was that the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under section 3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament which then has the opportunity to disapprove them. True, as I observed in **Odelola** (para 33): "the question is what the **Secretary of State** intended. The rules are her rules." But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates' Instructions (IDIs) issued intermittently to guide immigration officers in their application of the rules. IDIs are given pursuant to paragraph 1(3) of Schedule 2 to the 1971 Act which provides that:

> "In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (**not inconsistent with the immigration rules)** as may be given them by the Secretary of State . . ." (emphasis added)."

107. Looking at the term "religious duties" in accordance with the natural and ordinary meaning of the words, and recognising that they form part of the statements of the Secretary of State's administrative policy, and in light of the very limited evidence before the respondent, I cannot say that the respondent was not rationally entitled to have interpreted the immigration rules so as to exclude Sufi Naat singing from the performance of religious duties.

108. The previous grant entry clearance as a Tier 5 (Religious Worker) Migrant was as a Sufi Naat singer was however a relevant consideration that should have been taken into account by the respondent, but does not appear to have been, at least expressly. Moreover, the principle that like cases should be treated in a like manner is another way of describing what Lord Hoffmann described in **Arthur J S Hall & Co v Simons** [2002] 1 AC 615, 688H as "the fundamental principle of justice which requires that people should be treated equally and like cases treated alike." In **Chirairo, R (on the application of) v SSHD** [2016] EWCA Civ 77, at [25], Richards LJ stated:

> It is not in doubt that a discretionary public law power must not be exercised in

> an arbitrary or partial way. If two individuals in identical circumstances are knowingly treated differently, this may well involve an arbitrary exercise of power in the case of one of them and, without a rational explanation, is liable to be struck down as unlawful. Moreover, the circumstances of the two individuals, though not identical, may be so similar as to call for a rational explanation for the different treatment to be given, if the unfavourable treatment given to one is to stand. It would be unfair of the Secretary of State not to treat like cases alike in the sense of discriminating against someone upon inadequate grounds: see *R v Secretary of State for the Home Department, ex p Zeqiri* [2002] UKHL 3; [2002] INLR 291 at [56] per Lord Hoffmann. Nonetheless, caution is required. First, personal circumstances will usually differ to an extent which prevents two individuals from being treated as like cases. Secondly, different decision-makers faced with substantially the same facts may on entirely rational grounds come to different conclusions: see *Otshudi v Secretary of State for the Home Department* [2004] EWCA Civ 893.

109. The question of whether a Sufi Naat singer is someone who performs "religious duties" is not a matter of the exercise of discretion, but **Chirairo** helpfully expresses the principle of consistency in decision-making and that like cases should be treated in a like manner. I am satisfied that the previous grant of entry clearance to the applicant as a Sufi Naat singer in the category of Tier 5 (Religious Worker) Migrant meant that the respondent was required to explain why she decided this aspect of the present application differently. To the extent that the respondent appears to have failed to take the previous grant of entry clearance into consideration in her interpretation of the immigration rules, and to the extent that she has failed to give an explanation for treating this aspect of the two applications differently, she has acted unlawfully.

Was the Decision unlawful in its assessment of the applicant's intentions?

110. The fourth ground contends that the respondent acted in a Wednesbury unreasonably manner (**Associated Provincial Picture Houses LTD v Wednesbury Corporation** [1947] EWCA Civ 1) in respect of her conclusion that the applicant was not genuinely seeking to undertake his stated employment as a Sufi Naat singer.

111. I can deal relatively briefly with this ground. The respondent properly identified discrepancies between the job advert and the employment contract namely:

a) The advert stated an annual salary of £21,000 whereas the contract stated an annual salary £19,500;

b) The advert stated that the job was "permanent" and did not state that applications from overseas were accepted whereas the applicant, as recorded in the contract, was a resident of Pakistan; and

c) The advert stated that the job location was "London" whereas the contract required the services to be provided "all over the United Kingdom".

112. Further, the Decision additionally identified vagueness in the applicant's 2019 interview answers regarding his proposed working hours, and a lack of

clarity concerning his work pattern and his work location, and the Decision expressed doubts as to how the applicant could be working 30 hours a week for his sponsor in light of his answers. The respondent was rationally entitled to conclude that the applicant did not genuine intend to undertake the work described in his application for the reasons given. In his 2018 interview the applicant was asked only a few questions about his working hours and his answers did not materially expand on those given in his later interview. The factors upon which the respondent placed reliance were apparent from the face of the documents upon which the applicant relied and his answers in interview, and were all relevant to an overall assessment of the applicant's intentions.

113. The applicant's contention that the respondent failed to appreciate that all the points upon which she relied had been adequately addressed in the 15 January 2019 Administrative Review application is not borne out by scrutiny of those representations. The representations focus on differences in dates for the end of the applicant's proposed employment and briefly assert that the advert did not specifically relate to the applicant. I have dealt with the last point at paragraph 99 above. The Administrative Review application focuses on Facebook accounts that were not the subject of the decision now under challenge and did not comment on the issues of vagueness and lack of clarity as the applicant had not, at that stage, undergone the interview where these points became apparent. The amended grounds refer to information provided on the applicant's behalf in his November 2019 Pre-Action-Protocol Letter, but this post-dates the decision under challenge and was not therefore before the respondent when her decision was made, and the September 2019 joint Administrative Review application and Pre-Action-Protocol Letter did not meaningfully engage with the points raised by the respondent other than to assert that there was no discrepancy in respect of the stated salary.

114. I am consequently satisfied that there is no merit in the applicant's challenge to the respondent's decision under paragraph 245ZO(i) and that the respondent was rationally entitled, for the reasons given, to conclude that the applicant did not genuinely intend to undertake the role recorded by the Certificate of Sponsorship Checking Service. The respondent was consequently lawfully entitled to refuse the application under paragraph 245ZO(i) even though other elements of the Decision, as discussed above, were unlawful. The respondent's assessment under paragraph 245ZO(i), when read in the context of the decision, was separate from and independent of the refusal under paragraph 320(7A) and of the respondent's approach to the nature of Sufi Naat singing and whether it constitutes the performance of religious duties.

Maintenance

115. As I have found that the respondent was lawfully entitled to reject the application under paragraph 245ZO(i), it is not necessary for me to consider and determine the arguments that were only advanced at the hearing and in written submissions that followed the hearing concerning the refusal based on the maintenance requirements. Those arguments are rendered academic in light of my findings.

Conclusion

116. To the limited extent that the Decision relied on paragraph 320(7A) of the immigration rules, I find that those elements are unlawful for the reasons given. I therefore make a declaration that paragraph 320(7A) was unlawfully deployed.

117. I make a further declaration that the respondent's assessment of whether Sufi Naat singing constitutes the performance of religious duties, by reference to paragraph 111(d) of Appendix A of the immigration rules, is unlawful for the reasons given.

118. The respondent was however lawfully entitled to conclude that the applicant did not genuinely intend to undertake his role recorded by the Certificate of Sponsorship Checking Service, with reference to paragraph 245ZO(i). This finding is separate from and independent of the unlawful elements of the decision identified above. For these reasons I decline to quash the decision.

Signed: *D.Blum*

Upper Tribunal Judge Blum

Dated: **8 February 2021**

Applicant's solicitors:
Respondent's solicitors: Z2001261/GAS/HOI1
Home Office Ref: SHEFO/1107548
Decision(s) sent to above parties on: 08/02/2021

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then

the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3.