JR-2022-LON-000085

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

In the matter of an application for Judicial Review

The King on the application of

Professor Lisa Short — Applicant
(NO ANONYMITY DIRECTION MADE)

versus

Tech Nation — Respondent
-and-

Secretary of State for the Home Department — Interested Party

NOTIFICATION of the Judge's decision

UPON Upper Tribunal Judge Allen having heard Mr T Wilding, Counsel, instructed by the Applicant, Mr R O'Ryan, Counsel, instructed by the Respondent, and Ms J Anderson, Counsel, instructed by the Government Legal Department on behalf of the Interested Party at hearings on 21 September 2022 and 25 January 2023

AND UPON the judgment of Judge Allen, dated 10 February 2023, being handed down on 9 March 2023 by Upper Tribunal Judge Norton-Taylor following Judge Allen's retirement

AND UPON consideration of an application for permission to appeal to the Court of Appeal by the Applicant and consideration of costs submissions made by the Applicant and Respondent

IT IS ORDERED THAT:

(1) This application for judicial review is dismissed on all grounds.

(2) The Applicant shall pay the Respondent's costs following a detailed assessment, if not agreed, and the assessment shall be conducted on the standard basis;

(3) The Applicant shall pay 25% of the Respondent's claimed costs on account, that payment being £12,964.33. That payment shall be made no later than 14 days after the handing down of Judge Allen's judgment on 9 March 2023;

(4) That there be no order as to costs in respect of the Interested Party's costs in these proceedings;

(5) Any application to vary the order at (3), above, must be made on at least 48 hours' notice to the other party.

Permission to appeal to the Court of Appeal

(1) Judge Allen's conclusion at [48] that the Respondent's decisions were not procedurally unfair has not been challenged in the application for permission to appeal.

(2) None of the grounds put forward by the Applicant justify a grant of permission.

(3) Ground 1 asserts that Judge Allen erred in his conclusion at [81] that the Respondent's review did not contain any new reasons. However, the Judge was unarguably entitled to conclude as he did at [76] and [81]. Essentially, the Judge found that no new reasons of any material substance had been relied on in the review. There was nothing arguably erroneous in the conclusion that the same points had been reiterated in the review, albeit with "slightly more detail".

(4) Ground 2 contends that Judge Allen failed to resolve a matter in dispute, namely reliance by the Respondent on points contained in the guidance when rejecting the application. This ground is unarguable. The Judge's analysis at [92] is clear. He was unarguably entitled to conclude that the Respondent committed no public law error by taking the guidance into account, whilst at the same time not considering itself bound by that guidance. Indeed, what is said at paragraph 10 of the grounds provides the answer to the proposed challenge: guidance is there to assist; that is precisely what the Judge found had occurred.

(5) Ground 3 is based on alleged irrationality on the part of the Respondent and Judge Allen's alleged erroneous approach to the arguments put forward by the Applicant. With respect, there is clearly nothing of substance in this ground. At [93]-[122], the Judge considered the relevant arguments in great detail. The subsequent discussion at [123]-[131] must be seen in the context of what preceded it. The analysis and conclusions were unarguably open to the Judge.

(6) Ground 4 asserts that Judge Allen failed to take account of additional evidence. It is said that this new evidence went to the issues of whether new reasons had been relied on in the review and/or whether the Respondent's decision-making was irrational. In my view, the underlying basis of ground 4 is effectively relying on allegations of bad faith and bias, both of which were expressly withdrawn during the course of proceedings. In any event, I can see no arguable basis in respect of the new evidence which could have gone to impugn the review process which had been the subject of challenge before the Judge.

Costs

(1) I have considered the range of powers under rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I have considered the written submissions provided by the Applicant and Respondent (including the Respondent's response dated 8 March 2023). I acknowledge that the Applicant and Respondent are agreed that there should be a summary assessment of costs. However, I am not bound by such an agreed position.

(2) The costs in play are significant (being £51,857.32, as now claimed by the Respondent). The Applicant's costs submissions make a large number of specific points relating to the reasonableness and/or proportionality of the costs claimed. Having regard to all the circumstances and notwithstanding the agreed position, in my judgment it is appropriate for costs to be subject to a detailed assessment. That assessment shall be on the standard basis.

(3) I am not bound to make an order for an interim payment of costs by the Applicant to the Respondent pending the detailed assessment, although such an order may be appropriate in the exercise of my discretion: rule 10(10) of the 2008 Rules. Upon a detailed assessment, there is a realistic possibility that the costs claimed by the Respondent will be reduced. In all the circumstances, an order for an interim payment of costs is appropriate, but only to the extent of 25% of the costs claimed by the Respondent. In my judgment, that represents a reasonable sum at this stage.

Signed: H Norton-Taylor

Upper Tribunal Judge Norton-Taylor

Dated: **9 March 2023**

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): *9 March 2023*

Solicitors:
Ref No.
Home Office Ref:

IAC-FH/AH-CK/SC-V1

IN THE UPPER TRIBUNAL

JR-2022-LON-000085

Field House,
Breams Buildings
London
EC4A 1WR

21 September 2022 and 25 January 2023

R
(ON THE APPLICATION OF PROFESSOR LISA SHORT)

Applicant

and

TECH NATION GROUP LIMITED

Respondent

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested Party

BEFORE

UPPER TRIBUNAL JUDGE ALLEN

- - - - - - - -

Mr T Wilding, directly instructed, appeared on behalf of the Applicant.

Mr R O'Ryan, instructed by Ward Hadaway Solicitors appeared on behalf of the Respondent.

Ms J Anderson, instructed by the Government Legal Department appeared on behalf of the Interested Party.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

- - - - - - - - - - - - - -

JUDGE ALLEN: The applicant seeks judicial review of two decisions of the respondent. The first of these is a decision of 2 September 2021 not to endorse the applicant's application for endorsement under Part W7.6 of the Immigration Rules and secondly, a decision of 16 December 2021, upholding, upon endorsement review, the decision of 2 September 2021. Permission to apply for judicial review was granted by Upper Tribunal Judge Kamara.

2. The applicant applied under Appendix W of the Immigration Rules on 15 November 2020. This concerns the "Global Talent" category and she sought endorsement in the area of digital technology. The respondent is the relevant "endorsing body" for the purposes of an application under Part W7.6 of Appendix W. That application was refused on 28 November 2020 and a subsequent endorsement review was refused on 4 January 2021. However, in the course of a subsequent application for judicial review of those decisions the respondent decided to withdraw both of the earlier decisions and make a fresh decision of 2 September 2021, the first decision under challenge. Following that refusal, an endorsement review decision of 11 October 2021 upheld the decision to refuse endorsement but that decision was subsequently withdrawn following the letter before claim and a further endorsement review decision, the further subject of the current challenge, was made as set out above on 16 December 2021.

Jurisdiction

3. There is an issue as to whether Tech Nation are an entity amenable to judicial review, and it will be appropriate to address that matter before going on to consider the

substantive issues as set out in the four grounds of challenge and the response to those grounds.

Appendix W

4. Appendix W was introduced on 20 February 2020 and though it was deleted by operation of HC 813 of 22 October 2020 and "Appendix Global Talent" was inserted with effect from 1 December 2020, it is made clear under the heading "Implementation" within the Statement of Changes that an application, as in this case, made before 9am on 1 December 2020 will be decided in accordance with the Rules in force on 30 November 2020.

5. A Global Talent migrant is defined in the Immigration Rules as a migrant who is granted leave in the Global Talent category under Appendix W. Under Part 6A, Part 9, Appendix A and the Global Talent category in Appendix W of the Rules, "endorsing body" means an organisation which has been approved by the Home Office to endorse an applicant as a Global Talent migrant or Tier 1 (Exceptional Talent) Migrant.

6. At W7.1 is the following:

> "(a) Applications for endorsement must be made to the Home Office but are considered by the endorsing body. Applicants should not contact the endorsing body directly following the submission of their application.
>
> (b) In all cases the endorsing body will advise the Home Office whether or not it endorses the applicant. If the applicant is not considered by the endorsing body to have met the endorsement requirement set out in these Rules, or sufficiently

demonstrated that their presence in the UK will contribute to the advancement of their sector, the application will not be endorsed.

(c) If successful, the decision maker will provide the applicant with a dated endorsement letter."

The Rules define the "decision maker" as the Secretary of State.

7. I shall return in more detail to the further provisions of Appendix W in the context of the specific grounds of challenge.

8. From the above, however, it can be seen what the essential structure of decision-making under Appendix W is. The endorsing body to consider applications made in the field of digital technology under Appendix Global Talent is the respondent.

9. On behalf of the respondent it is argued that it is not a public body for the purposes of judicial review, first, because it is not a public body and does not perform public duties or functions, and secondly, that it is in any event not the decision maker, but it is the Home Office which is the decision maker.

10. In his oral submissions, Mr Wilding on behalf of the applicant relied on and developed the points made in his skeleton argument and as set out in detail in the grounds of claim. It is argued that Tech Nation is liable to judicial review in the matter of endorsement decisions in that it had had delegated to it the application of provisions of the Immigration Rules, and the endorsing decision is essential

for any entry clearance application; indeed it is a prerequisite.

11. Reference is made to guidance in R v Panel on Takeovers and Mergers ex parte Datafin Plc [1987] WL 492523, and R v London Beth Din (Court of the Chief Rabbi) ex parte Michael Bloom [1998] COD 131, where it was said inter alia that for a decision to be judicially reviewable it must be a decision reached by a body exercising a statutory or (de facto or de jure) governmental function.

12. Particular reliance was placed on what was said in Ames v The Lord Chancellor [2018] EWHC 2250. At paragraph 55 we find the following:

> "From the cases cited to us, we derive the following principles. First, there is no universal test of when a decision will have a sufficient public law element to make it amenable to judicial review. It is a question of degree. Secondly, in deciding whether a particular impugned decision is amenable to judicial review, the court must have regard not only to the nature, context and consequences of the decision, but also to the grounds on which the decision is challenged. There is, we think, a risk of an element of circularity in this approach: to an extent, in deciding whether the decision is amenable to judicial review, the court is looking to the merits of the claim for judicial review which the claimant wishes to put forward. Nonetheless, the nature of the challenge may shed light on the extent to which the decision is of a public rather than a private nature. Thirdly, the fact that the decision is made by a public body exercising a statutory power will not in itself be a conclusive indication that there is a sufficient public law element:

a government body may negotiate commercial contracts without inevitably becoming subject to judicial review. Fourthly, and conversely, the fact that the challenged decision relates to payments to be made by a public authority pursuant to a contract will not in itself be a conclusive indication that there is no sufficient public law element. Fifthly, it will be necessary to consider whether the challenged decision is one which is necessarily involved in the performance of a public function, or is merely incidental or supplementary to a public function. Sixthly, if the decision does not have a sufficient public law element to make it amenable to judicial review, the fact that the aggrieved party has no other avenue of appeal is not a reason for treating the decision as if it were public law decision."

13. In this context, it is argued that while the respondent is not a public body per se, it clearly carries out public functions or alternatively, when those functions are carried out they are amenable to judicial review. It is argued that Tech Nation is predominantly funded by the United Kingdom government, and reference is made to their website where it is said that 80% of their funding is from the Department for Digital, Culture, Media and Sport. It is also argued that they plainly carry out a public function insofar as helping with growth in the tech industry in the UK and abroad and plainly are funded by the United Kingdom government to advance its policy aims. On this basis, it is argued that they are a public body but that even if they are not, they do carry out public functions which are amenable to judicial review. They are one of several endorsing bodies delegated authority by the Secretary of State under the Immigration Rules to determine endorsement applications, and of the six

endorsing bodies approved by the Home Office the other five are, it is said, plainly public bodies in the pure sense (Arts Council England, The British Academy, The Law Society, The Royal Academy of Engineering and UKRI). Further points made include the argument that an application for endorsement is made directly to Tech Nation, they consider the evidence, apply the Immigration Rules and determine whether an application is endorsed or not. The Immigration Rules are underpinned by statute and carry a quasi-legal basis. It is made clear under the Code of Practice for Endorsing Bodies that the Global Talent endorsement requirements will comply with any UK legislation and Immigration Regulations, as detailed on the Home Office pages of the gov.uk website. Unlike, for example, Appendix Student (and previously Tier 4) where a Confirmation of Acceptance for Studies letter was required, an endorsing body directly applies the Immigration Rules and comes to a positive or negative decision under those Rules. As such, the function is entirely a public one going to a person's ability to be able to qualify for entry clearance.

14. It is also argued that Tech Nation is the decision maker. It is said in the Global Talent Code of Practice for Endorsing Bodies Version 1.0 February 2020, inter alia, that:

> "The endorsing bodies are responsible for assessing whether an individual who makes an application under the Global Talent category is internationally recognised as a leader, or has demonstrated the potential to become a leader, in their particular field. This assessment will be carried out by the endorsing bodies without involvement from the Home Office.
>
> …

> The application under the Global Talent category is therefore dependent on the decision of the relevant endorsing body either to grant or refuse an endorsement, but a decision to grant an endorsement is not of itself decisive as to whether a visa will be issued."

15. On this latter point, Mr Wilding accepted that of course an entry clearance application was liable to the general entry clearance requirements, but argued that the entry clearance requirements for a Global Talent visa were relatively modest. He referred to the provisions of W3, which include evidential flexibility, being over 18, being not in breach of the Immigration Rules and the general grounds for refusal. A credibility assessment did not have to be carried out where it was a Global Talent application. In essence, that was the job of the endorsing body. Nor was there any requirement that maintenance requirements be met. It was the case therefore that the criteria were modest and therefore that the applicant was even more reliant on the endorsement decision itself.

16. It was argued that it was obvious in this case that Tech Nation were the underlying decision maker and the Home Office did no more than communicate the decision. It was not a question of advice by Tech Nation to the Home Office.

17. In her submissions, Ms Anderson relied on the position set out in the Detailed Grounds of Defence. It was a question of law for the Tribunal as to where the judicial review lay in relation to the decisions under challenge. The question of law was governed by the interpretation of Part 54.1(2)(a) of the CPR and public law principles. The Rule, which was intended to encapsulate public law principles and so would be

interpreted in line with the principles as illuminated in the jurisprudence, defined the scope of judicial review as being:

> "A claim to review the lawfulness of
>
> ...
>
> (ii) a decision ... in relation to the exercise of a public function".

Therefore, it was argued, the scope of judicial review was related to the exercise of a public function rather than categorisation of the body that performed the function. This approach assisted in ensuring effective judicial supervisory review since the entity actually exercising the public function was most likely to be in a position to provide the court with the requisite information for judicial scrutiny. The position reflected the modern world where public functions were carried out by bodies other than central government and local government as there was expertise in bodies with other roles and all these functions could not be performed by central government.

18. In his submissions, developing the points made in his skeleton argument and the Summary Grounds of Defence, Mr O'Ryan argued that the respondent was not a public body and did not perform public duties or functions. Tech Nation Group Limited was a private company limited by guarantee and had the stated goal of fuelling the growth of game-changing founders, leaders and scaling companies so they can positively transform societies and economies. They are provided by Tech Nation with the coaching, content and community they need for their journey in designing the future. The activities of Tech Nation as an endorsing body represented only a limited element of its activities. It was

not empowered to act or perform duties as an endorsing body under statute and there was to be no assumption that it was performing public duties or functions. The decision maker under Appendix W was an Entry Clearance Officer or the Secretary of State. The role of endorsing bodies, including Tech Nation, was merely to "advise" the Home Office on the merits of applications under Global Talent. The respondent engaged specialist industry assessors to provide that advice and in relation to any requests for reviews of its decisions not to endorse. The outcome of an application for endorsement was not communicated to an applicant by the respondent but rather by the Home Office.

19. Mr O'Ryan also quoted from paragraph 10.180 of the 10th edition of Macdonald's Immigration Law & Practice, which states the following:

> "It is unlikely that an Endorsing Body would be considered a public body for the purposes of judicial review proceedings. The only remedy therefore for a refusal of a Stage I application (the endorsement application) is the endorsement review process."

20. Mr O'Ryan also referred to the witness statements of Mr Matthew Jeffs-Watts, the Head of Visa Programme at Tech Nation, describing the organisation structure and endorsement decision-making processes within Tech Nation. It was important to bear in mind that the Immigration Rules were not a statutory instrument but represented statements of administrative policy. Though Mr Wilding had argued that there were very limited tasks to be carried out before entry clearance was granted, it was argued with reference to the construction of W3.7 including the caveat (a) which was absent from the remaining subparagraphs and in (b) it was

said that they would take into account any required endorsement and then a number of other factors including evidence put in and its credibility and this did not have the Global Talent limitations in (a). Therefore, even if endorsement were granted, there could be a refusal of entry clearance or leave to remain for any of the reasons within W3.7(b) if the Secretary of State was not satisfied with the evidence. It was therefore not the case that the Secretary of State took no part in the credibility assessment or the evaluation of the evidence post-endorsement. By way of reply on this point, Mr Wilding argued that paragraphs (i) to (iv) of W3.7(b) did not touch on or even mention the Entry Clearance Officer turning his or her mind to an endorsement decision as to whether it was properly made or not. Subparagraph (b) was part of the entry clearance requirements. W7.6, however, set out the endorsement criteria specifically as could be seen at (c). When assessing applicants the endorsing body would take into consideration all of the following matters set out, so it assessed the appellant. It was entirely in keeping with the Code of Practice and the applicant's submissions.

Discussion

21. As is clear from what was said in Ames, there is no universal test of when a decision will have a sufficient public law element to make it amenable to judicial review. It is clear that Tech Nation, a company limited by guarantee, carries out other functions than those comprised in the endorsement process. Equally though, it may be said that the government is not always amenable to judicial review as for example in the context of the negotiation of commercial contracts, as referred to in paragraph 55 in Ames.

22. There is a helpful analysis in Auburn, Moffett and Sharland Judicial Review Principles and Procedure, to which I referred the representatives and which was discussed in the course of argument. One of the points made there is that the fact that a body is woven into a system of public regulation would tend to suggest that it is the type of body whose actions, decisions or failures to act are amenable to judicial review. It is said that such bodies are likely to include those that operate parallel to, or work in close connection with, other bodies that are clearly governmental in nature and those which administer a code into which the government has substantial input. On the other hand, at paragraph 2.48 it is said that generally, a third party that has a contract with a public body to carry out a function will not itself be regarded as carrying out functions amenable to judicial review merely because the functions in question are statutory functions of the public body or because the third party is subject to regulation in the performance of those functions. It is said that generally, the actions and decisions of such a third party will only be amenable to judicial review if they are so amenable by virtue of the third party's own powers and nature. There may, however, be a special reason to treat the actions and decisions of such a third party as amenable to judicial review, and issues such as the nature of the body will need to be considered. I also bear in mind the quotation from Macdonald cited by Mr O'Ryan that it is unlikely that an endorsing body would be considered a public body for the purposes of judicial review proceedings. Clearly, weight must be attached to such a comment in a leading immigration law text, but it is also relevant to bear in mind the point made by Mr Wilding that it is a bold statement not supported by any reference to case law, whereas the analysis in Auburn, Moffett and Sharland, albeit not in

the context of immigration law, does cite authority for the propositions addressed.

23. The matter is not one of easy resolution. However, I have concluded that, though I do not consider Tech Nation is a public body, it is exercising a public function and as such is amenable to judicial review. In this regard, I attach particular weight to the fact that it is carrying out a public function in acting as an endorsing body and that, contrary to the argument on behalf of the respondent, it is not simply advising the Secretary of State but its decisions are effectively rubber-stamped. There are the relatively minor matters in Appendix W7 that are further hoops to be jumped over by an applicant. These are essentially minor and in essence, the decision is made by Tech Nation. It is not without relevance that the other endorsing bodies approved by the Home Office appear to be public bodies in the pure sense as described in the grounds, though it is important to bear in mind, but I think it is not relevant to these particular bodies that such a body might at times exercise a non-public function. It is also not relevant that there is no avenue of recourse other than a review. It is however not without relevance that to a significant extent the respondent is publicly funded. I also see relevance to the point made by Ms Anderson concerning the scope of judicial review as involving a claim for review of the lawfulness of a decision in relation to the exercise of a public function. It is, to my mind, clear that a public function is being exercised in this case by the respondent in making an endorsement decision which is in effect rubberstamped by the Home Office. The context of the authorities cited in Auburn, Moffett and Sharland at paragraph 2.48 concerns local authorities contracting out statutory responsibilities for residential

care for the elderly and disabled. This seems to me to be demonstrably factually different from the situation before me.

24. Accordingly, I conclude that the respondent is a body exercising a public function for the purposes of being amenable to judicial review.

The Substantive Claim

The Law

25. The application was made under Appendix W of the Immigration Rules. The requirements for this, for the purposes of this application, as set out in the applicant's grounds for judicial review are as follows:

> **Appendix W7.4 Contains the general endorsement criteria for applications:**
>
> Evidence required to demonstrate the applicant meets the endorsing body criteria must be submitted as part of the endorsement application. To allow the applicants skills and experience to be accurately assessed, the endorsing bodies require specific forms of evidence set out in W7.5 to W7.7:
>
> (a) Where an applicant is required to provide a documentation from a third party, the documentation must:
>
> (i) Be dated.
>
> (ii) Show the organisation logo and registered address, if written on behalf of a third party organisation.

(iii) Be signed by the third party, or an individual authorised by a third party organisation to respond on its behalf.

(iv) Be typed, not handwritten.

(v) Contain full contact details, including telephone number and email address, of the third party to allow the document to be verified if required.

(b) Evidence submitted for endorsement cannot include objects, Digital Versatile Discs (DVDs) or Compact Discs (CDs), digital files or documents that only show web links. If an applicant wishes to use the content of a webpage as part of their supporting documents, they must provide a printed copy of the page which clearly shows the Uniform Resource Locator (URL) for the page.

(c) Documents must be written in English or Welsh, or accompanied by a full translation that can be independently verified if required.

(d) The endorsing body will independently assess whether the evidence provided appropriately and adequately supports the applicant’s claim that they meet the relevant criteria.

(e) Where these Rules require applicants to provide a letter of recommendation from a UK based individual or UK organisation, or to hold a UK based research fellowship, specified evidence from the Isle of Man is also acceptable.

(f) Where these Rules require applicants to provide a letter of recommendation, this letter must:

(i) specifically refer to and support the Global Talent Application, not be a general, all purpose letter.

(ii) be a maximum length of three single sides of A4 paper, excluding the author's credentials and/or curriculum vitae.

(g) Where an applicant is required to provide a curriculum vitae, the curriculum vitae must be a maximum length of three single sides of A4 paper.

W7.6 Endorsement Criteria – Digital Technology Applicant (Assessment by Tech Nation)

Tech Nation accept applications from applicants with technical and business skills in the digital technology sector. Technical applicants must demonstrate proven technical expertise with the latest technologies in building, using, deploying or exploiting a technology stack and building technical infrastructure. Business applicants must demonstrate proven commercial, investment, or product expertise in building digital products or leading investments in significant digital product businesses. Examples of applicants considered as technical business applicants by Tech Nation can be found in the guidance.

(a) The applicant must meet one of the following:

(i) They satisfy 1 of the key "Exceptional Talent" and 2 of the qualifying "Exceptional Talent" criteria in the table below.

Exceptional Talent (leader in relevant field)

Key

1. Have a proven track record of innovation in the digital technology sector as a founder or senior executive of a product-led digital technology company or an employee working in a new digital field or concept that must be clearly evidenced.

2. Proof of recognition for work outside the applicant's immediate occupation that has contributed to the advancement of the sector (e.g. evidence that they have gone beyond their day to day profession to engage in an activity that contributes to the advancement of the sector).

Qualifying

1. Have made significant technical, commercial or entrepreneurial contributions in the digital technology sector as either a founder, senior executive or employee of a product-led digital technology company.

2. Have been recognised as a leading talent in the digital technology sector.

3. Have undergone continuous learning/mastery of new digital skills (commercial or technical) throughout their career.

4. Have demonstrated exceptional ability in the field by making academic contributions through research published or otherwise endorsed by a research supervisor or other expert.

26. In addition the applicant must provide the documentation set out at W7.6(b), which includes a Tech Nation Global Talent

application form, a CV, three letters of recommendation from different members of the digital technology sector (each no more than three A4 sides and length) and no more than ten documents as evidenced from the key and qualifying criteria (each no more than three A4 sides in length).

27. Further, Appendix W sets out additional factors which the endorsing body will take into account when assessing applications (W7.6(c):

(i) the applicant's track record/career history (including their international standing, the significance of their work and the impact of their activity in a company or as an individual);

(ii) the strength of the supporting statements in the letter of personal recommendation, and evidence in relation to qualifying criteria;

(iii) the expected benefits of the applicant's presence in the UK in terms of the contribution to the UK digital technology sector;

(iv) factors including but not limited to, the applicant's academic track record;

(v) the commercial impact of the applicant's previous work, achievements and experiences.

Global Talent Code of Practice for Endorsing Bodies (Version 1 February 2020).

Also relevant are the Global Talent Code of Practice for Endorsing Bodies (Version 1 February 2020), Global Talent (guidance for caseworkers) Version 3 December 2020) Global Talent (guidance for applicants) (Version 7/20 July 2020).

28. The December 2020 guidance is that relied on by the applicant. The point is made in the summary grounds of defence that in fact the appropriate guidance given the timing of her application was Version 2 of the 5 June 2020, but there are no material differences between the two versions.

29. As required by the Immigration Rules at W7.6(b) the applicant submitted an online Tech Nation application, a CV outlining career and publication history, three letters of recommendation and ten documents and evidence in relation to the criteria to be satisfied. She requested her evidence be considered for all criteria rather than submitting documents as evidence of one of two key criteria and two of the four qualifying criteria.

30. The decision under challenge is dated 2 September 2021, deciding not to endorse the applicant's application for endorsement under Part W.7.6 and the decision of 16 December 2021, upholding, upon endorsement review, the decision of 2 September 2021.

31. In the decision of 2 September 2021 the applicant was found not to have met any of the mandatory criteria or any of the qualifying criteria. There is feedback set out with the decision giving reasons why it was not felt that the application met any of the key or qualifying criteria. Rather than setting this out in full, I will refer to the relevant parts of it as they were addressed by Counsel in the course of written and oral argument.

32. Likewise with regard to the review decision, a number of points are made in respect of concerns that the assessor had, and again rather than setting this out in full I will refer

to the relevant parts of it as they arose for consideration and discussion in the course of argument.

Grounds of challenge

33. There are four grounds of challenge. Mr Wilding before and at the start of the hearing on 25 January 2023 put forward two further proposed grounds, but upon consideration decided that he would not proceed with an application for permission to amend the grounds so as to argue those points.

Ground 1 Procedural Fairness

34. Mr Wilding adopted in oral argument the grounds and the skeleton argument in this regard. He placed reliance on the guidance in R v Secretary of State for the Home Department ex parte Doody [1993] UKHL 81 in which such points are emphasised as the fact that the standards of fairness are not immutable and that at what fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects. It is also said there that 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.

35. Mr Wilding also relied on what was said in Balajigari v Secretary of State for the Home Department [2019] EWCA Civ 673, which among other things refers to the fact that 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. Procedural fairness 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. Also, 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.

36. Mr Wilding described the decision and the review as calling into question the genuineness of the authors of the letters of recommendation. He argued that the contents of the letters had not been substantially called into question but the inference throughout the decision and subsequent review suggested a lack of credibility. The applicant had continually said in correspondence that if there were any issues of clarification required then Tech Nation could contact her or any of the authors of the letters. The approach was said to be unfair and unlawful because she and her referees had no opportunity to address any issues, perceived or otherwise, with their evidence. Mr Wilding argued that fairness dictated that there should be an invitation to address any concerns. Where the respondent said credibility was not impugned, this was, it was argued, surprising, bearing in mind what was said in the review that there were several instances of identical wording within the references and other letters provided, though it was said that no question was raised about the honesty or integrity of the referees. The review endorsed the previous assessor and that must mean there were question marks about the reliability of the contents. The respondent could not have it both ways. Either what had been provided was so repetitious that it was not independently drafted or that was not the case. The applicant was at a crossroads as to whether she could understand the basis upon which the

decision was taken other than on the evidence provided. It was not enough to say that a fresh application could be made. Balajigari set out what fairness usually required. This was not an appealable decision, so judicial review was the only remedy. A proper process, it was argued, was conducive to better decision-making and there was a risk of defensiveness when reconsidering, as referred to in Balajigari. In that case, as here, there was only limited legal review and this was clearly inadequate. The thrust of the two reviews was that the letters of support had not been independently drafted and this clearly suggested a lack of credibility. There was nothing to distinguish this type of case from a Balajigari type of case. It was clear that where there were credibility concerns an applicant should be contacted about them.

37. Insofar as reliance was placed by the respondent on what had been said by the Court of Appeal in Taj [2021] EWCA Civ 19, this was a case concerned with the Tier 1 Entrepreneur route and the PBS was there said to be designed to take out discretion and replace it with clear and objective criteria. There was no opportunity or right in the PBS system to plug gaps or deficiencies. There was a clear process and structure.

38. However, that ignored what had actually happened. At paragraph 20 in Taj it could be seen that there was an interview and the challenge about no follow up. The process there had within it mechanisms for interviews and site inspection and there was internal oversight and consultation with the manager as to whether a paper consideration was proportionate. None of that applied in this process. If there were an analogy with Taj, there were far more procedural safeguards in such a case than in this case and it

was therefore the case that Taj was not inconsistent with Balajigari. There were different processes.

39. Also, Appendix W could not be compared with the PBS system. They had different objectives. Appendix W required one key and two qualifying criteria to be met and these were evaluative and not, as in Taj, clear objective criteria. There was therefore no real comparison. In effect, the applicant found herself applying blind. If the credibility of a document was impugned and the author was not asked about it then it seemed that they were told to go and get better evidence. However, it was necessary to understand the basis upon which evidence had been rejected. It was not a fair process either in the original decision or in the review. As was said at paragraph 25 of Mr Wilding's skeleton, the unfairness was more pronounced than in Balajigari because the substantive detail of the criticism was in the review itself rather than in the initial assessment. It was unfairness upon unfairness. Appendix W, in particular with regard to the Global Talent visa scheme, was necessarily for a small category of prospective applicants and not akin to, for example, students, taking away all evaluative assessment, and the opportunity should have been provided to address concerns in a meaningful way.

40. In his oral submissions in respect of Ground 1, building on the points made in the summary grounds of defence and his skeleton argument, Mr O'Ryan argued that the applicant seemed to say that any concerns whatsoever should have been put to her. The assertion in the initial decision that there were instances of duplicate content in the documents relied upon by the applicant was not an allegation of dishonesty. The respondent was entitled to observe that referees had repeated the same facts regarding the applicant and that referees were

expected to be able to provide more first-hand testimony regarding the applicant. Likewise, the observation in the review decision that there were several instances of identical wording within the references and the letters provided were not made to allege dishonesty but to support the proposition advanced in the review letter that that brought into question "the overall value" of that supporting material. This was an entirely proper approach and the weight to be attached to the evidence was a matter for the respondent.

41. Balajigari was concerned with the issue of decisions to refuse indefinite leave to remain on the basis of paragraph 322(5) of the Immigration Rules, in that particular case in the context of allegations of dishonest dealing in relation to tax affairs. It was clear that it was the operation of paragraph 322(5) alongside an allegation of dishonesty that resulted in the court finding a duty, in some circumstances, for the Secretary of State to put her concerns to an applicant. The context of the decision was important. The applicant had not been refused on the character, conduct or dishonesty basis. There was no allegation of dishonesty. Balajigari had no purchase. The respondent had done what the Immigration Rules told it to do, to test the strength of the evidence, and it was not obliged to put its concerns to the applicant before the decision was made. The prejudice was different from that experienced by the applicants in Balajigari. Mr O'Ryan endorsed what was argued by Ms Anderson with regard to the applicability of Taj v Secretary of State for the Home Department [2021] EWCA Civ 19.

42. In her oral and written submissions Ms Anderson argued that the relevant passages in Balajigari were concerned with the process for making a finding that an individual had been

dishonest (i.e. had intentionally sought to deceive the Secretary of State) as the basis for refusal of leave. Even in that context, Ms Anderson argued, the Court of Appeal concluded that there would not normally be a need for an interview, so long as there was an opportunity to address the conduct forming the basis of this dishonesty concerns prior to a final determination of whether the relevant conduct was dishonest (i.e. there was no innocent explanation for it).

43. Ms Anderson argued that in this instance there was no finding of dishonesty nor did the decision rely on any such misconduct as the grounds to refuse leave (and ultimately to require departure from the UK, barring return, as was the position referred to by the court to justify the intervention in Balajigari).

44. Ms Anderson made the point that courts and tribunals often had evidence from witnesses who believed that they were providing a full and accurate account of the position but where their views were not accepted as accurate or not accorded weight. The evaluation of the weight to be given to individual elements of the evidence in an overall assessment of an application could not be reduced to a binary decision about the veracity of its author. The weight to be accorded to each part of the evidence in an overall assessment was for the decision maker.

45. In Taj, the Court of Appeal had distinguished Balajigari and the so-called Doody principles of procedural fairness associated with the refusals founded on concerns of dishonesty, from decisions refusing immigration applications where the application and documents provided were judged not to satisfy the decision makers that the relevant requirements were met. It was held that on its true analysis of an

evidential assessment the issue was not one of personal veracity. With regard to procedural fairness it was held that there was no obligation in law to put any concerns about the inadequacy of the supporting materials provided with an application to an applicant prior to a decision, even where that concerned the existence and genuineness of the business relied on. She quoted from paragraph 56 of Taj where, inter alia it was said:

> "If the decision maker is then led to entertain doubts by virtue of the submission of this inadequate evidence, then this is not of such a nature as to trigger a duty on the part of the decision maker to institute some additional, incremental system or procedure to allow an applicant a second chance to get it right."

46. Ms Anderson made the further point that the law did not and could not require a potentially open-ended cycle of submission, review and resubmission to address the basis for any refusal in an attempt to resolve the dispute. Any system had to provide an outcome for an application within a reasonable time and at a reasonable cost to ensure that it was reasonably accessible to applicants. There was a balance to be struck between a workable, affordable system and procedural fairness. The situation was completely different from that in Balajigari. Taj was clear on the distinction. It was necessary to look at the context and whether credibility was the issue. One could see the tension between this situation where there is a refusal and the bad faith argument and a public, lasting judgment. The claim had not been properly particularised and it was not a procedural error case. The respondent had bent over backwards to help and be flexible and take everything into account and in respects where this was not required. This was not a

challenge to the system/process but seemed to be a request for special treatment. This was just a normal process of evaluation.

47. By way of reply, Mr Wilding relied on his earlier submissions but also made the point that on a reading of the decision and the review, there was an apparent impugning of the authors of the endorsement letters with the reference to “cut and paste, and if that was what was alluded to, the applicant was entitled to expect to have that flagged to her. Reliance was placed also on Wahid [2021] EWCA Civ 346 and what was said at paragraphs 31 and 32 including the reference to the requirement for procedural fairness depending upon the facts and the context in which the decision was taken, including the nature of the legal and administrative system within which the decision was taken. It was concluded at paragraphs 32 that it was arguable that where an Entry Clearance Officer harboured suspicions of dishonesty, procedural fairness required the applicant to have the opportunity to respond. It was relevant as this was an entry clearance case. If it were the case that there were a lot of similarities of language the applicant should be able to address that but any event it was misplaced as the only similarity was one sentence and it could not be read as a cut and paste exercise. There was a concern, given the disclosure documents, as to whether the application contained fraudulent information. On the face of it, that mindset continued on from the decision to the review.

Discussion: ground 1

48. I do not consider that this ground is made out. In my judgment, Mr O’Ryan and Ms Anderson are right to emphasise the context of the decision and the particular point of

distinction from Balajigari as concerning in that case an allegation of dishonesty with significant consequences for the applicant, as opposed to the situation in this case which, although clearly not on all fours with Taj, is much more akin to that situation as a refusal of an immigration application where the application and documents provided were judged not to satisfy the decision maker that the relevant requirements were met. As in this case, it was not a case of personal veracity, and in Taj it was held that there was no obligation to put any concerns about the inadequacy of the supporting materials provided with an application to an applicant prior to decision. As was said at paragraph 56 in Taj, it is not unreasonable in such circumstances to expect that the burden of providing the information should lie with the applicant. There was no duty on the decision maker in such a case to institute a system or procedure to allow an applicant a second chance if they had doubts by virtue of the submission of inadequate evidence. Bearing the context of the decision in this case in mind, I consider that the remarks in Taj are much more applicable to this situation than those in Balajigari, and indeed also with regard to Wahid, which, although it was as Mr Wilding points out an entry clearance case, was one where there was a suspicion of dishonesty which makes it a decision much more in line with Balajigari.

49. Accordingly, Ground 1 is not made out.

Ground 2: Failure to Follow Own Guidance

50. The relevant part of the respondent's guidance in relation to an endorsement review says at follows:

> "If the decision is upheld and the reasons for refusal remain the same:
>
> - the Home Office will notify you by email. You will not be entitled to a further endorsement review as the grounds for refusal have not changed.
>
> If the decision is upheld, but with revised reasons for refusal:
>
> - a new refusal letter will be served along with the endorsement review letter from the endorsement reviewer stating why the refusal has still been upheld. If there are fresh reasons for refusal which were not notified originally, you will be able to submit a further endorsement review request limited to those fresh reasons."

51. Mr Wilding argued that the respondent had clearly upheld the decision but gave revised reasons for the refusal and as a consequence the decision was inconsistent with the guidance. Mr Wilding referred to the response to the pre-action letter where it was said that where the endorsement review process involved merely "confirming that the correct procedures were followed" it was averred that to the extent that any additional feedback provided by the reviewer extended beyond that narrow remit, no challenge could lie in respect of that additional feedback. He argued that this was plainly not what had happened in the instant case and that it was in any event inconsistent with public law principles. Nor could it be said that fresh reasons had been given only where there was a change to the endorsing body's view as to whether a particular key or qualifying criterion was satisfied. The

review was essentially a re-refusal of the application and not a review at all, and it failed to engage with the material submitted with the application. The new issues raised in the review were as follows. First, it was said that the notarised documentation was insufficient, and no reasons were given as to why. The notarised document confirmed the appellant's roles in the two businesses which was therefore legally notarised documentation clearly meeting the relevant criteria. The applicant had made it clear in her evidence how she met both key criteria and all four qualifying criteria. The reviewer continued to misunderstand the role of guidance verses the Immigration Rules and that it was the rules that needed to be applied rather than the guidance. The reviewer had plainly not read the letters of recommendation thoroughly, if at all. There were references to several instances of identical wording within the references and other letters provided, but the applicant had only been able to identify minor duplication in three out of eight letters of recommendation that had been provided. This was only as to the factual events that the applicant had attended and it was perverse to suggest that that in some way reduced the credibility of the author's letters. The review panel failed to identify which "entire pages" of the evidence had been duplicated and the underlying reasoning continued to be inadequate.

52. New reasons were raised in respect of the proof of earnings points and this was a point never raised in any previous review or decision. It demonstrated further the deliberate actions of the respondent in seeking reasons to refuse the application, rather than an objective assessment. The review panel referred to what the guidance said as to what financial documentation and proof of earnings should be provided. This

was guidance and not a requirement of the Immigration Rules. In any event, the applicant was not an employee at any time but was the founder. She did not have payslips, contracts of employment or anything similar. She had provided notarised evidence showing her director's remuneration at both companies, explaining that she could not provide the documents as they contained privileged and confidential information. This was why she had obtained notarised copies, as well as providing contact details for a board member to confirm. The respondent had done nothing to verify one way of the other. There was also evidence from Hirander Misra who confirmed her position, her work and her commercial outcome with Distichain.

53. It was also perverse to make the point that multiple pieces of evidence had been provided on one file multiple times running into hundreds of pages. It had been said that this was clearly in breach of Tech Nation guidance and it was perverse and showed the panel being incapable of reading the evidence provided. A CV for one of the three authors of the letters of recommendation did not fall within the page limit set by the Rules.

54. There was also a failure to give reasons why the evidence as to the patent evidence was insufficient, just that it had not been able to verify or inspect details via internet searches. This was inappropriate and perverse and contact details had been provided for people who could provide such corroboration. The evidence had been provided notwithstanding that the applicant was a founder and inventor rather than an employee as contemplated in the guidance. She had included verified evidence of both the inventorship form and intellectual patent office registration numbers and the clearly marked QR code taking the reader to the secure,

immutably hashed full patent application and anchored on the Vizidox blockchain.

55. The assertion that no information about her previous significant employment contracts had been provided was not only a new reason but it was unclear what criteria it would go towards. It was also unreasoned and perverse to say that none of the companies where she had been employed could be described as product-led digital technology companies. All the evidence explained how the companies were product-led.

56. As regards the comment that it was difficult to determine what her immediate occupation was, as she had she had listed so many organisations and schemes where she was a mentor, it was difficult to understand how she spent her time or what value that mentoring might generate and that it was not possible to determine from the evidence provided how any of that engagement would lead to advancement of the sector, this was again an extension of and raising of new reasons to refuse and was a further example of the respondent searching for reasons to refuse. Evidence of her work for the year prior to and delivering the outcome of that work at The 17th World Summit of Nobel Peace Laureates was clear evidence going towards her reach beyond her day-to-day activities, not to mention the supporting references by numerous industry figures. The reasoning, such as it was, was manifestly insulting. On any reading of her CV and supporting evidence, it was clear that the applicant had a wide-ranging career and encompassed activities broader than her “ordinary” activity. The respondent sought to look for evidence of the “value” she brought, which was not a criterion within the Rules, given that it was entirely subjective and it was all, in any event, captured in the evidence submitted.

57. There was also criticism of the evidence as being non-specific or not relating directly to or not provided according with the criteria but this failed to be specific. The applicant should not have to guess what the respondent was alluding to. It was extraordinary to state that she had not been clear about which criteria she wished to be assessed against nor how her evidence was said not to match the criteria. She had provided a table of documents which identified how each piece of evidence met aspects of the criteria.

58. In his oral submissions, Mr Wilding argued that the review decision clearly stepped beyond the reasons in the original decision. The terms of the guidance were clear. The failure to apply the guidance properly and the unfairness meant the applicant was still unclear why her application would have been refused anyway as was asserted by the respondent and the Secretary of State. The evidence spoke to key criteria 1 and 2 and the qualifying 1 to 4. There was an element of ground 4 with regard to the post-decision evidence upon which the Secretary of State relied. With regard to the reference to AAT ceasing trading or never having traded, this was in many respects a red herring. The application had been made before then when the company was established and as the applicant said in her witness statement, it was before funding was withdrawn. In fairness, the guidance with regard to reviews of the initial decisions meant that one could see about requests for updating evidence and where Appendix W was clear that the Global Talent route did not involve very forward looking criteria, she did not have to have a job or business on arrival, but nothing needed to be set out but it just needed to be shown that there was a person with a Global Talent. The presumption was that such a person in that

industry would continue to be such and be an advantage to the United Kingdom. So a change since the application was made did not save any unlawfulness in the decision. The applicant had addressed it all.

59. It seemed that the Secretary of State had little interest in engaging with the applicant's ability to meet the Rules. She had always been happy to assist with any queries or concerns so there was a real materiality to the unlawfulness. There was a misapplication of policy in the decision-making process and it was unlawful and material, and the change of circumstances was irrelevant.

60. Mr Wilding addressed the argument made on behalf of the respondent that the applicant appeared to proceed on the basis that any change in any reasons at all between the initial decision and review decision would give a right to further review under the procedure was in the guidance. New reasons needed a new review decision. There was a very flawed decision-making process and they were looking for issues in the evidence rather than assessing in the round. It was the case that there was not a challenge to the guidance as being inconsistent with public law principles, but it was a question of a failure to apply the guidance.

61. In his submissions with regard to this ground, Mr O'Ryan relied on what was said in the summary grounds of defence. It was not unlawful to take into account and apply the guidance in making both the initial decision and the review decision. The process of endorsement review was not governed by Immigration Rules but by the process set out at pages 25 to 27 of the Global Talent Guidance and within the Endorsement Review Guidance. However the endorsement review process merely confirmed that the correct procedures were

followed, and to the extent that any additional feedback was provided by the reviewer which extended beyond that narrow remit, no challenge could lie in respect of that additional feedback. Where the underlying reasons for a key or qualifying criterion not being met were essentially unchanged, for example where it was determined that such criteria were not met due to insufficient or inadequate evidence supporting the application, no right to a further indorsement review arose. The applicant appeared to argue that any difference in reasoning at all between the initial and review decisions would represent “revised reasons” and entitle a further endorsement review and yet the applicant would simultaneously criticise the respondent for failing to consider the substance of the grounds for an endorsement review if identical reasoning was offered within the endorsement review decision. The reasoning was circular and would result in an unworkable scheme where an indefinite number of endorsement reviews could be applied for. In this case, both the initial decision maker and the reviewer had reached decisions that the application did not satisfy any of the key or qualifying criteria and the reasons why the application was refused were identical, namely that the applicant had not provided sufficient evidence to satisfy any of the key or qualifying criteria. The review had been conducted in accordance with the Global Talent Guidance. Inevitably, where there was a contention that evidence had not been considered an endorsement review would involve greater coverage of evidence and further detail, but this did not amount to new matters or reasons not found in the original refusal decision. The underlying reason on both occasions was the same and related to evidential difficulties. This was summarised in the initial decision as “there was not sufficient quality of evidence to qualify the

application for any of the available Key or Qualifying criteria and therefore we do not endorse this application" and this was confirmed in the review, which concluded:

> "there is insufficient material in this application to demonstrate Global Talent as defined by Tech Nation's previous visa programme. The applicant does not meet any of the criteria of the Global Talent programme and therefore cannot be endorsed via this visa route".

62. In his oral submissions Mr O'Ryan renewed his argument that what was suggested by the applicant was wholly unworkable. The Endorsement Review Policy set out what an endorsement review was and what the reviewer would look at. It was said that they would only examine the original application to confirm that the correct procedures were followed when deciding the application and the information should not be resubmitted and new evidence could not be provided as part of the review. On one reading of the process therefore it seemed to be just a check to see if they had all the information for the Home Office with regard to the original decision. There was a policy as to what was intended to happen and arguably that went much further than was required by revisiting the merits, and this favoured the applicant.

63. It was not accepted that there were fresh reasons in the review. If there was a change in any of the key or qualifying criteria that was a case for fresh reasons but otherwise the proposition that any fresh reasons would lead to a further review being capable of being requested was wholly unworkable. The underlying reasons were the same. There was insufficient or inadequate evidence to find the criteria were met and that had not changed even if there were a different use of language. No fresh or revised reasons had

been given. It was clear that the relevant Immigration Rule had been addressed so even if within the body of the document there was reference to guidance, that was clearly supplementary and there was a clear indication in the table as to whether the criteria were met. This was perhaps more of a ground 3 point. The reference to guidance in the body of the decision was not an error of law and it was not saying it was a mandatory requirement to be addressed.

64. In her submissions, with regard to ground 2, Ms Anderson argued that this ground failed to distinguish properly between the comments made in the fresh evaluative review of the application and the essential ground for refusal of the application. If a review was expected to produce a carbon copy of the comments on evaluation of the application and evidence then it would be at risk of an allegation that it was not a genuine review. It was to be expected that a fresh evaluative assessment would make its own comments. The basis for refusal was however the same as before, that the application did not demonstrate that the relevant requirements were met. There was no new ground for refusal, in particular the application was not refused on grounds of dishonesty or any other ground of refusal.

65. It was argued that in the alternative, which was not accepted, the comments were properly “reasons” within the intention and meaning of the guidance, it would be permissible to depart from the guidance in this instance since a further fresh review limited to such “new reasons” would not reasonably alter the outcome so it would serve only to cause unnecessary cost and delay. The essential point about the guidance was that it was not an inflexible legal straitjacket but was required to be applied in an informed case-specific and practical way. With regard to the guidance

there was a confusion between reasons for the decision and reasons for reasons. If the decision was on basis A but on basis B on review, then that was very different from a different explanation as to the factors going to A. As could be seen, there was quite extensive further comment before the review and one could expect differences as a consequence and the review from what had been said in the earlier decision. The applicant could not have it both ways. Consistency of approach was to be expected. At the end of the day procedure was procedure and it could be departed from for good reasons and it should not be a never-ending resource- consuming exercise.

66. In his response, Mr Wilding argued that the point was that the arguments made on behalf of the applicant might not suit the respondent but it was in keeping with what had been argued. The internal review, which essentially was quasi-judicial, protected the respondent as it protected the applicant. The applicant could make representations as to why the endorsement decision was wrong and would only have to say yes or no and there was no safeguard and it should be questioned what was the function of the guidance as regards “new reasons”. To say that it was wholly unworkable was an easy way out but if there were proper underlying decision-making with clarity on the reasons and upheld with clear reasons then that showed that it was not unworkable. For the applicant both decisions made little sense as to the basis of the rejection of her evidence and it was necessary for her to be able to understand why the evidence was lacking. The reasons were case-specific and there clearly were new ones and there had been a failure to apply the guidance.

Discussion in Respect of Ground 2

67. I have set out above what is said in the guidance as to the process where the decision is upheld and what should happen if there are revised reasons for refusals.

68. Mr Wilding has set out what are said to be the new issues, at paragraph 54 and the various subparagraphs in the grounds, and summarised paragraph 31 of his skeleton argument. The first of these is that it is said that the reference to notarised documentation being insufficient was a new reason. It is noted in the review that the documents were notarised ,but the information contained within them was said, in any event, not to be sufficient to demonstrate that the relevant criteria had been satisfied. This was a general point however that is also made in the original decision. It is said there that there is not a sufficient quality of evidence to qualify the application for any of the available key or qualifying criteria. The point that the documents are notarised is a comment only and does not go to the substance of the point being made in that part of the review decision.

69. The next point said to involve a new reason is the reference in the review decision to the fact that the review failed to identify which “entire pages” of the evidence had been duplicated. But again there is the point in the initial decision that there were instances of duplicated content in the application. It was also said there that referees repeating the same facts without directly experiencing the applicant’s contribution is not sufficient. Again, there does not appear to be a different reason being provided here.

70. The third point made is that new reasons were raised in relation to the proof of earnings points. Here the review

decision refers to the fact that the guidance indicates that wherever possible financial documentation and proof of earnings should be provided to enable Tech Nation to assess the application, and that for evidence that would exceed the page limit, only important aspects should be provided. It is said that examples of the verifiable third party evidence are provided within the guidance material and in any event, for the purposes of the review, the panel has reviewed and considered all the evidence provided. There is reference to three live contracts that the applicant says she is actively delivering against and earning from at the time the application was made and it said that no documentation was provided as evidence. There is reference in the original decision to the fact that whilst many documents and much information is presented in the application, there is actually very little verifiable third party evidence that substantially supports the criteria. It also says that the application contains many references to activities without any substantive proof or specifics on the applicant’s direct contribution, and giving examples of this.

71. Again I consider that in essence what is discussed in the review document is not materially different from the points made admittedly rather more broadly, in the original decision.

72. There is also said to be a new reason in the reference in the review document to multiple pieces of evidence having been provided on one file multiple times, running into hundreds of pages, including the length of the CV included for Professor Mammo Muchie alone running to 234 pages, which was said to be clearly in breach of Tech Nation guidance.

73. I read this however as a comment rather than a reason for the decision that was made. It is an illustration of the multiple pieces of evidence that had been provided and the point is made that the panel has unpicked and reviewed all the multiple pieces of evidence provided. I do not read this as amounting a new reason or indeed to a reason at all.

74. It is said next that the reasons for rejecting the patent evidence are new. The review decision mentions two patents with which the applicant said she had been involved . One was a patent pending status and so no details were available in the public domain for inspection and the applicant did not include these details in her application, and the second was an Australian patent and the panel had been unable to verify or inspect it via internet searches and no further details of it were provided beyond the filing number.

75. Again however, there is a reference in the original decision to patents where it is said that there are a few references to patents, sometimes referred to as pending and sometimes not and there is no evidence submitted showing the applicant’s contribution to a registered and approved patent.

76. Again, I do not consider that fresh reasons have been provided with regard to this point, but essentially the same point is being made in slightly more detail.

77. The next point that is said to be a new reason is the assertion in the review that no information about the applicant’s previous significant employment contracts had been provided. But again, in the original decision, there is reference to the application containing many references to activities without substantive proof or specifics including delivery of a digital product executing a contract and a

further contract. Again therefore I consider that there had not been provided any fresh reasons in what was said in the review decision.

78. As regards the next point, it is said to be a set of new reasons in commenting that it was difficult to determine what the applicant's immediate occupation was and that she had listed so many organisations and schemes where she was a mentor it was difficult to understand how she spent her time and what value that mentoring might generate. Again it is relevant to look at the first main paragraph at page 181 of the bundle in the initial decision, referring to there being many documents and much information presented with actually very little verifiable third party evidence substantially supporting the criteria. There is also the comment that the application contains many references to activities without any substantive proof or specifics on the applicant's direct contribution. There is more particularly the specific point made further down the page that with regard to the criteria in KC2 this requires proof of recognition for work outside her immediate occupation, it is said that it is very difficult to ascertain what the applicant's immediate occupation is, given that there are four current founder/co-founded roles in her CV along with a further nine advisory roles and 28 other roles listed on her LinkedIn profile as being "current". Essentially the same point is being made and again fresh reasons are not set out.

79. The final contention as regards new reasons is with regard to what is said in the review as the evidence being non-specific or not relating directly to or not being provided according to the criteria and not being clear about which criteria the applicant wished to be assessed against, or how her evidence was said to match the criteria.

80. Again, this appears to me to be no more than a slightly more specific addressing the issue raised in the earlier decision that many documents and much information are presented but there was actually very little verifiable third party evidence substantially supporting the criteria, the general comment at the start of the feedback that there is not sufficient quality of evidence to qualify the application for any of the available key or qualifying criteria and the general point at the end of the decision that it has not been sufficiently evidenced in the application that the activity is of the required calibre i.e. innovation, impact or contribution to demonstrate the application meets any of the individual criteria to be endorsed.

81. In sum therefore I do not consider that the points argued in respect of there having been new reasons set out in the review going beyond what was included in the original decision, is made out. I see force in any event in the point made on behalf of the respondent and the interested party that there is a real risk of circularity if there is not some greater clarification at least or exploration of matters that were addressed in the original decision. A review cannot be a mirror image of the original decision or it would be understandably challenged as not having given any independent thought to the matter. It cannot have been intended that there should be the circularity that concerns both Mr O'Ryan and Ms Anderson. Nor do I consider that the explanation lies in Mr Wilding's argument that if there is proper underlying decision-making, which is clear on the reasons and upheld with clear reasons, that this shows the system is not unworkable. In broad terms, the refusal in each case is essentially the same, that the evidence was not such as to satisfy the criteria and the fact that more specificity is

contained at times in the reasons given in the review is not, in my view, a reason to say that there has been a failure to conform to the guidance on the point. Accordingly, I do not consider that this ground is made out.

Ground 3: Unlawful Application of Guidance

82. In this ground, it is argued that the respondent erred in law in applying the guidance rather than the Immigration Rules, citing the authority of Alvi v Secretary of State for the Home Department [2012] UKSC 33 on the point. The point is made that the review continues to refer to the contents of the guidance and the reasoning as to why evidence is rejected and neither decision nor the review focusses on the applicable Immigration Rules and how the evidence is insufficient. Having set out the requirements in the Rules in respect of the key and qualifying criteria, it is argued that neither decision considered the evidence submitted against these criteria, failing to set the evidence against the Immigration Rules and approached the consideration of the evidence in a scattergun way which makes it impossible to understand why the evidence does not meet the criteria under the Rules. The further point is made that there is no example of objective decision-making in the failure to set the evidence against the Immigration Rules either in the original decision or the review. It is argued that at both stages the reasons given demonstrate that the decision maker was going on a search for reasons to refuse rather than assessing the evidence in the round. It is argued that the contents of the guidance are irrelevant for the consideration of whether someone meets the provisions of the Immigration Rules or not. The guidance included examples in respect of this category of case, for example as to how a person could demonstrate a proven track record with regard to key criteria

1. These were examples of what the evidence might look like. The decision and the review had a consideration/expectation that the applicant needed to provide evidence of income and earnings but this was not required by the Rules but was an expectation in the guidance. The review clearly fixed on the guidance and not the Rules and there was another example of that in respect of key criteria 1, the track record and the bullet points at page 442 of the bundle and the expectation, for example, at page 390 in the guidance addressed at paragraphs 21 to 23 in the review decision. Again there was a nod to the guidance. It was clear that the review was focused on the type of evidence set out in the guidance rather than considering what the rule required and the evidence should be considered in the round. This ran throughout the decision. The point was emphasised at paragraph 36 of Mr Wilding's skeleton argument. He was not saying that it was wrong to reference the guidance, but that where the decision was based on a failure to provide evidence as outlined in the guidance and considering the Immigration Rules criteria it was difficult to see how the reviewer or the decision maker had applied the guidance in the Rules and this was the basic problem identified in Alvi. The application of the guidance in this case was flawed in considering the guidance as a set of criteria to be met and this showed a lack of rigour in the decision-making process, in seemingly applying evidential expectations from the guidance rather than an objective assessment of the evidence as set against the provisions in the Rules and this was clear in the decision and the challenge.

83. This was a separate ground of challenge and the logical end point but the criticisms about the process built into the perverse nature of the decision and the reasons given were

such that the applicant did not understand the basis on which her evidence was rejected.

84. The point was made at paragraph 60 of Mr O'Ryan's skeleton that there was no challenge to the lawfulness of the guidance, and that was correct, but it was a question of its application in the instant decision. The decision makers had relied entirely on the guidance and not the criteria. The argument made by the respondent appeared to suggest that where a person was working in a new digital field etc. that a patent application would demonstrate this but this had been done and it was rejected as it had not yet been approved. It was questioned why that was relevant to the reasons for refusing. This was just an example in the guidance.

85. In his submissions, both oral and written, Mr O'Ryan argued that it was very clear from the proforma documentation that both the initial decision and the review were taken with the Immigration Rules at the forefront of the decision maker's minds as the form itself required them to undertake a tick box process identifying which of the key and qualifying criteria had been met (if any) as well as which of a number of the additional factors listed at paragraph 15a to 15c of Appendix W applied. As was explained above the feedback in both decisions, it was clear on their face that in the assessor's opinion there was not a sufficient quality of evidence to qualify the application for endorsement under the key or qualifying criteria. These were objective decisions made on the basis of the evidence presented.

86. It was the case that the review also referred to the guidance, but the guidance itself made it plain that the endorsement requirements for digital technology applicants appeared in Appendix W, so reference to guidance was clearly

also implicitly a reference to the Immigration Rules. Accordingly, the fact that the guidance was referenced did not mean that the Immigration Rules had not been considered or applied. It was any event clearly relevant and indeed necessary for the decision maker to have regard to the guidance when taking a decision since it explained how the requirements of the Immigration Rules might be met in particular cases. It was also denied that there was no evidence of objective decision-making. As had been argued, the Immigration Rules formed the backdrop to the conclusions set out as the feedback clearly explained.

87. With regard to Alvi, it was held there that a specific requirement of immigration control which, if not satisfied, would lead to an application for leave to enter or remain in being refused, was a Rule within the meaning of section 3(2) of the Immigration Act 1971 and represented a “Rule” which should be present in the Immigration Rules and not in guidance. However, it was argued on behalf of the respondent that there was simply no “Rule” actually existing within the Global Talent Guidance, or treated as existing within that guidance by the respondent. The limits to the amount of evidence that an applicant should submit was set out within the Rules and the guidance reflected such Rules. The guidance set out certain examples of how the Immigration Rules might be met but these were no more than examples and were not mandatory requirements, nor were they treated as representing mandatory requirements.

88. The decision maker was obliged to test the evidence so they were entitled to consider it in the round, looking at its qualities. When there was a reference to, for example a patent applied for but not granted, such a reference was one that the decision maker was entitled to make. The

contribution made would be more firmly established if the patent had been granted rather than an application filed. The allegation that the decision maker had elevated the requirements of the guidance into Rules was not sufficiently particularised. There was no reference to which parts of the decision were errors of law and it was not said which parts of the reasoning were unlawful or irrational. The points identified at paragraph 36 in the applicant's skeleton, as opposed to where it was said there were references to the guidance being treated as a Rule, were of no materiality. The reference at page 388 and a couple of other examples elsewhere, including reference to the guidance indicated that wherever possible financial documentation proof of earnings should be provided and there were a couple of other examples. On behalf of the respondent, it was argued that the guidance was clear. It could be seen that despite failures to accord with the guidance, for example as referred to, in respect of 13 to 17 & 19, nevertheless, the panel had reviewed and considered all the evidence provided, as was made clear. None of the guidance had been elevated into a firm Rule. The rules required there to be a testing of the strength of the application as to whether the key criteria were met. Whether the applicant had made money in any activity was relevant and it was not a misdirection in law for that to be considered. The guidance referred to the provision of evidence of remuneration. It was not treated as a Rule. However, possible evidence should be provided of earnings etc. as referred to further on in the paragraph concerning 13 to 17 & 19 as it should be borne in mind what the applicant said she earned with regard to AAT and P & L. Less regard could be seen from Mr Jeffs-Watts' witness statements that by April 2022 both companies had filed dormant accounts and AAT had been wound up. The applicant accepted in her witness

statements that the AAT figures were projected income. It was not obvious and one could say that she claimed to have been paid that money but she accepted that she was not. There were concerns about it not being a product-led company and there was insufficient activity ever to file accounts. It was accepted that this was new evidence but it should be taken into account as it shed clear light on the circumstances in AAT when the application was made.

89. In her submissions Ms Anderson argued that what in fact Alvi said was to require that a substantive requirement which, if not complied with alone would inevitably lead to refusal of an application, should be in the Immigration Rules. The decision was concerned with hard binary Rules determining the outcome and not considering evaluative assessments of materials such as in this case. The applicant did not identify any instance of non-compliance with the said “Rule” and the guidance which inevitably then informed the ground for refusal of endorsement.

90. The Supreme Court had not said in Alvi that guidance was irrelevant to decisions, and indeed in Lumba [2012] 1 AC 245, the Supreme Court had indicated that there were occasions where guidance might be legally required to indicate matters relevant to a substantive decision, such as how a broad discretion to detain under immigration powers might be exercised. It could not be argued that merely referring to guidance and not the Immigration Rules rendered a decision unlawful or that there was a legal requirement to set evidence against the Immigration Rules as a prerequisite to a lawful decision.

91. By way of reply, Mr Wilding argued that the review itself relied on what was found in the guidance as being a reason to

refuse, for example with regard to the reference about the guidelines being clear about the need to select one KC and two QCs and the assessor noted that the applicant had not followed the guidance. Proof of earnings had been required but that was not a relevant factor and was not even in the Rule so the relevance of that paragraph should be queried. The applicant had done as best she could to show wherever she had earned income, for example from ChangerInc at page 523 and that showed her remuneration and in any event the reference to guidance brought in an expectation in guidance that was not in the Rules.

Discussion: Ground 3

92. I do not agree that the argument made on behalf of the applicant is borne out by the decision in Alvi. It does not preclude the use of guidance in a situation in particular as here where there is an evaluative assessment of materials to be made. It is clear from both the decision and the review that they were firmly set in the context of the Immigration Rules and that they did no more than take into account the guidance at relevant points, as in my view the decision makers were properly entitled to do. It is clear that in more than one instance even where the guidance had not been followed, nevertheless the evidence submitted was assessed against all criteria as indicative of the fact that the reviewer did not see herself as rigorously bound by the guidance, but applied them in a sensibly flexible way. There would be no point to having guidance if it could not be taken into account in a decision, whether in the initial decision or the review decision. I see no indication that the decision makers bound themselves to the guidance at the expense of the Rules, but that they rather treated the Rules as the broad framework within which the decision had to be

made but bearing in mind the greater detail in the guidance, which is after all there to assist applicants as well as decision makers. Accordingly, I find no error of law with regard to ground 3.

Ground 4: Perverse, Irrational and Unreasoned Decision-Making

93. Here, at the outset, the applicant takes issue with the respondent's position in the pre-litigation correspondence that a decision maker either making the initial decision or the review decision is not obliged to refer to every single item of evidence, but it is argued that on any reading of the evidence the Rules are met, the reasons given for refusing are incoherent and in themselves obviously ignorant of the evidence submitted. It is argued that every reason given falls into either being obviously perverse or answered by the evidence submitted. Although a decision maker may not have to refer to each piece of evidence, the contents of the evidence need to be read and considered. Thus, the applicant denied that she provided evidence in excess of that required under the Rules. She provided ten items of evidence which included an additional five letters of endorsement by global experts, three letters of recommendation, a personal statement and her CV for consideration in respect of the criteria under the Immigration Rules. She also provided other documents and links to her LinkedIn profile. The respondent was under a duty within the Rules to consider all the evidence together and yet had failed to do so. In saying that the additional feedback was not intended to provide a detailed analysis of the evidence provided or to set out in detail why it did not meet the necessary standard, the respondent was in effect saying that it had no duty to give reasons in refusing an endorsement decision as the feedback was not intended to be a detailed analysis of the evidence

provided or to explain why a standard was not met. This was clearly unlawful. If the respondent did not have to give reasons, whether adequate or otherwise, for the refusal of an application then the decision and the review had clearly not complied with the respondent's overarching duty on an endorsing body under the Code of Practice. The points made at paragraph 54 of the grounds as to why the new issues raised in the review were irrational were unlawful as the reasoning throughout plainly failed to engage with the totality of the evidence produced. The decision maker had chosen either not to consider it at all or to look for reasons to reject the application. The decision maker seemingly wanted every single item of evidence to be corroborated elsewhere, which was problematic for an application which was limited to the number of pieces of evidence and length which could be submitted. Nevertheless the eight letters of recommendation detailed and corroborated the evidence provided by the applicant, as did her LinkedIn profile and live media updates, which the respondent asserted it had researched.

94. As regards the reference by the review "panel" to having the same phrases and being identical, there was no identification of the significance of this or otherwise. That it was said that the review had been carried out in good faith with the assumption that the references and other information provided were truthful did not leave the applicant with any confidence that the review had been undertaken objectively. It was manifestly perverse to say that key criteria 2 could not be met because all the examples failed to explain how this was outside the applicant's day-to-day activities and how she "added value" as being counter to what the Immigration Rules

said and showed again a lack of objectivity, impartiality and bad faith.

95. As regards the statement that the applicant's activity for Distichain had not been confirmed with payslips or a contract, this should be seen against the fact that she was a board member and not an employee, as was confirmed in the corroborating statements and evidence.

96. It was unclear what was meant in questioning her involvement in the two companies and the development of technology towards a patent because it did not show product-led technology. The evidence highlighted that both companies were product driven and there were patents for both, which the applicant had invented. It was said that there was no information available in the public domain, but the Application Registration Number by the IPO, a copy of the Inventorship form 7, a copy of the architect plan as an appendix for that application and the QR code for AAT had been supplied. Of more relevance was the fact that the Intellectual Property Office was the decision maker on patents and not Tech Nation. It was perverse to suggest that the respondent would ask or expect to view the full content of a highly confidential patent. It was a crucial part of the evidence which all pointed to the qualifying criteria being met.

97. It was unreasonable and perverse to say, for example, that the patent was pending when it was clear that the applicant had set up a new company with a new invention and accompanying patent to show her global talent. It was neither here nor there whether the application was pending rather than accepted for her standing as a world leader. It was another example of the decision maker going far beyond

the requirements of the Rules and incorporating their own erroneous understanding of how this industrial sphere operated.

98. It was argued that the decision and review read very much as if they were written by someone completely unfamiliar with the applicant's work. Completely new points were taken and of the five decisions made in total, all refused for differing reasons. It was impossible for the applicant to understand why her application had been refused. The reasoning was inadequate and the authors of the decision were looking for a reason to refuse the application at the best and were incapable of understanding what the evidence showed, or at worst not being objective.

99. What was important with regard to AAT and P&L was that the companies, when they were set up, showed the applicant's global talent, and what happened subsequently was obviously outside her control. The global expertise, technology and innovation provided and developed by the applicant was being utilised in projects after the application in the UK including, but not limited to, Law Tech UK, the Ministry of Justice, The Centre for Digital Trade and Innovation which showed her ongoing position in the industry. Although the respondent and the interested party highlighted the arm's length approach the assessor had had from the respondent and refuted any suggestion of bias or lack of objectivity, it was difficult to understand however how Mr Jeffs-Watts was in any position to give a commentary on the applicant's application or evidence and unclear how he could comment on the strength or otherwise of the application as someone who is not an assessor. The subject access request response redacted emails between the assessor and someone at the respondent

called into question the claim that the assessors were at arm's length and independent.

100. Issue was taken with the third statement of Mr Jeffs-Watts in various respects including denying that the applicant identified herself as a "design eco-system thinker and strategist", and overlooked the fact that information was provided concerning ChangerInc Global, that there was some description of the work regarding a patent in the application, corroboration existed of her academic achievements and the statement appeared to ignore the contents of Mr Elturk's letter identifying attending and contributing the applicant's virtual lecture series. Contrary to what was said of there being no reference to being one of the twelve world's subject matter experts appointed by the SAE Institute and Navitas Careers & Industry Division, there was reference to the LinkedIn profile in this regard. The criticism of the applicant for not mentioning delivery of the cybersecurity programme for the Abu Dhabi School Government cybersecurity programme was answered by the fact that it was in her LinkedIn profile. Information as to the UNGA Saudi Summit and the research session had been in her profile since September 2021. A number of other instances are set out where issue was taken with responses by Mr Jeffs-Watts to contentions made by the applicant.

101. In sum it was submitted that evidence satisfies the provisions of Appendix W. For the respondent to say that key criteria 2 could be met because of all the examples failed to explain how this was outside the applicant's day-to-day activities and she "adds value" was perverse and counter to what the Immigration Rules said. There was no requirement of the Rules that her activities with Distichain should be confirmed with payslips or a contract. The evidence

highlighted that both companies with which she had been involved in the development of technology towards a patent were product driven contrary to what was said by the reviewer, and there was information available in the public domain, as set out above. It was perverse for the respondent in essence to request or expect to be able to view the full content of a highly confidential patent.

102. Mr Wilding built upon these points in his oral submissions. The reasons given showed either a lack of understanding of the evidence or an irrational consideration of that evidence. On the basis of the criteria set out in the Immigration Rules it could be seen from the evidence and how the applicant presented it that she went to great lengths to identify which evidence tallied with which criteria. The evidence began with the CV that had to be put in and the endorsing letters from three individuals and up to ten further pieces of evidence. The evidence the applicant highlighted clearly showed a proven track record of innovation in the technological sector and application outside her immediate area. The reviewer's concerns were no more than efforts to chip away at the edges of the evidence. It was unclear why the reviewer had identified a lack of substantive evidence for quality and support: it was unclear what was lacking. The first three paragraphs of the review said very little about the actual information and evidence presented. There was reference to the previous assessor being correct that there were several instances of identical wording. It was said that they were not raising any question or integrity and assumed that they were truthful. All three letters set out all that was required, identifying who the author of the letter was, how they knew the applicant and identifying their experience and the applicant's recognition in the industry.

The reviewer said nothing much. There was no question about their honesty but the substance of the three letters was not addressed and this left the applicant in the dark. It seemed from how the Rules were drafted that three letters were the cornerstone of the application, but it was unclear why they were rejected.

103. The overarching submission was that the approach taken in the decision and the review was said to raise issues with parts of the evidence but not the evidence as a whole. One would think the letters would be significant in identifying who the applicant was and her position in the industry and supported all she said in her evidence. All one had was a complete failure to engage with that. There was then an exercise of jumping about the evidence with no logical order to the review. There was a reference to the issue of proof of earnings and no documentary evidence about that but that was not right, the evidence had been provided with regard to global talent and the table of her remuneration from the company minutes. It was obvious why she had had to present her evidence in that way and she had explained why she could not share the company minutes. They were looking for Exceptional Talent category people and on any reading of her CV she was clearly someone of pre-eminence in the sector. She identified, and the endorsing letters corroborated, her position in, for example, twenty global thought leaders etc and the conferring on her of the title of professor extraordinaire and the doctorates. She could not just put in payslips or a P60 equivalent. She had explained it all in the evidence, and the decision maker and the reviewer did not engage with that. Simple statements had been made about limited evidence and complaints about the CV but the decisions did not go into what the document said. There was

a failure to appreciate that it was an application from a person giving evidence of such significant standing in various projects that it required careful consideration of that evidence. An example was the points made about the patent but it was signposted at the beginning that it was a project and the QR code for the pending patent was included. It was said by the reviewer that that was not enough, but it was not clear why not.

104. Also there was no requirement in the Rules for a patent to have been granted at the end of the process but it was demonstrative of the applicant's ability. The criteria set out in the Immigration Rules had been lost along the way by the decision makers in this case.

105. It was also unclear why the applicant needed to provide previous employment contracts as there was no requirement for that in the Rules. It had been said that it was difficult to determine what her occupation was but this again was not a requirement of the Rules. This was entirely irrational and reference was made again to the relevant criteria. The applicant's table showed several items of evidence with her contribution to the wider business and the digital community including what she provided to the summit of Nobel Peace Laureates. Her referee Mr Armstrong addressed this. No reasons had been given as to why the specifics of the Rule were not met and points had been raised that were not requirements for the Rules, so there had been a failure to consider the evidence against that criterion.

106. Also points were made in respect to parts of the evidence in the review about future activities which said they could not be accepted as evidence as they had not occurred. The applicant could not win. One testimony had spoken to what

she had done with them historically and what she would do going forward. This was perfectly normal. Again the wording of the Rules should be borne in mind. The evidence was demonstrative of a highly regarded person working with such people in the sector and moving forwards. It was difficult to show ongoing expertise if there were not referenced to future events. Their decisions amounted to just a scattergun set of reasons as to why some of the evidence was not accepted and this was unreasonable and irrational. With regard to Distichain either she had to show historical or current or possibly future involvement and this was inconsistent and ignored the totality of the evidence of what she had done for these organisations. In the review decision there was then a jump to qualifying criterion four on the issue of academic contributions etc. On Mr Wilding's reading of Professor Muchie's letter it showed the historical contribution of the applicant and her work in the future. She was working with him to develop an advanced course at a university. This was therefore further evidence of both processes singularly failing to deal with the evidence presented.

107. The skeleton responded to Mr Jeffs-Watts' statement and although that was not the decision under challenge, it seemed to take the approach that what the applicant had identified in her witness statement was not in her application. Each point, in that regard, was dealt with in paragraph 53 of Mr Wilding's skeleton. Ground 4 was concerned with the irrationality of the decision but the point was that the evidence was of such a quality that on any reading the requirements of the Immigration Rules were met and no reasonable decision maker applying the Rules correctly could

decide, as had been done. On the basis, such a finding could be made and a mandatory order could be made.

108. In the summary grounds of defence and in his oral and written submissions, Mr O'Ryan argued that notwithstanding any observation made by the decision makers as to the difficulties, experienced in considering all the evidence submitted, it was averred that all the evidence had indeed been considered. They were not obliged in law to refer to every single item of evidence. They were obliged to consider the evidence as a whole and they had patently done so. It was made clear in the initial decision that the reason for refusal was that there was not sufficient quality of evidence to qualify the application for any of the key or qualifying criteria. Additional feedback was then provided, the purpose of which was to assist the applicant to understand why the application had been refused. The additional feedback was not intended to provide a detailed analysis of the evidence provided or to set out in detail why it did not meet the necessary standard. The format of the decision clearly followed that recommended by the Secretary of State at Annex D, Global Talent Code of Practice for Endorsing Bodies.

109. The decision fell within the range of rational responses. The challenge was little more than disagreement. Upon review, the assessor addressed and responded to each and every point raised by the applicant but ultimately reached the same conclusion as did the original decision-maker.

110. As regards the specific points set out at paragraphs 54(a) – (h) of the grounds, it was argued that the challenge was one of disagreement. The feedback was not intended to provide a detailed analysis of the evidence provided or to set out in detail why it did not meet the necessary standard. Responses

were made to specific complaints, as set out in the review. It was accurate to say that there was repetition within the letters of recommendation. Though there was no allegation of dishonesty, the decision maker was entitled to observe that the repetitive nature of the content of the references did not demonstrate that the referees had their own independent and personal knowledge of the applicant's background and experience. It was clear, as was confirmed, that consideration was given to all the evidence provided. The respondent was entitled and indeed required, to take into consideration the strength of the supporting statements in the letters.

111. As regards the point about the lack of evidence of remuneration of the applicant and the comment on the complaint raised in the review about there being very little evidence to verify compliance, the reviewer correctly pointed to the guidance which advised how evidence should best be presented, including evidence regarding remuneration and provided examples of where the application appeared to lack documentary support. In any event, it was unclear whether the applicant was asserting that she had received remuneration in 2020 from AAT of whether the sums specified were anticipated earnings or the supposed value of the time for her work done for that company.

112. As regards paragraph 54(d) this was a specific response to paragraph 18 of the review letter and confirmed that it had all been unpicked and reviewed and there was no basis for the allegation of perversity or irrationality. Paragraphs 54(e), (f) and (g) were essentially disagreement. As regards paragraph 54(h) the assessor was entitled to provide the feedback set out. There was no obligation to provide a greater level of specificity than had been provided. There

was no requirement that each item of evidence be corroborated by another. The assertions were not adequately evidenced.

113. It was appropriate to remark in respect of key criteria 2 that it was relevant to observe that the examples failed to explain how this was outside the applicant's day-to-day values and how she "adds value". It was clearly required that proof be provided of recognition outside the applicant's immediate application that had contributed to the advancement of the sector and this was in any event an adjunct to the central conclusion of the initial decision that insufficient evidence had been provided of specific activities satisfying the key criteria. On review the applicant had challenged that conclusion and sought to refer back to the evidence relied on and the reviewer had considered that evidence and came to the same conclusion as that in the initial decision.

114. The point regarding Distichain came down to the same point about a lack of quality of supporting evidence provided. The response was within the range of reasonable responses.

115. There was also no merit to the complaint regarding the reference to patent evidence. No link had been provided within the application to any publicly accessible patent in the manner suggested by the guidance and nor had the reader been directed that it was necessarily important to scan the QR code. The point about the insufficient quality of evidence was again relevant in this regard.

116. As regards the point that the decision and review read as if they were written by people who were not familiar with the applicant's work, it was the case that the respondent's assessors were unlikely to have any direct knowledge of a given applicant's work, which why it was incumbent on

applicants to be clear, precise and specific in their applications and to present the information supporting their applications in a format enabling the reviewer to identify clearly the evidence relied on. The respondent had in any event been specified by the Secretary of State as an endorsing body due to its specialist expertise in the field of digital technology.

117. The respondent also referred to the applicant's reliance on Simetra Global Assets Limited v Ikon Finance Limited [2019] EWCA Civ 1413 in support of the proposition that reasons for a decision must be adequate. It was argued that the reasons contained in the two decisions were adequate in law. It was also necessary to take into account the context of the decisions under challenge. The panel members were not judges giving judgment after a contested trial but undertaking an administrative task of determining an application for endorsement under the Immigration Rules. As was said in Doody, the law did not at present recognise a general duty to give reasons for an administrative decision, though it was fair to say that the common law was moving more towards a position where reasons should be given unless there was a proper justification for not doing so.

118. The use of the expression "panel" did not of itself raise any arguable error of law. The term had been explained adequately in particular in Mr Jeffs-Watts witness evidence. Heavy reliance as identified by the respondent has been placed by the applicant on her work with AAT and P&L, which she denied was unsustainable as she had referred to her work within those companies as career highlights and they were the first two named companies in her application form and the first two named companies for which the applicant said she intended to work within the United Kingdom. The observations

in respect of AAT were entirely consistent with what the applicant now accepted, which was that it was always a dormant company and that was also the case for P&L.

119. In summary, it was argued, the respondent had taken into account the relevant evidence and came to conclusions open to it on that evidence. The challenge was largely a matter of disagreement but the evidence had been considered and reasons given as to why the key criteria were not met. As regards Mr Jeffs-Watt's consideration of the evidence that the applicant set out subsequent to the decision, this started from the post decision evidence of the applicant and Mr Jeffs-Watts had not said that none of the evidence was with the original application but had said repeatedly that the applicant had not said most of this and most of what was now said could not be found in her application so it had no bearing on whether or not the decision was erroneous.

120. In her written submissions, Ms Anderson argued that if a decision genuinely met the demanding requirements to demonstrate perversity in an area of evidential assessment that should be self-evident. She argued that the very complexity of the applicant's selective submissions belied the allegation of perversity and amounted to mere disagreement with the outcome and the reasons. The duty to give reasons was also context-specific but there was only ever a duty to give reasons for the decision made and never a duty to give reasons for the reasons nor to give reasons for not making a different decision. The essential flaw in the applicant's approach was the assumption that the decision maker was bound to grant the endorsement given the perceived strength of her application and supporting materials. It was an area however where there was legitimate scope for differing opinions and the decision-maker was not effectively

bound to concur with the applicant's own assessment. It was clear that the court should not enter into forming opinions on matters that entailed specialist expertise and experience.

121. It was clear that all the usual processes and procedures had been carried out and it could not be said to be such a clear case that perversity was made out. It was outside the Tribunal's specialist knowledge and experience to address the merits of the decision-making. It was not a case that cried out for only one answer and a finding of perversity was a last resort. There was a refusal of an application for leave to remain that had been dealt with very carefully and considered properly and otherwise it needed a conspiracy theory to make the claim out. It was difficult for the applicant to judge that she had just missed on what was required. One would expect a consistent approach. It was ultimately the Secretary of State's responsibility to see that the decision-making criteria were met and she had no interest in the particulars of this application, but as to the appropriate public law compliant process being carried out. Hence they could not be no contact between the Secretary of State and the endorsement body and likewise with regard to the assessor. There was no question of a supervisory or advisory element, what mattered was what was said and it would be wrong if the decision maker had been told to refuse at all costs, but if they were told to follow a compliant process then that was fine. A degree of supervision and accountability was fine and it was like the judicial review process. It was very important to spell out the basis of the decision challenged and why the decision had been made.

122. By way of reply, Mr Wilding argued that with regard to the evidential criticism it was necessary to read the applicant's

witness statement carefully. She referred to how funding was withdrawn from AAT and this was of course post-decision and post application but insofar as the respondent took issue with reliance on AAT the applicant showed the basis upon which the funding was withdrawn and how she operated in her industry. Mr O'Ryan said that the money from AAT could not have been earned and yes, that was the case, but it was a question of executive economic contributions but the AAT evidence was accurate at the time of the application and also the Charger Inc evidence identified the applicant's role with a product-led company. The evidence was expected to be scrutinised. Clear reasons needed to be given and that had not been done. If the Tribunal went through each evidential piece it showed a person who met the requirements of the Rules. It was not just a matter of disagreement. It should be questioned how she could understand how this evidence did not meet the criteria and that was what the ground 4 concerned. The decision was incoherent and irrational. The further disclosure showed the mindset of the respondent and Ms McKenna, the assessor who had discussed matters, and it seemed that Mr Jeffs-Watts had disputed that originally and the input concerning the redraft all showed the respondent taking the wrong end of the stick with regard to the evidence and whether it showed criteria 1 and 2 were met. The applicant had put in the evidence as required and it had been set out how she met the criteria and it was clear what her role in the sector had been. She wore several hats across the industry. The respondent needed to engage with this and to do so with clear reasons and had not done so.

Discussion: Ground Four

123. On my reading of the initial decision and the review decision, they both contain, in the context of the relevant

Immigration Rules, a careful evaluation of the evidence that was before the assessors. There was no obligation on them to give reasons for reasons, and in my view, in all respects, the decisions are perfectly adequately reasoned. The points set out at paragraph 78 of the summary grounds of defence assist in understanding the response to the challenge made. As regards paragraph 54a of the grounds, I consider this is simply a matter of disagreement. The assessor concluded that the information contained within the application as a whole, including within the notarised documents was insufficient to show that the relevant criteria were met. In my view that was a perfectly adequate response.

124. As regards the points made in paragraph 54b, to a degree the reviewer responded to specific complaints, as set out in the review. It was relevant to note repetition within the letters of recommendation and to note that the repetition might bring into question the overall value of the supporting material. It was not outside the range of acceptable responses for the decision maker to consider that the degree of repetition identified was such as to justify the comment made. It was important and indeed necessary to take into consideration the strength of the supporting statements and the letters of personal recommendation and the evidence in relation to qualifying criteria. It is relevant again to note that this was done in the context of an assessment of the applicant’s ability to satisfy the requirements of the Immigration Rules.

125. As regards paragraph 54c, concerning the proof of earnings points, this was a comment on a complaint raised by the initial decision that there was very little evidence available from the material provided with the application to verify compliance with the criteria. It was entirely

appropriate to point to the guidance in this regard which advises how evidence should best be presented. These were not new issues raised, as I have observed earlier in this judgment, nor do I accept that there was any perversity or other unlawfulness in that approach.

126. Paragraph 54d noting a breach of Tech Nation guidance in the multiple pieces of evidence on one file multiple times is a response to paragraph 18 of the review letter, but in any event it was confirmed that all the evidence had been considered and I can see no unlawfulness in that regard either.

127. The issue of the patent evidence raised at paragraph 54e is one where simple disagreement has been expressed. There is no arguable perversity in that regard. The assessor was fully entitled to have and to note the concerns that she expressed in regard to the AAT patent and the Australian patent.

128. As regards paragraph 54f and the lack of information about previous significant employment contracts, and the conclusion that it would appear that none of the companies where the applicant had been employed could be described as product-led digital technology companies, this is in my view again a matter of disagreement. The assessor, as can be seen from her witness statement, clearly spent an unusual amount of time in considering this application, but no basis has been shown to identify any unlawfulness in this regard either. The fact that the applicant considers the companies to be product-led digital technology companies does not mean that the assessor was bound to take that evaluation and adopt it as her own. It is clear that the evidence was considered in the round.

129. Paragraph 54g again is a challenge to understandable concerns on the part of the reviewer given the difficulty that she clearly had in determining what the applicant's immediate occupation was. The evidence of her activities such as the work at The 17th World Summit of Nobel Peace Laureates and other matters was not such as to make it clear that the assessor's concerns were inappropriate ones. There was clearly a lack of clarity in the evidence clearly in this regard.

130. As regards paragraph 54h, the criticism of the evidence as being non-specific or not relating directly to or not being provided in accordance with the criteria is a summary in my view rather than an addressing of any specific point.

131. Bringing these matters together, I consider, as set out earlier, that the evaluation in the original decision and in the review, both provide sufficient reasons for the decisions that were reached in both. They were clearly made in the context of the Immigration Rules and applied, where appropriate, the guidance that was clearly relevant and which was appropriately referred to. The challenge to the decisions is, in my view, essentially one of disagreement. There are both specific and general concerns about the evidence expressed by the assessor which led her to the conclusion which she reached that the criteria under the Immigration Rules were not met. That and the earlier decision to deny the case infected by any error of law.

132. In conclusion therefore, I find that none of the grounds of challenge is made out and as a consequence this application for judicial review is dismissed.~~~~0~~~~

David Allen

Upper Tribunal Judge Allen *10th February 2023*

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