



23 October 2020

PRESS SUMMARY

R (on the application of Pathan) (Appellant) v Secretary of State for the Home Department (Respondent)
[2020] UKSC 41
On appeal from [2018] EWCA Civ 2103

JUSTICES: Lord Kerr, Lord Wilson, Lady Black, Lord Briggs, Lady Arden

BACKGROUND TO THE APPEAL

The Appellant made an application for leave to remain as a Tier 2 (General) Migrant in the UK. At the time his application was made, it was supported by a valid certificate of sponsorship (CoS) from his employer, Submania Limited (Submania). However, the Home Office revoked Submania’s sponsorship licence while the application was outstanding. The Home Office did not inform the Appellant and, three months after revoking Submania’s licence, rejected his application on the basis that he no longer had a valid CoS from a licensed sponsor and so he had not fulfilled the conditions for the grant of leave.

The Appellant sought an administrative review of the decision to reject his application and a 60-day period to enable him to provide a fresh CoS, but the decision was maintained. The Appellant then applied for judicial review in the Upper Tribunal. The Upper Tribunal dismissed his application, and the Court of Appeal dismissed his appeal, the Court of Appeal holding that the Appellant’s challenge raised an issue of substantive unfairness. The Appellant appealed to the Supreme Court.

JUDGMENT

The Supreme Court allows the appeal. The Court unanimously holds that the Home Secretary breached her procedural duty to act fairly by failing promptly to notify the Appellant of the revocation of his sponsor’s licence. The majority of the Justices (Lord Kerr, Lady Black, and Lord Briggs) hold that the Home Secretary was not under a further duty to provide a period of time following notification to enable the Appellant to react to the revocation of his sponsor’s licence. Lord Wilson and Lady Arden concluded that the law did impose this further duty on the Home Secretary. Lord Briggs would have dismissed the appeal despite the Home Secretary’s breach of the duty promptly to notify.

REASONS FOR THE JUDGMENT

Issue (i): Did the Home Secretary’s failure promptly to notify the Appellant of the revocation of his sponsor’s licence breach the duty of procedural fairness?

The Court unanimously answers this question “yes”. Lord Kerr and Lady Black (delivering a joint judgment) consider that it is a “*self-evident*” aspect of that duty for the Home Secretary to ensure that the Appellant had timely notice that, for a wholly unanticipated reason, his application was bound to fail (carrying potentially devastating consequences). They find that this duty is underpinned by the notion that a person such as the Appellant should be afforded as much opportunity as reasonably possible to accommodate and deal with such a decision [107].

Lord Kerr and Lady Black consider that this duty can be characterised as procedural rather than substantive because it is a negative duty: an obligation not to deprive the Appellant of the chance to avoid, or mitigate the effects of, the Home Secretary’s adverse decision on his application [108]. The Appellant would ultimately have to be notified that his sponsor’s licence had been revoked, and so the duty promptly to notify does not create any novel positive obligations [112]. Nor does the fact that the procedural duty may result in the opportunity to avoid the effect of an adverse outcome affect that conclusion [137-140]. Consequently, the duty arose as a matter of procedural fairness.

Lord Briggs agrees that the Home Secretary’s failure to notify constituted procedural unfairness, but he does not consider that this breach justifies the Court setting aside the Home Secretary’s decision. He considers that the Appellant’s lost opportunity to improve his position resulted from the Home Secretary’s voluntary (and probably unconscious) three-month delay in dealing with the application and that, because the delay was a mere “*happenstance*” and the Home Secretary was not obliged to give the Appellant any such breathing space, this breach ought not to render the decision unlawful [197].

Issue (ii): Was the Home Secretary under a duty to provide a period of time following notification to enable the Appellant to react to the revocation of his sponsor’s licence?

The majority answer this question “no”. Lord Kerr and Lady Black consider that the duty to act fairly in the circumstances involves a “*duty not to deprive, not an obligation to create*”. To require the Home Secretary to grant a grace period following notification would be to impose a positive duty and an extra extension of leave beyond that set out in the legislation or Immigration Rules [108-109]. This would be a substantive duty, falling outside of the bounds of procedural fairness [108; 141].

Lord Briggs agrees that a duty to provide a grace period following notification would be a substantive duty going beyond that set out in the Immigration Rules [164; 187]. He reasons that, if time is sought to change or improve the underlying facts to make them more favourable, the issue is probably substantive [177]. A grant of time to find new sponsored employment so as to qualify for Tier 2 leave to remain is therefore substantive [180]. So too is a grant of time to prepare for an orderly departure from the UK [178]. Furthermore, the ultimate consequence of the Home Secretary’s failure to grant a grace period—that the Appellant became an overstayer—is itself a matter of substance [183].

Lord Briggs also considers that the duty to provide a grace period would be “*perhaps a rare example of pointlessness*” [162] and that the principles that underlie procedural fairness have no application to a situation where the decision is inevitable (as was the outcome of the Appellant’s original application) [158; 162]. Equally, the “*collateral advantage*” of being able to take alternative steps as a lawful migrant while being protected from being an overstayer is not one which procedural fairness is designed to protect [164-165]. Consequently, the Home Secretary’s failure to provide a grace period was not challengeable under that head of judicial review (nor any other) [187].

In separate judgments, Lady Arden and Lord Wilson disagree with the majority. Lady Arden holds that the duty falls under procedural fairness because establishing a procedural impropriety is a necessary first step [27-28]. The substantive element in the challenge is a consequence of the procedural fairness argument rather than *vice versa* [32], and this conclusion is supported both by the fact that the Home Secretary’s substantive decision is unchallenged [74] and by the fact that the rule in question is unaffected by the determination of procedural unfairness [75].

Lady Arden also considers that this is not a case of pointlessness: if granted a grace period, the Appellant would have a chance (which may only be small) that he may find a new basis for applying for leave to remain [61]. Rather, it is pointless to impose a duty on the Home Secretary to notify the Appellant promptly if that duty is not accompanied by a grace period giving the Appellant a meaningful opportunity to take steps in light of that notification [72]. She also considers that the opportunity to take any such steps ought not to depend “*serendipitously*” on the amount of time that happens to pass between notification and rejection [72]. She agrees with the judgment of Lord Wilson [92].

Lord Wilson agrees with Lady Arden. He holds that the duty of fairness at common law can impose positive obligations [203-204] and that a duty to provide a grace period would not be inconsistent either with the statute or the Immigration Rules [205]. He queries how, “*without departure from ordinary meaning*”, the Appellant’s complaint could be described as not being procedural [208]. Furthermore, he finds that a duty of prompt notification would be “*to give nothing of value*” to the Appellant unless accompanied by a duty to provide a grace period and that “*the law should not impose a duty nor confer a right if they are of no value*” [217]. He finds that the Home Secretary would have been likely to refuse the Appellant’s application immediately after notification if it were only subject to a duty of prompt notification [221]. Consequently, he considers that only both duties—taken together—would yield the Appellant a reasonable time within which, while not suffering the serious consequences of being an overstayer, he could seek to vary his leave to remain application or seek leave to remain outside the Immigration Rules [222]. He therefore considers that procedural fairness requires both duties to be imposed.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>