Neutral Citation Number: [2024] EWHC 2154 (Admin)

Case No: AC-2023-LON-003679

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2024

Before :

Richard Kimblin KC sitting as a Deputy Judge of the High Court

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Between :

R (on the application of Tendercare Management Limited	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Mr Saad Saeed (Solicitor Advocate) for the **Claimant**
Jack Anderson (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 23rd July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16th August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Richard Kimblin KC sitting as a Deputy Judge of the High Court

INTRODUCTION

1. The Claimant owns and runs a care home in Ilford and also provides carers to other care homes, local authorities and to the public. In December 2020, the Claimant was granted a sponsor licence by the Defendant in order to sponsor workers from abroad. The Claimant now sponsors and employs around 34 migrant workers under the skilled worker category. The Claimant-sponsored migrants are all either carers or senior carers.

2. By a letter dated 26th October 2023 the Defendant decided to revoke the sponsor licence ('revocation letter' or 'RL'). With permission granted by Calver J on 19th March 2024, the Claimant now applies for judicial review of that decision on nine grounds.

3. The Claimant's licence is currently suspended by reason of interim relief granted on 19th December 2024 by Karen Ridge, sitting as a Deputy High Court Judge. The effect has been that sponsorship, employment and care arrangements have remained in place until conclusion of the substantive proceedings.

4. The legal issues arise from the relationship between the Claimant and other care providers (the agency issues), record keeping (the migrant tracking issues) and the correct approach to the decision to revoke (the discretion issues).

5. Mr Saeed appeared for the Claimant and Mr Anderson appeared for the Secretary of State. I was greatly by assisted each of them and by the careful preparation of the materials and the arguments which allowed all nine grounds to be addressed in one day.

FACTUAL BACKGROUND

6. On 9th and 13th June 2023, the Defendant carried out an inspection at the Claimant's registered office to assess the Claimant's suitability as a registered sponsor. The Claimant's director was interviewed, as were members of its staff.

7. By letter dated 21st August 2023, the Defendant decided to suspend the Claimant from the register of licensed sponsors ('suspension letter' or 'SL'). In short summary, the Defendant had concerns that the Claimant was acting as an employment agency/business.

8. In addition to the suspension letter and the revocation letter, there is a third important letter in the case which is the Claimant's letter to the Defendant, dated 4th October 2023 ('Claimant's letter'). It was via the Claimant's letter and an associated witness statement from the Claimant's sole director, Ms Muhobo Mohamoud, that the Claimant challenged the suspension decision and contended that revocation was not appropriate.

Employment arrangements

9. There are four care companies to consider, and which feature in the evidence. The Claimant company is Tendercare Management Ltd which owns and operates a care home called Oasis Court at 115 Elgin Road, Ilford. The Claimant has agreements with two companies which it considers as partners: Naza Connect Care ('Naza') which runs four care homes and YP Quality Care Ltd ('YP'), which runs two care homes.

10. In 2018, the Claimant contracted with Naza to provide care workers and senior care workers when Naza was short of staff. Similarly, in 2020, the Claimant contracted with YP to the same end as the contract with Naza.

11. Each of these contracts contains a definition of 'contract' as follows:

> "Contract' refers to the Schedule of Chargeable Fees, the agreed scope of work as arranged between "The Company" and the "Partner", these Terms & Conditions of Business and any other document or term incorporated into a contract between "The Company" and the "Partner". Care or support worker refers to any suitable employee of Tendercare Management Ltd who provides Services help to the "Partner".

12. The fourth company is Axcelence Limited. The Claimant entered into a contract with Axcelence Limited in August 2017. That contract is defined as:

> "Contract" refers to the Schedule of Chargeable Fees, the agreed scope of work as arranged between the "The Company" and the "Hirer", these Terms and Conditions of Business and any other document or term incorporated into a contract between "The Company" and the "Hirer".

13. The contract provides that 'Carer' refers to any suitable employee of Tendercare Management Ltd who provides Care help to the "Hirer".

The Investigation

14. The investigation included interviews with the Claimant's Director, Ms Mohamoud and its employees. In total, there are eleven interview records. The interviews with employees each follow the same pattern, starting with personal background and history of migration. The interview then turns to details of employment including the work location, duties, pay, hours, holidays, supervision and control. Only the answers are recorded, not the questions.

15. I have found that none of the interviewees is critical of the Claimant. There is no suggestion of any problems with deductions from pay, charging of fees for sponsorship, with holiday entitlement, sick leave, or supervision. As a whole, the interviews present a respectable impression of the Claimant as an employer.

16. The investigation also included a consideration of employee records.

Suspension

17. The suspension letter addresses four concerns:

    a) General Sponsor Duties', which is the agency issue

    b) 'Monitoring Immigration Status' which commences by setting out concerns that the Claimant is supplying agency labour

    c) 'Record Keeping and Recruitment Practices'

    d) 'Migrant Tracking and Monitoring'

18. The concerns at (b) and (c) above were considered further, and in detail, before and within the Revocation letter. The Defendant was satisfied by the responses received in the Claimant's letter which overcame the Defendant's concerns. I therefore say nothing further about them.

19. As to the agency issue, the SL explained:

> "2. During the visit, you stated to our Compliance Officer (CO) that you supply your sponsored workers to facilities owned by 'Naza Connect Care' and 'YP Quuality Carev Ltd' (sic).
>
> 3. You also state you supply staff to 'Axcelence Ltd' on an agency basis, where your supplied staff are managed by 'Axcelence Ltd' staff. You confirmed your sponsored workers are not placed on these assignments.
>
> 4. The contracts you have with 'Naza Connect Care' and 'YP Quuality Carev Ltd' (sic) do not state that they agree for you to run the care facilities for them nor to manage the staff whilst operating there. They are essentially the same contract as with 'Axcelence Ltd'."

20. For this reason, and because Ms Parmar had stated during interview that "*Staff of care home coordinate"*, the Defendant was not satisfied that the Claimant had full responsibility for all the duties, functions and outcomes of the sponsored workers' job. The roles were routine and open-ended. It was said (SL 15): *"The sponsored health care roles you have are not involved in the running of your business. As such, we are not satisfied the roles exist."*

21. Further in support of this conclusion, the SL explained:

"8. In addition, four of your sponsored workers who were interviewed confirmed they worked at 'Naza Connect Care'. These are:

• Md Shofiqul Islam

• Jubayer Ahmed Rimon

• Sadek Hossain

• Abdullah Al Mamun

9. One of your sponsored workers, Bhavisha Kalpeshkumar Parmar, works at a 'YP Quuality Carev Ltd' (sic) location. The roles are routine and open ended for both clients."

22. The Migrant Tracking and Monitoring concern was expressed in this way:

"36. You stated to our CO that attendance is monitored by shift leaders, rotas and timesheets. Records were kept by you and were seen by our CO. You state that annual leave records are kept with your accountant. You then stated that you do not record sick leave.

37. As you do not appropriately record absences, we have concerns that you do not have a system in place to be able to comply with your sponsor duties.

38. Appendix D: keeping documents - guidance for sponsors part 1 g) states you must retain:

A record of the worker's absences, which may be kept electronically or manually.

39. This is in breach of Annex C2 b) of the Workers and Temporary Workers: guidance for sponsors part 3 as stated above."

Response

23. The Claimant's letter of 4th October 2023 responded to the suspension letter.

24. The first point was to contend that the Defendant had misunderstood the business arrangements. Each employee has a contract which specifies the place of work as "working in the community". At all times, the Claimant tells the employee what their duties are. The contracts with Naza and YP make this clear. Naza and YP contact the Claimant and request a certain number of employees. Once Naza and YP designate which residents will be cared for, it is entirely up to the Claimant to manage and

provide the required care. The contracts in fact support the Claimant's position that it retains supervision and control of its employees on the occasions that they work at either Naza's or YP's premises.

25. The Claimant is not an employment agency and is not acting as an employment agency.

26. The second point is that there are genuine vacancies for workers sponsored by the Claimant.

27. The third point was to the effect that an adequate system was in place to prevent illegal work. This no longer disputed and I say nothing further about it.

28. The fourth point was to address concerns about migrant tracking and monitoring, and this was addressed by providing copies of employees' time sheets. So far as sickness was concerned, it was explained that only one sponsored worker took any time off for illness; Mr Abdul Momin and his claim for statutory sick pay was provided.

29. The fifth point was in the alternative to the Claimant's primary case that the Claimant was wholly compliant with the sponsor licence. It was contended that the Defendant should exercise any discretion in the Claimant's favour if the Defendant found any lack of compliance with the sponsor licence. The Claimant advanced ten factors to be taken into account, namely:

    i) Any non-compliance was unintentional and a mistake in interpreting the Guidance.

    ii) The Claimant's business is genuine and a very important service to the local community.

    iii) There was substantial compliance.

    iv) Non-compliance was small or narrow.

    v) There is a great need for the Claimant's employees in the care sector.

    vi) The Claimant is trustworthy.

    vii) The Claimant is willing to work to remedy any non-compliance.

    viii) What is and is not an agency is not clear.

    ix) 40 people would be affected if the sponsor licence is revoked.

    x) There is a public interest in the care provided by the Claimant.

30. Notwithstanding the Claimant's letter, the Defendant revoked the sponsor licence.

Revocation

31. On the agency issue, the Revocation letter maintained the Defendant's stance as was articulated in the Suspension letter. The text from the Suspension letter which is set

out at paragraphs 21-22 of this judgment was repeated in essentially the same terms at RL 8-12. The Defendant then went on to consider the Claimant's representations, setting out large parts in full.

32. At RL 18, the Defendant said:

"Your client's statement outlines that their management of staff within these other organisation premises is based on a verbal agreement. No corresponding evidence of this arrangement has been provided. We do not find this credible when the contracts provided confirm that a scope of work will be drawn up when your client's services are engaged and so such details could have been included in this."

33. At RL 24, the Defendant found that the contracts with Naza and YP had been in place for 5 years and 3 years respectively and, without any scope of works for employees having been provided, must be considered as ongoing and routine. At RL 25 reference was made to a case called *Minster Care* on the topic of agency workers.

34. At RL 27, the Defendant found that no evidence had been provided to demonstrate direct instruction of work. RL28 and 29 are relevant to Ground 3 (Fairness):

"28. Following a further review of the YP Quality Care Ltd contract and Naza Connect Care Limited contract, we note that this does include provision to state that a scope of work will be drawn up prior to commencement which does support that the service provided by your client could be specific and timebound however these scopes of work were not provided.

29. Given that your client has failed to provide additional evidence to confirm the arrangement they have outlined with YP Quality Care Contract and Naza Connect Care Limited, either through scope of work or similar documents and have failed to evidence direct management of their workers while undertaking work at these companies, we remain unsatisfied that this issue has been addressed."

35. By RL 29, the Defendant concluded that the Claimant had failed to evidence direct management of their workers while undertaking work at Naza's and YP's care homes. At RL30, the Defendant cited Part 3 of the Guidance on this topic and reached an overall conclusion on this issue in this way:

"Annex C1 x) of the Workers and Temporary Workers: guidance for sponsors part 3 which states we will revoke your licence if:

You are, or you are acting as, an employment agency or business and you have supplied a worker you are sponsoring to a third party as labour."

36. At RL37-38, the Defendant further concluded:

"As noted above in General Sponsor Duties 1, given the lack of evidence provided, we remain unsatisfied that your client's sponsored workers are not being supplied for routine labour to third party organisations in line with our Suspension decision and so your client has failed to demonstrate that their roles represent genuine vacancies within their business. As such this issue has not been addressed.

38. Annex C1 z) of the Workers and Temporary Workers: guidance for sponsors part 3 which states we will revoke your licence if:

We have reasonable grounds to believe the role for which you have assigned a CoS is not genuine – for example, because it:

• does not exist

• is a sham (including but not limited to where the CoS contains an exaggerated or incorrect job description to deliberately make it appear to meet the requirements of the route you assigned it under when it does not); or

• has been created mainly so the worker can apply for entry clearance or permission to stay"

37. At RL50, the Defendant accepted the Claimant's representations as to immigration status checks.

38. On the Migrant Tracking and Monitoring issue, the Defendant came to these conclusions at RL 60-63:

"60. As part of the representation supporting documents, you have provided copies of your client's Sickness and Absence policy, Annual Leave policy and Mr Momin's SC2. We note that while the SC2 does provide details of the start of the sickness leave period it does not demonstrate how long this sickness absence was for and so does not provide a suitable record of absence by itself.

61. Review of the timesheets provided for Mr S Islam as noted, shows that these do include large section of the sheets marked with slashes which would correspond to the absences described. However, these records do not provide any indication as to the reason for absence nor any distinction between which days of these periods are work absences and which would amount to the workers' normal none work days. These make the records limited in showing the specifics of the absence and demonstrate that your client's sponsored worker is receiving the correct amount of annual leave days as per UK employment law.

62. Given these issues, we remain dissatisfied that this issue has been addressed.

63. Annex C2 b) of the Workers and Temporary Workers: guidance for sponsors part 3 which states we will normally revoke your licence if:

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

39. The Defendant decided to revoke the Sponsor licence. The exercise of discretion and the decision were recorded at RL64-69:

"64. We always take into consideration the potential impact revocation may have on a sponsor and consideration is always given to re-rating a sponsor licence to allow a sponsor to demonstrate full compliance with their sponsor duties if appropriate.

65. We have considered the possibility of downgrading your client's licence and issuing them with an action plan. However, we will only downgrade a licence and issue an action plan where there is scope to rectify shortcomings or omissions in systems or retained documents.

66. As already stated, your client has acted in contravention of Annexes C1 x), C1 z) and Annex C2 b) of the Workers and Temporary Workers: guidance for sponsors part 3. Downgrading their licence is not appropriate due to the seriousness of their non-compliance with their sponsor duties.

67. We believe the issues described above constitute a failure by your client to comply with their sponsor duties.

68. Paragraph C10.4 of the Workers and Temporary Workers: guidance for sponsors part 3 states:

Annex C1 of this document sets out the circumstances in which we will revoke your licence – these are known as 'mandatory' grounds of revocation. If any of these circumstances arise, we may revoke your licence immediately and without warning.

69. As a result, your client's sponsor licence has been revoked. There is no right of appeal against this decision."

Witness evidence

40. Jama Mohamoud is the Claimant's Registered Manager and General Manager. His evidence in these proceedings is that there is no written scope of work because it is most efficient to deal with that orally given the nature of the work and relatively short notice given by Naza and YP. He is the person who is responsible for the scope of work and she decides how many and which of the Claimant's employees are required. Along with his Deputy Manager, Halima Hersi, he is either present or the point of contact for the Claimant's employees.

41. Naza's and YP's carers are managed by their own management.

42. The contracts with Naza and YP pre-date the Sponsor licence. There was a discussion between Muhubo Mohamoud and the owners of Naza and YP and an oral agreement made to allow Tendercare to manage its worker in Naza and YP care homes.

43. Halima Hersi gives essentially the same evidence as Jama Mohamoud, who has always stressed to her the importance of making sure that the Claimant complies with the requirements of the sponsor licence. Najma Hersi is a director of YP. Zainab Ahmed is a director of Naza. Each gives evidence which corroborates that of Jama Mohamoud.

THE GUIDANCE

44. The "Workers and Temporary Workers: guidance for sponsors" lies at the heart of this case ('the Guidance'). It is in three parts, namely Part 1: Apply for a licence; Part 2: Sponsor a worker – general information, and; Part 3: Sponsor duties and compliance. Each is evidently updated from time to time and I was taken to the guidance which was relevant at the time of the decision.

45. The layout of the Guidance is to give Part 1 paragraphs an 'L' prefix, so paragraph L1.1 is concerned with what a licence is. Following that pattern, the Part 2 guidance has 'S' prefixes, and Part 3 has 'C' prefixes. Further, each Part has one or more Annexes, which maintain the pattern of prefixes. In addition, there are appendices which are expressed to be appendices to the Guidance as a whole, rather than any particular part. In this case, Appendix D is relevant (keeping documents) and I shall turn to that below. Taken together, the Guidance which has been produced for consideration in this case extends to 207 pages.

46. With that route map in mind, I shall summarise the particular paragraphs of Guidance which figure in the grounds.

47. It is a guiding principle that with the significant trust placed in a sponsor comes a direct responsibility to act in accordance with the UK's immigration laws, all parts of the guidance, and with wider UK law, including but not limited to UK employment law [L2.2], [C1.3 to C1.5; C7.1].

48. There is guidance which is specific to employment agencies. This makes clear that even a business which is an employment agency may not sponsor a worker and then supply that worker as labour to another organisation, regardless of any genuine contractual arrangement between the parties involved [L5.11]. The consequence of breach of that guidance is revocation [L5.12].

49. Outside of the particular circumstances of employment agencies, the Guidance addresses work on a contract basis by requiring that the sponsor must be whoever has full responsibility for all of the duties, functions and outcomes or outputs of the job the worker will be doing [S1.24]. They must be contracted by the sponsor to provide a service or project within a certain period of time. This means a service or project which has a specific end date, after which it will have been completed or the service provided will no longer be operated by the sponsor or anyone else [S1.25]. It is not permissible to sponsor a worker for an ongoing routine role nor to provide an ongoing routine service for a third party regardless of the nature or length of any arrangement between the sponsor and the third party [S1.26].

50. The consequence of breach of the guidance on working on a contract basis is revocation [S1.28].

51. There is guidance on recording keeping, provided in Appendix D. The Appendix states, at 'g' that a sponsor must keep *"A record of the worker's absences, which may be kept electronically or manually."*

52. On the topic of worker absences, I was taken during the hearing to S4.20 to S4.22 which require that a sponsor to cease sponsoring a worker who is absent unless a valid exception reason applies. Those reasons are listed in S4.27 and include matters such as maternity and jury service.

53. The compliance element of Part 3 of the Guidance (cf the duties element) explains the process of compliance checking. One potential outcome of a compliance check is to downgrade a licence from A-rating to B-rating, the upshot of which would be a requirement to follow an action plan [C8.3]. It is explained that *"In general, we will only downgrade your licence for relatively minor breaches of the sponsorship system*

that we believe can be resolved by issuing an action plan. In more serious cases, we will suspend or revoke your licence." [C8.2].

54. The process of suspension is to write to the sponsor to give initial reasons [C9.10] and to provide 20 days for a response which is the sponsor's opportunity to set out mitigating arguments and to supply supporting evidence but there will be no oral hearing [C9.11]. At C9.12, the Guidance says this:

"If we identify any additional reasons for the suspension of your licence during that 20-day period, including any additional information gained during the course of discussions or interviews with workers to whom you have assigned a CoS, we will write to you again, giving you another 20 working days to respond in writing to the additional reasons."

55. The circumstances in which a sponsor licence will be revoked include, but are not limited to, where:

• you cease to have (or never had) a trading presence

• you cease to meet the requirements of the route, or routes, in which you are licensed

• there is a serious or systematic breach of your sponsor duties

• you pose a threat to immigration control

• you have been convicted of a relevant criminal offence (see Annex L4 of Part 1: Apply for a licence) or issued with a specified civil penalty

• you are engaging or having engaged in behaviour or actions that are not conducive to the public good [C10.1]

56. Firstly, there are 'mandatory' grounds of revocation [C10.4 and Annex C1]. Secondly, there are circumstances in which a sponsor licence will normally be revoked, unless there are exceptional circumstances [C10.6 and Annex C2]. Thirdly, there are circumstances in which a sponsor licence may be revoked [C10.7 and Annex C3].

57. The 'mandatory' ground which is particularly in issue here is:

C1 x. You are, or you are acting as, an employment agency or business and you have supplied a worker you are sponsoring to a third party as labour

58. It is also relevant, to note a further 'mandatory' ground which is relevant to Ground 4, as to employment agencies:

C1 y. You are an employment agency or employment business and we grant a sponsor licence to you on this basis, but later find a worker you are sponsoring has been supplied to a third party as labour

59. The 'normally revoke' ground which is in issue here is:

C2 b. As a result of information available to us, we are not satisfied you are using a process or procedure necessary to fully comply with your sponsor duties.

APPLICABLE PRINCIPLES

The Nature of the Regime

60. The nature of the Sponsor licence regimes is now well established through a decade of litigation. The often-cited summary of the legal principles in *R (London St Andrew's College) v Secretary of State for the Home Department* [2018] EWCA Civ 2496 at [29] includes, as particularly relevant here

"(1) The essence of the system is that the Secretary of State imposes "a high degree of trust" in sponsors ….

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

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

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

…

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

(7) The primary judgement about the appropriate response to breaches by licence holders is that of the Secretary of State. The role of the Court is simply supervisory. The Secretary of State is entitled to maintain a fairly high index of suspicion and a 'light trigger' in deciding when and with what level of firmness she should act *(R (The London Reading College Ltd) v Secretary of State for the Home Department* (2010) EWHC 2561 Admin per Neil Garnham KC.

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

61. As to (4) above and the issue of discretion, I shall return to the applicable principles and the recent decided cases when I come to Grounds 8 and 9.

62. The burden of showing compliance is on the licence holder: *Prestwick Care Ltd v Secretary of State for the Home Department* [2023] EWHC 3193 (Admin) at [28]; *Operation Holdings Ltd (t/a Goldcare Homes) v Secretary of State for the Home Department* [2019] EWHC 3884 at [70].

The role of the Court

63. The role of the court and relative expertise of the Defendant's officers is very clear from *London (St Andrew's College)* summary at (7) and (8). In the context of a rationality challenge and the degree of scrutiny to apply, it is well established that it is not for the court to reach its own view on the merits of the decision nor to consider the balance which the decision-maker struck between competing interests and the weight accorded to each interest: *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1335, cited in *Taste of India v Secretary of State for the Home Department* [2018] EWHC 414 at [61] per Richard Clayton KC and *R (Operations Holdings Ltd) v Secretary of State for the Home Department* [2019] EWHC 3884 at [37] per Alison Foster KC, as she then was.

64. It is also helpful to keep in mind that the questions raised by the Guidance involve judgement for the decision-maker, not questions of precedent fact, particularly where the topic is whether the Sponsor or an individual is an employment agency or an agency worker. There is no one factual answer to that question: per Natalie Lieven KC, as she then was, in *Datamatics UK Limited v Secretary of State for the Home Department* [2016] EWHC 1780 at [20].

65. Those judgements are then expressed in the decision letters. The decision letters are to be read as whole, in their proper context and as directed to those who are very familiar with the operation of the care homes and the investigation which has taken place. An overly legalistic or forensic analysis is not appropriate: *Clarke Homes Ltd v Environment Secretary* [2017] PTSR 1018 at 1089H, per Sir Thomas Bingham MR.

Fairness

66. When coming to consider fairness in decision making, I was taken by Mr Saeed to the decision of the House of Lords in *Bushell v Secretary of State for the Environment* [1981] AC 75 on facts concerned with a public inquiry. The decision in a case such as this is not the result of contested proceedings before a tribunal because, of course, it is the result of an investigation by those who are charged with monitoring the proper operation of the immigration regime. I therefore do not find to be especially helpful authorities such as *Bushell* which address fairness as between parties who are seeking to persuade a tribunal. Rather, I agree with the analysis of Alison Foster KC, as she then was, in *R (Operations Holdings Ltd) v Secretary of State for the Home Department* [2019] EWHC 3884 at [36], that:

> "In light of the submissions that are made in this case, it is worth recalling that public law decisions affecting individual's rights are subject to common law requirements of procedural fairness. Procedural propriety depends on the subject matter of the decisions, the executive functions of the decision-maker and the particular

circumstances in which the decision is made (*CCSU v Minister for Civil Service* [1985] AC 374) and also that what fairness requires depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates *(R (o/a Easyjet) v Civil Aviation Authority and ors* [2009] EWCA Civ 1361 and see also *Lloyd v McMahon [1987] AC 625; and R v SSHD ex parte Doody [*1994] 1 AC 531). These principles were applied in the similar context of a Tier 4 Licence in the *London Reading College* case."

THE GROUNDS FOR JUDICIAL REVIEW

67. There are nine grounds via which the Claimant contends that the revocation decision was unlawful. As I indicated at the outset, it is possible to consider the legal issues within three groups, namely:

    i) The relationship between the Claimant and other care providers (the agency issues);

    ii) Record keeping (the migrant tracking issues), and;

    iii) The correct approach to the decision to revoke (the discretion issues).

68. In some respects for each of these groups, the important parts of the evidence, the applicable guidance and some parts of the relevant case law are distinct. Nevertheless, each ground is properly pleaded as a distinct error of law and I shall consider each of them accordingly.

[i] Agency Issues

69. Grounds 1 to 5 allege the following errors of law:

    [1] Irrationality in the consideration of the investigation evidence and failure to take relevant evidence into account;

    [2] Misdirection as to the relationship between the Claimant and Naza and YP;

    [3] Unfairness in that revocation was based on a matter which had not previously been raised;

    [4] A failure to apply the findings in *Minster Care Management* correctly, and/or to apply the relevant guidance correctly;

    [5] The same points in respect of the part of the revocation letter headed 'General Duties 2'

70. I mention Ground 5 first of all. It refers to a feature of the suspension and revocation letters, namely that it contains two headings, the first of which is 'General Duties 1' and the second is 'General Duties 2'. The purpose of Ground 5 is to make clear that the Claimant maintains its grounds in respect of both parts of the revocation letter. At the hearing, I asked the advocates whether I should treat and read the revocation letter as a whole. They agreed with that unsurprising proposition and so I say no more

about Ground 5. I have considered Grounds 1 to 4 as against the whole of the revocation letter.

Ground 1

71. The main points under Ground 1 relate to the contract and arrangements, both written and oral, between the Claimant, Naza and YP, and the Defendant's treatment of the available evidence. Before turning to those main points, I recall that the court's role in reviewing this decision is limited to errors of law. There is no right of appeal against a revocation decision on the merits and that is territory into which the court will not go. The judgements which are to be made on the merits of the evidence are the Defendant's judgements, subject to rationality. I am not finding precedent fact but dealing with a judgement about employment agency to which there is no one factual answer: *Datamatics*, supra. At times, Mr Saeed's submissions came close to a merits argument. It is necessary for me to understand the detail of the evidence in order reach a conclusion on the Claimant's case on the alleged errors of law, but the court is only concerned to establish whether or not there is a rational basis for the decision.

72. The Claimant put the contractual point in this way. RL18 (paragraph 32 above) noted that no documentary evidence of the oral arrangements as between the Claimant and Naza and YP had been produced. This is said to be Wednesbury unreasonable or irrational or a failure to take account of other evidence.

73. Mr Anderson submitted that the Defendant was not obliged to accept Ms Mohamoud's assertion that there was an oral contract or arrangement that ensured that, having previously been operating on an employment agency basis, the arrangements were now compliant with the requirements for using sponsored workers. On a fair reading of the decision letter, the Defendant is not making the point that the oral contract was not in writing (which would be absurd) but that there was a dearth of documentary evidence to show that the arrangements envisaged by the oral contract were in fact in place.

74. In my judgement, the Claimant's case on Ground 1 is an example of reading the RL in an overly-legalistic and forensic way. I do not consider it to be a fair reading of the decision to take it to require documentary evidence of an oral arrangement. All that is being said is that, as a matter of fact, there is no documentary evidence of the oral arrangement. Unsurprisingly, the Defendant regarded this as a weaker evidential position than if a written set of arrangements had been produced. There was no obligation on the Defendant to accept Ms Mohamoud's evidence and in my judgement this was a rational finding which should not have surprised the Claimant.

75. Further, this finding is an important and evidentially well-founded concern about the Claimant's operation. The contracts in issue were entered into some years prior to the grant of the Sponsor licence. On their face, they provide for the Claimant to supply labour to a third party. This activity is addressed in the Guidance in two forms. The Guidance prohibits the supply of agency workers by an employment agency. That Guidance does not apply to the Claimant because the Claimant is not an employment agency business, but it is one way in which the Guidance makes clear that provision of labour to third parties is strictly controlled. Secondly, and of direct application, it is clear that any provision of labour to a third party must be for a service or project within a certain period of time with a specific end date, after which it will have been

completed [S1.25]. Ongoing routine roles or service for a third party are not permitted [S1.26].

76. Having found that the pre-existing contracts gave rise to real concern of breach of the Guidance, that was a clear ground on which to base consideration of the future of the licence. That is because the contracts are consistent with circumstances in which the roles of sponsored workers are routine and open-ended. That is expressly outside the scope of this immigration regime: see S1.24-26 as summarised at paragraph 49 above. That brings into play the balance of the evidence available, a large part of which is the evidence obtained from sponsored workers who gave interviews.

77. Mr Saeed took the court carefully through the interviews to make good the submission that there was no evidence that the roles undertaken by sponsored workers at Naza and YP were either routine or open-ended. The Claimant was not acting as an employment agency and the interviews support that, he submitted. Via that exercise and having re-read those interviews I agree with Mr Saeed that there is substantial evidence that the Claimant takes active control of sponsored workers while they are in third-party care homes. It is clear from that evidence and from the witness statements of Jama Mohamoud, the Claimant's Registered Manager and General Manager, and her Deputy Manager, Halima Hersi, that the general working arrangement is for sponsored workers to be subject to the direction and supervision of the Claimant. So much is confirmed by the witness statements of Najma Hersi who is a director of YP and Zainab Ahmed who is a director of Naza.

78. However, that is only a partial response to the Guidance. It addresses the need for supervision and control to be by the holder of the sponsor licence, not the third party. It does not address either of: (i) 'routine', or; (ii) 'a certain period of time', i.e. not open-ended. On the contrary, the interviews provide evidence on which the Defendant could properly conclude that the work being undertaken was routine. The interviews do not provide evidence that the tasks to be undertaken were anything other than routine. That gap is not filled by the witness statements which have been filed on behalf of the Claimant either at the time of the investigation nor in these proceedings.

79. As to the status of the witness statements which were filed in these proceedings, if there had been evidence to fill the gaps as to routine duties or the requirement to avoid open-ended work, I would then have needed to go on to decide how that evidence was relevant to the decision under challenge because, of course, it post-dates that decision and is produced *ex post facto* and in the course of the litigation. However, that is not the circumstance which presents itself. Rather, even taking a benevolent approach and accepting all of the evidence at face value, there remains a failure to show that the work undertaken was not routine and a failure to demonstrate that the work was not open-ended. The evidential burden on the Claimant was not discharged: *Goldcare Homes.*

80. It is a guiding principle that with the significant trust placed in a sponsor comes a direct responsibility to act in accordance with all parts of the guidance [L2.2], [C1.3 to C1.5; C7.1]. The Defendant's findings as to breach of the Guidance in S1.24 to S1.26 as to third party contracts were rational and reasonable. Ground 1 is therefore not made out.

Ground 2

81. This ground is concerned with an acknowledged difference of terminology in the revocation letter when dealing with the representations made by the Claimant. At RL 20 the Defendant said (underlining added):

> "Your client's representations note that although the contracts between Tendercare Management Ltd and these three companies appear similar there are material differences between the contracts with Naza Connect Care Limited and YP Quality Care Ltd and that held with Axcelence Ltd. However, a further explanation of these differences is not included in your representations."

82. The representations letter in fact said:

> "material differences in the relationships between our client and Naza and YP when compared to the relationship between our client and Axcelence."

83. Mr Saeed submitted that the Defendant's error was material because the misdirection meant that the Defendant focussed his mind on the wrong issue. If the Defendant had put his mind to the relationship that these parties had, he would have focussed his mind on what was actually happening in practice at the time of his inspection and he would have considered how the relationship had evolved to comply with the sponsor licence regime. It was submitted that the error ties in with the errors in Ground 1.

84. Mr Anderson accepted that the Claimant's representation was that there was a difference in the relationships, rather than in the written contracts. But he submitted that it was immaterial. The Defendant was entitled to consider that the Claimant had failed to provide evidence that it had the necessary control over the workers and/or that they were indeed contracted "to provide a service or project within a certain period of time."

85. Firstly, in my judgement, the essence of this ground is to seek to draw a distinction between 'relationships' and 'contractual relationships'. The terms 'contract' and 'relationship' are broadly interchangeable in the current context. The written contract describes the legal relationship. The discussions between the parties which were oral and not recorded form part of the relationship and may or may not be contractual in form or substance.

86. Secondly, the court is not construing a contract or a statute but is reviewing a decision letter. A straightforward and down to earth reading is called for. In my judgement, this ground is based on an unduly forensic approach to a decision letter: *Clarke Homes*. In a decision letter which is addressed to a sponsor licence holder which knows its own contracts and knows the nature of the representations which it has made, it is clear and obvious that the Defendant was addressing what has also been referred to as the 'arrangements'.

87. Thirdly, the Defendant was trying to grapple with the evidence as to those arrangements and the Defendant found the evidence to be lacking, as was open to him. As I have held in respect of Ground 1, part of those arrangements was an oral agreement. Whether that oral agreement was a contract is not something which I need to decide. However, I am unimpressed by an argument which is founded on the mere difference in terminology which is relied upon here when the source of the evidential

difficulty is of the Claimant's own making, namely a failure to provide sufficient evidence as to the exact nature of the work undertaken for a third party.

88. For these reasons, ground 2 fails.

Ground 3

89. Via the skeleton argument, the Claimant argues that the Defendant's decision is unfair because the revocation decision takes the point against the Claimant that the written contracts refer to a scope of work being drawn up, and no such scope of work has ever been provided. The contentious paragraphs are at RL 28 and 29 which it is helpful to repeat:

> "28. Following a further review of the YP Quality Care Ltd contract and Naza Connect Care Limited contract, we note that this does include provision to state that a scope of work will be drawn up prior to commencement which does support that the service provided by your client could be specific and timebound however these scopes of work were not provided.
>
> 29. Given that your client has failed to provide additional evidence to confirm the arrangement they have outlined with YP Quality Care Contract and Naza Connect Care Limited, either through scope of work or similar documents and have failed to evidence direct management of their workers while undertaking work at these companies, we remain unsatisfied that this issue has been addressed."

90. In contrast to the skeleton argument, the case advanced in the Grounds has a different focus. It is submitted on behalf of the Claimant that the revocation letter raised for first time that the verbal agreements between the Claimant and Naza and YP are not credible in light of the fact that the written contracts refer to a scope of work being drawn up: RL 17-18. This was not something that was raised by the Defendant in the suspension letter, not could it have reasonably been inferred from the contents of the suspension letter. I will address both formulations.

91. The Claimant's case is that this point was not raised in the suspension letter. The Claimant submits that it was thereby denied the opportunity to respond to that point. Mr Saeed, in his oral submissions, described this as a fundamental right to respond. He also submits that was unfair and not in accordance with C9.12 of the Guidance which says that if additional reasons for suspension/revocation are found, a further 20 day period will be provided for a response. Moreover, additional information and evidence was provided with the letter before action which have not been adequately responded to.

92. The Defendant asked me not to permit the Claimant to rely on the C9.12 Guidance element of this ground on the basis that it was not set out in the Claimant's grounds: *R(Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841 at [67-69].

93. I agree that the point was new and first emerged in the Claimant's skeleton argument. Judicial review is not a rolling-process of evolving grounds which, if permitted to proceed in that way may affect the fairness of the proceedings. However, I consider that the Claimant has done no more than properly draw the Court's attention to a part

of the Guidance which is exactly on point. At common law, the Claimant's case is about a proper opportunity to meet the case against it. That is also what C9.12 is about. If the Claimant had not raised the Guidance point then I consider that the duty of candour would require the Secretary of State to draw it to my attention. Either way, it is important that I have regard to it. Accordingly, I shall consider the relevant Guidance under this Ground.

94. Mr Anderson submitted that, in the present context, the Defendant had made clear its concerns that the Claimant was operating arrangements akin to an employment agency. The Claimant accepted that it operated as such with Axcelence on the basis of substantively the same written contract as was in place for Naza and YP. If the Claimant maintained different arrangements were in place, it was for the Claimant to provide a full explanation and evidence in relation to the arrangements in place in response to the suspension letter. The Defendant was not obliged to go back and forward with the Claimant nor to have regard to further representations made after the decision to revoke had been taken.

95. With the benefit of Mr Saeed's careful presentation of the evidence in this case and having reviewed it again, I have concluded, for the reasons which follow that: (a) the scope of works issue was very much in play and articulated as a matter of concern from the outset, and; (b) the Claimant had a full opportunity and there was no unfairness nor any failure to follow C9.12 of the Guidance.

96. First, RL28 is concerned with the contracts. The contracts are the Claimant's own documents. The Claimant must also be taken to know and understand the requirements in the Guidance. I find that the Guidance is clear as to the constraints on provision of labour to third parties. A key part of the Guidance is the requirements for specific scope of the work activities and duration, including an end point. It was therefore obvious from the outset that the Claimant was going to have to show the Defendant how it went about ensuring that sponsored workers undertook work within a scope which was compliant with the Guidance. That burden is on the licence holder.

97. Second, in my judgement, RL28 is even-handed. The Defendant notes that the contract does include provision for a scope of work, which support the proposition that the service provided by the Claimant could be specific and timebound. This point is, in part, in the Claimant's favour. However, it also begs the question 'Where is/are the scope(s) of work?'. That is a question which went unanswered save for reference to verbal agreements.

98. Third, the finding that the verbal agreements were not credible having regard to the express terms of the contracts is, in my judgement, a fair and natural finding which was made after an investigation, preliminary findings in the suspension letter, an opportunity to respond and detailed consideration in full revocation letter.

99. Fourth, the basic facts are fixed: (1) there are written contracts on which both the Claimant and Defendant exchanged their views; (2) there is evidence of a verbal agreement in the form of Muhubo Mohamoud's witness statement; (3) there are no documents which purport to show the scope of work. In my judgement, there is no good reason to go back to the Claimant with a preliminary finding on credibility because the Defendant either accepts the evidence of verbal agreement or he does not.

100. Fifth, I do not consider the finding on credibility to be a finding to which the Guidance at C9.12 is directed. C9.12 is expressly concerned with new reasons to revoke. So, if, late in the process, it is found that there is a record-keeping breach which had not previously been put to the sponsor, the Guidance would require that a 20-day opportunity is given to respond and provide evidence in support. But the situation complained of in this case is not a new reason to revoke. Rather, the Defendant is simply explaining his assessment of the evidence on the topic of third party labour. The Defendant is not proposing or deciding to revoke the sponsor licence because the verbal agreement is not credible. The reason for revocation is a finding that there is breach of the Guidance on third party labour.

101. Accordingly, Ground 3 also fails.

Ground 4

102. The Claimant submitted that the Defendant erred in his application of the ratio of *Minster Care Management Ltd v SSHD* [2015] EWHC 1593 (Admin), and also erred in applying his own guidance at S1.24 to S1.29 (summarised at paragraphs 49-50 above).

103. It is submitted that when Neil Cameron KC, sitting as a Deputy High Court Judge said, at [57] of *Minster Care Management Ltd*, that it was irrational to say that [a sponsor] was acting as an employment agency if it operated [the care home] and if it retained a substantial degree of control over the home, this is only one example of how the guidance can be met, but it is not the only way in which the guidance can be met.

104. As I have set out at paragraphs 33-34 above, the *Minster Care Management* point was addressed at RL 25-29 in order to address what had been said in the Claimant's representations letter.

105. In my judgement, Mr Cameron KC was not articulating any principle of law or wider application for his finding in *Minster Care Management Ltd*. In that case, the Claimant ran a care home business. The second of the three issues in the case was whether or not the Defendant has misinterpreted or misapplied her policy. The policy in question applied to employment agencies and was paragraph (y) to Annex 5 of the Guidance as it applied at that time, namely:

> "You are an employment agency or business and you have supplied migrants that you are sponsoring to a third party as labour."

106. The Claimant was not an employment agency. Mr Cameron KC held that the Defendant misapplied her policy because the Claimant did not apply for a sponsor's licence as an employment agency and it was irrational to treat the Claimant as if it was an employment agency. Accordingly, that ground was upheld.

107. The essential holdings of the court in respect of that second issue are of no application in the present case. The Defendant has not applied the wrong policy and the Claimant has not suggested that is so.

108. The Guidance which applies in this case is plainly that at S1.24 to S1.29 and the revocation reason is not that which is set out in the list of 'mandatory' grounds which are in issue here are:

> C1 y. You are an employment agency or employment business and we grant a sponsor licence to you on this basis, but later find a worker you are sponsoring has been supplied to a third party as labour

109. This mandatory ground is entirely directed at employment agencies. It was not relied upon by the Defendant in this case. It is the equivalent or successor ground to that which was considered in *Minster Care Management Limited.*

110. In this case, the relevant ground relied upon is this:

> C1 x. You are, or you are acting as, an employment agency or business and you have supplied a worker you are sponsoring to a third party as labour

111. In my judgement, the Defendant was entitled to find that the Claimant was acting as an employment agency. The Defendant did not apply the Guidance at C1 y which would have been directed to businesses which sponsored employees as part of the employment agency business, as an employment agency. There was no misinterpretation of the Guidance and *Minster Care Management Limited* is of no assistance in this case. Accordingly, Ground 4 fails.

112. I have explained the function of Ground 5 at paragraph 70 above, and now proceed to consider the migrant tracking issues. In the result, I find no error of law in the Secretary of State's treatment of the agency issues.

[ii] Migrant Tracking Issues

113. Grounds 6 and 7 allege the following errors of law:

> [6] Error in understanding the evidence on recording absences, such that the decision is Wednesbury unreasonable and/or irrational
>
> [7] Further or in the alternative to Ground 6, that lack of reasons for worker absences is not a requirement of the Guidance and hence there was no basis in the Guidance for such criticism of the Claimant;

114. These grounds are closely connected and arise from the same paragraphs of the RL. In his submissions, Mr Saeed advanced ground 7 as an alternative to ground 6. At RL 60-62 (set out at paragraph 38 above) the Defendant observed that sickness records did not demonstrate how long sickness absence was for and so does not provide a suitable record of absence by itself. Timesheet records do not provide any indication as to the reason for absence nor any distinction between which days of these periods are work absences and which would amount to the workers' normal none work days. The Claimant had not demonstrated that the sponsored worker is receiving the correct amount of annual leave days as per UK employment law, it was said.

115. Mr Saeed did not seek to contradict the RL directly. The timesheet records do not distinguish between types of absence. However, Mr Saeed submitted that these observations and conclusions were irrational because the payroll does record holiday.

There was no breach of paragraph 1g of Appendix D, namely to retain *"A record of the workers absences, which may be kept electronically or manually"*. These, the Claimant says, show beyond doubt that the correct holiday entitlement is available to sponsored workers, in accordance with employment law.

116. Further, per Ground 7, there is nothing in Appendix D that requires the Claimant to record reasons for absence nor any precise form of documentary record. Accordingly, the Claimant has a wide discretion as to how it chooses to comply with paragraph 1g of Appendix D. To go beyond the Guidance is ultra vires and the Defendant has adopted a substantive criterion for compliance which is unlawful.

117. Mr Anderson submitted that this ground misses the point because the Defendant did not rely on paragraph 1g of Appendix D. To the contrary, he submitted, the Defendant relied on Appendix C(2)(b), namely to satisfy the Defendant that the sponsor is using a process or procedure necessary to fully comply with the sponsor's duties. The Defendant has not prescribed that reasons for absence need to be recorded – that is not necessarily the only way in which the Claimant's duties could be fulfilled – but was entitled to consider that the Claimant had not demonstrated a system that would adequately ensure compliance with its obligations in UK employment law. That is not the imposition of an ultra-vires requirement; it is the application of Appendix C(2)(b) to the particular facts of this case.

118. In my judgement, the starting point is the obligation on the sponsor to cease sponsoring if the sponsored worker is absent for such period as is specified in S4.20, which is basically 4 weeks. There is an exception. That exception comes into play if the absence was for a valid reason. The available valid reasons are specified. Other compelling reasons may be advanced [S4.29]. It follows, therefore, that there must be a system in place which permits the sponsor to record and identify both the quantum of the absences and the reasons.

119. The Defendant was entitled to conclude on the evidence that the system was not adequate. It is effectively conceded on behalf of the Claimant that reasons for absence were not recorded. It may be possible to stitch together the information from timesheets and payroll information to glean an understanding of some of the reasons for absence. Whether that is so or not, the Defendant had a good basis for his decision from the terms of the guidance at S4.20 to S4.29. It was neither irrational nor beyond the Defendant's powers, founded in the Guidance, to make the findings which he did and to conclude that there was not full compliance with the sponsor's duties.

120. In my judgement, the Claimant has focussed narrowly on a single line in Appendix D, namely paragraph 1g, but has failed to appreciate the scope of the requirement on the sponsor, and it purpose. A sponsor who reads the Guidance so narrowly and who fails to grapple fully with the duties which are explained in the Guidance is at peril of a conclusion such as that made in respect of the Claimant's records.

121. For these reasons, Grounds 6 and 7 fail.

[iii] Discretion Issues

122. Grounds 8 and 9 are concerned with the decision to revoke on the basis that there were, contrary to the Claimant's primary case, breaches of the Guidance. These are

grounds which are concerned with the exercise of the Defendant's discretion not to revoke.

123. By Ground 8, the Claimant submits that the Guidance gives a discretion to revoke the Claimant's sponsor licence if the Claimant does not have a system in place to record absences [Annex C2 b]. RL 59 to 62, do not demonstrate that any thought or consideration was given as to the exercise of discretion. If the Defendant did consider the exercise of discretion on this issue it was not adequately reasoned. Given the relatively minor nature of the non-compliance regarding the keeping of records, the Claimant submits that the Defendant could easily have given an opportunity to the Claimant to put in place a system that would be to his satisfaction. In fact, at paragraph 65 of the revocation decision, the Defendant states that "…we will only downgrade a licence and issue an action plan where there is scope to rectify shortcomings or omissions in systems or retained documents." The Claimant submits that it falls squarely within this category and so the Defendant ought to have given it an opportunity to put in place a system to the Defendant's satisfaction.

124. The Secretary of State's response is short: the question for the Defendant was whether the licence should be revoked on the basis of the identified breaches taken as a whole. The Defendant did that and the reasons are set out at RL 64-66.

125. By Ground 9, the Claimant draws attention to the Response letter and the factors which it asked to be considered along with suggestions that were more appropriate than revoking its sponsor licence. The Defendant responded to this at paragraph 65 of the Revocation letter by stating that "we will only downgrade a licence and issue an action plan where there is scope to rectify shortcomings or omissions in systems or retained documents." Then at paragraph 66 the Defendant states that "Downgrading [the Claimant's] licence is not appropriate due to the seriousness of [the Claimant's] non-compliance with their sponsor duties."

126. The Claimant submits that the Defendant has failed to apply what he said at paragraph 65 of the revocation decision, and he therefore failed to consider whether there is scope to rectify the shortcomings. While the Defendant stated that the Claimant's non-compliance was serious, that is not the same as saying there is no scope to rectify any non-compliance. Nowhere in the revocation letter has the Defendant considered or shown that he has considered the factors highlighted by the Claimant, whether the shortcomings could be rectified, whether an action plan could be issued, and how long any such rectification will take. Instead the Defendant has only highlighted that the breach is serious, which may be relevant, but is not the correct test according to the guidance, and is not the only consideration.

127. The Claimant further submits that the Defendant appears to have treated his guidance as binding because at paragraphs 65 and 68 of the revocation decision he refers back to it and relies upon what it says. *In R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, Lord Dyson JSC said, at paragraph 21: "…….it is a well established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers." The Claimant submits that the Defendant has treated his guidance as binding and as being inflexible.

128. Again, the Secretary of State's response is short. The revocation letter expressly refers to the exercise of discretion. The Defendant is entitled to have a policy under which

certain breaches are "mandatory" grounds which will lead to revocation in all but very exceptional cases. That was true of the breaches of S1.24 and S1.26 and Annex C1(x) and C1.44 and 1.46 and Annex C1(z): §§31 – 38 in the present case. The Defendant was entitled to consider that there were no exceptional reasons to justify departing from his policy.

The cases on the discretion issues

129. There are four relatively recent first instance judgments on discretion issues in revocation cases:

R (Prestwick Care Ltd) v Secretary of State for the Home Department [2023] EWHC 3193

R (Supporting Care) Ltd v Secretary of State for the Home Department [2024] EWHC 68 (Admin)

R (New Hope Care Limited) v Secretary of State for the Home Department [2024] EWHC 1270, handed down on 24th May 2024

R (oao) One Trees Estates Ltd v Secretary of State for the Home Department [2024] EWHC 1644 (Admin)

130. *New Hope Care Limited* and *One Trees Estates Ltd* each follow *Prestwick Care Ltd*. I will consider those cases first of all, and then turn to *Supporting Care Ltd* which has not been followed.

131. In *Prestwick,* it was held by HHJ Kramer, sitting as a Deputy Judge of the High Court at [90] that "*there was no requirement to take these* [impact on business] *factors into account either in reaching a decision as to whether the claimant had complied with the guidance and, if not satisfied that it had, what the defendant should do about it."* It was unrealistic to expect the Defendant to take account of commercial factors because the Defendant's expertise was in immigration control [92]. The Defendant could never be sure that it had the complete picture [93].

132. In *One Trees Estates Ltd* the sole issue on which permission to apply for judicial review was granted was *"Did the Secretary of State make a material public law error in failing to conduct an adequately reasoned global assessment of all relevant considerations in deciding how to exercise his discretion?"* Margaret Obi, sitting as a Deputy Judge of the High Court, dismissed the claim in a judgment handed down on 26th June 2024. She reviewed three of the authorities:

133. On the exercise of discretion, Margaret Obi followed *Prestwick* and *New Hope* and held:

i) The Secretary of State was required to focus on the impact on the integrity of the immigration control and Sponsorship regime, not the consequences for the claimant. The revocation decision, and the "global assessment" issue, must be considered in the context of the decision as a whole. The Secretary of State has a responsibility to ensure that registered sponsors comply with the Guidance, and stringent use of its powers is important to its overall effectiveness. Therefore, the Secretary of State, having decided that downgrading the

Claimant's licence as an alternative to revocation would not be appropriate, was not required to assess the impact of revocation on the Claimant's business, employees, service users, and the wider social care sector.

ii) The *Prestwick* case was a complete answer to the Claimant's case and it should be followed

iii) Due respect should be given to the experience and expertise of the Secretary of State when determining the level and extent of the sponsor's compliance with the Guidance.

iv) Although the Secretary of State has a residual discretion, in the absence of a particular reason to exercise it (for a reason not already factored into or provided in the Guidance), there is no obligation to address or provide reasons for not exercising the residual discretion.

v) In *One Trees*, there was no such reason advanced by the Claimant in its representations to the Home Department. There was no proper basis for an exercise of residual discretion in favour of the Claimant given the Secretary of State's conclusion (a conclusion he was entitled to reach) that the breach of the Guidance was serious.

134. On giving adequate reasons, she held that the decision as to whether to revoke has to be made fairly and as a whole bearing in mind the context, that it is not drafted by lawyers nor for lawyers, that the arguments advanced were common to all such licence holders and to the fact that on its own terms, the decision makes clear that consideration is *"always"* given to the potential impact revocation may have on a sponsor. Moreover, given the mandatory nature of an Annex C1 revocation there was no reason to doubt that consideration had been given to the consequences of revocation for the claimant.

135. As I have indicated, in *New Hope*, David Pievsky KC, sitting as a Deputy Judge of the High Court, addressed the discretion issue on the basis of very similar submissions to those advanced before Margaret Obi. The judgment in *New Hope* on this issue was not necessary to the outcome because the revocation decision was quashed on a different ground. Nevertheless, the Deputy Judge reached a fully reasoned conclusion, consistent with the reasoning in *One Trees*. He also drew attention to *R (Raj and Knoll) v Secretary of State for the Home Department* in the Court of Appeal ([2016] EWCA Civ 770) per Tomlinson LJ at §32 : *"The mere fact that the decision making in this area may have serious commercial consequences for licensed sponsors is not of itself a reason to impose heightened scrutiny. The circumstance that the SSHD has special expertise in and experience of decision making in this field, and that the Court possesses no particular institutional competence and can claim no special constitutional legitimacy, militates against that submission… It is also clear that the exercise in which the SSHD is engaged involves no fundamental right of the Appellant, but on the contrary a right contingent upon adherence to the Rules"*.

136. In *Supporting Care*, ground 4 was that the Secretary of State failed to conduct an adequately reasoned global assessment of all relevant considerations in deciding whether to revoke or downgrade the sponsor licence. HHJ Siddique, sitting as a Deputy Judge of the High Court, held at [53] that *"Whilst the case law relied upon by*

the Secretary of State supports taking a firm response, it does not support a contention that the Secretary of State is absolved from engaging with the facts of a particular case and explain, with adequate reasons, why it is reasonable and proportionate to revoke a sponsor licence." He found that there was no demonstrable engagement with the question whether the revocation was reasonable and proportionate and quashed the decision.

Discussion

137. The Claimant's licence was revoked on more than one basis. There was a mandatory basis: Annex C1 x) – acting as an employment agency. Annex C1 z) was also relied upon, but the grounds have not focussed on that. There was also a basis under Annex C2 b) – not using a process to fully comply with sponsor duties. In terms of the discretion provided for in the Guidance, there is a hierarchy built into it. This three-tier hierarchy is to be found in Annexes C1 to C3 which are framed in terms of consequences which are 'mandatory', 'normal', and lastly where the consequence 'may' flow. Evidently, there is a discretion to apply in respect of two parts of the hierarchy, namely C2 and C3 cases.

138. If this were a C2 or a C3 case, or a combination of those, and there was no C1 breach, then there would obviously be a need for the Defendant to consider potential reasons not to revoke because the Guidance is clearly flagging that revocation does not always follow from such a breach of the sponsor's duties. For example, in a C3 case, the Guidance at [C10.7] provides that "Generally, we will not revoke your licence if only one of these circumstances arises, but we reserve the right to do so, depending on the gravity of the issue. The more of these circumstances that are present, the more likely it is that we will revoke your licence." This is a judgement to be made on the facts and circumstances of the particular case, applying such elements of the Guidance as are relevant.

139. However, the first question in this case is what, if any, discretion exists under the Guidance for a mandatory breach? That question in turn raises the issue whether the Guidance on mandatory breaches has the character of a rule or of policy. This question arises because the Claimant's case is that Defendant was applying his policy, to which there is a residual discretion, citing *Lumba* for that proposition.

140. It is necessary to commence by understanding the underlying power and purpose to the Guidance. In *R (New London College) v Secretary of State for the Home Department [2013] 1 WLR 2358* the Supreme Court considered the sponsorship licence scheme for educational establishments which was called the Tier 4 Points Based System. That system was not under immigration rules, but under guidance in the same manner of the scheme which applies in this case. The over-arching principle of licensing in that case is similar to this case, but the scope of the schemes and the guidance itself is different. In *New London College*, guidance laid down mandatory requirements governing (i) the criteria for the award of a sponsor's licence, (ii) the obligations of those to whom a licence has been awarded, (iii) the criteria to be applied by a licensed sponsor in issuing a CAS, and (iv) the procedure and criteria for suspending, downgrading or withdrawing a sponsor's licence.

141. The lawfulness of the guidance and the scheme of licensing was the issue before the Supreme Court. Lord Sumption (with whom Lord Clarke, Lord Reed and Lord Hope agreed), dealt with the mandatory nature of requirements in that scheme at [22]:

> "The criteria under paras 344—345 of the guidance are mandatory in exactly the same way as the criteria for granting it is in the first place. The mandatory requirements, whether they relate to the grant or the withdrawal of a licence or of highly trusted sponsor status, cannot be severed from the rest of the licensing scheme, because they are fundamental to its whole operation. It follows that either the sponsor licensing scheme is wholly unlawful by reason of its inclusion of mandatory requirements for sponsors, or it is lawful notwithstanding those requirements. Neither alternative will result in these claimants being licensed. There is no half-way house."

142. The mandatory criteria for the award and retention of a sponsor licence are a rule: Lord Sumption at [24]. Not all parts of the guidance are mandatory rules, per Lord Carnwath at [40]. Some parts may define criteria governing the exercise of discretion.

143. Pausing there, I would observe that, in contrast to rules, the policies of public bodies in many contexts are characterised by flexibility. Policies often have to be read and assessed together, not least because they may pull in different directions, so that they can guide the decision with due regard and weight to be given to each element.

144. A rule which is expressed in mandatory terms compels the decision maker to reach a particular result. Guidance is advisory in character and assists the decision maker but does not compel a particular result: *R(Alvi) v Secretary of State for the Home Department* [2012] 1 WLR 2208, per Lord Clark at [120].

145. So, a sponsor licencing regime may lawfully include mandatory rules. Therefore it becomes plain on authority at the highest level that sponsor licence guidance may, and does, contain rules which compel a particular result. That speaks of circumstances in which the Defendant is under no obligation in law to consider the application of discretion. So much is consistent with Lord Hope's characterisation of the system in *Alvi*: certainty not discretion (see point (4) of the summary of legal principles from *London St Andrews College* at paragraph 60 above).

146. Though the document has the title "Guidance", it may lawfully, and does, contain rules. The fact that the title of a document or provision is either 'guidance' or 'policy' may not be determinative of its character and may not indicate the relative status of each: *Mead Realisations Ltd v Secretary of State for Levelling Up Housing and Communities* [2024]; EWHC 279 (Admin), PTSR 1093 at [61-62] per Holgate J as he then was, citing *R(A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 at [39].

147. In my judgment, these concepts are the starting point in understanding the effect of the Guidance in circumstances where a breach has been identified for which revocation is mandatory. It is the starting point which goes to the true nature of such parts of the Guidance. So far as the Guidance expresses itself to be mandatory and is clear as to the decision which it compels, it is in the nature of a rule. Such an example is the Guidance at S1.28: "If we find you are supplying the worker, or workers, as labour to another organisation to undertake a routine role or you do not have full

responsibility for their duties, functions and outcomes or outputs, we will revoke your licence."

148. Guidance or policy which does not have such a legal basis as was held to be the case in *London New College* is quite different. So, in *Lumba* the target of the litigation was a policy, not a mandatory rule. That, in my judgement, is the first important point and distinction to have firmly in mind when approaching the alleged legal errors under Grounds 8 and 9.

149. Moreover, the purpose of sponsor regime is supportive of this understanding of mandatory revocation. In *New London College* per Lord Sumption at [29]: *"There are substantial advantages for sponsors in participating [in the Tier 4 scheme] but they are not obliged to do so. The Rules contained in the Tier 4 Guidance for determining whether applicants are suitable to be sponsoring institutions, are in reality conditions of participation, and sponsors seeking the advantages of a licence cannot complain if they are required to adhere to them."*

150. The arrangement between the Claimant and the Defendant is in the nature of a conditional licence. The Claimant knew, or can be taken to know, what the specified consequence of a 'mandatory' breach would be. The 'deal' is clear at the outset, and the Claimant accepted the deal.

151. I respectfully adopt and follow the analysis in *Prestwick, New Hope* and *One Trees* which supports the purpose of the sponsor regime and which do not follow *Supporting Care*. In that later regard, I agree with the reasons given by the Deputy Judge in *New Hope* at [127] as to the distinction to be drawn between the scope for the Defendant to stand back and decide in a particular case not to revoke and being proactively required to investigate and make findings about the potential impacts of a decision to revoke.

152. The legal duties in respect of a mandatory decision to revoke are not a two-way street. For the reasons explained above, there is no obligation on the Defendant to make reasoned conclusions on a Claimant's discretionary submissions on a mandatory breach. It may, however, in a particular case, be open to the Defendant to decide, for cogent reasons, that he will not revoke. It would not be unlawful to take such a course. This, in my judgement, is the residual discretion which remains open to the Defendant even in a mandatory case.

153. I return to the fact that there was both a mandatory and discretionary basis for revocation in this case. In my judgement it would be entirely artificial to require a distinct and separate analysis of the C2 basis for revocation when there is also a finding of a mandatory, C1, basis for revocation. It would be pointless and would lead to the same outcome. That disposes of Ground 8.

154. Lastly, as to reasons, once a decision maker has chosen to give reasons on a particular issue, those reasons must be legally adequate, whether those reasons were required to be given or not. The Defendant chose to give reasons in this case, so I must therefore consider their adequacy: *R v Criminal Injuries Compensation Board, ex p Moore* [1999] 2 All ER 90. However, what constitutes adequate reasoning is context-specific. Given the mandatory Guidance on revocation, any reasons given which go beyond that basic premise need only be brief.

155. The Claimant can be taken to know and understand that there was an Annex C1 breach with mandatory revocation. The Revocation letter made clear that the issues in the Claimant's letter had been considered but did not change the result. There was no obligation on the Defendant to provide reasons for his reasons. I consider that adequate reasons were given. Moreover, I do not consider that the Claimant has been substantially prejudiced.

156. Ground 9 fails.

Section 31(2A) Senior Courts Act 1981

157. Mr Anderson submitted that in the event there were legal errors as to tracking and monitoring, the decision would be highly likely to be the same. Given that I have found that the mandatory breaches provided a lawful foundation for revocation, I agree that the breaches in respect of tracking and monitoring would make no difference to the outcome.

CONCLUSION

158. The application for judicial review is refused and the claim is dismissed.