Michaelmas Term
[2020] UKSC 41
On appeal from: [2018] EWCA Civ 2103

JUDGMENT

R (on the application of Pathan) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Kerr
Lord Wilson
Lady Black
Lord Briggs
Lady Arden

JUDGMENT GIVEN ON

23 October 2020

Heard on 12 December 2019

Appellant	*Respondent*
Michael Biggs	Alan Payne QC Robert Harland
(Instructed by Vision Solicitors)	(Instructed by The Government Legal Department)

LADY ARDEN: (partly dissenting)

Overview

1. The United Kingdom operates a points-based system ("PBS") for the grant of leave to remain to non-EU nationals who wish to work or study here. There are five tiers, and for the purposes of this appeal the relevant tier is Tier 2 (General) Migrant. The applicant migrant must be sponsored by an employer which is licensed to sponsor migrants. The guidance relevant to the application makes it clear that his sponsor must be licensed by the Home Office. It also states that an applicant must have a valid certificate of sponsorship ("CoS") provided by his sponsor and that, if he does not have a valid CoS, the Home Office will reject his application. There is no discretion about this. The PBS has been described as "prescriptive" (*Kaur v Secretary of State for the Home Department* [2015] EWCA Civ 13, para 41 per Burnett LJ). The Secretary of State has a discretion to grant leave outside the PBS in exceptional circumstances (*R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, [2017] 1 WLR 823, para 4 per Lord Reed). Moreover, the Home Office has power to revoke a licence at any time.

2. In this case, Mr Pathan made his application and was sponsored by his employer, Submania Ltd ("Submania"). It was his second application for Tier 2 leave. Submania held a sponsor's licence and provided him with a valid CoS when he put in his application, but he contends that, unbeknown to him, while his application was outstanding, the Home Office revoked his sponsor's licence before his application was determined. The Home Office did not inform Mr Pathan of this and simply rejected his application on the basis that his sponsor was no longer licensed, and so he had not fulfilled the conditions for the grant of leave. The principal issue is whether the Secretary of State's failure to inform Mr Pathan of the revocation of his sponsor's licence is reviewable in public law on the grounds that it amounts to procedural unfairness, that is, a breach of the rules of natural justice. These, so far as relevant, in appropriate circumstances require a person to have an opportunity to be heard on any material information which the decision-maker acquires and of which he was unaware. Procedural unfairness is to be contrasted with substantive unfairness, where the challenge is to the merits of the rule under which the decision against him was or is to be challenged. The grounds on which such a challenge can succeed are generally limited to situations where the rule is irrational. Mr Pathan sought an administrative review of the Secretary of State's decision to reject his application, but the decision was maintained. He then sought judicial review of that decision in the Upper Tribunal.

3. Mr Pathan contended in the Upper Tribunal (Upper Tribunal Judge Allen) [2017] UKUT 369 (IAC) and in the Court of Appeal (Sir Andrew McFarlane P, Singh and

Coulson LJJ) [2018] EWCA Civ 2103, [2018] 4 WLR 161 that the decision of the Secretary of State to reject his application without giving him an opportunity to find another sponsor is reviewable in public law on the grounds of procedural unfairness. Both the Upper Tribunal and the Court of Appeal dismissed Mr Pathan's appeal. In the Court of Appeal, Singh LJ gave a full judgment and the other members of the Court agreed (with Coulson LJ expressly agreeing with reservations of Singh LJ about the decision mentioned in the next paragraph). The Court of Appeal held that Mr Pathan's appeal raised a question of substantive fairness. As substantive fairness was not a free-standing ground for judicial review, Mr Pathan would have to show irrationality. He could not succeed on that ground because the rules for the PBS had been drafted for rational policy reasons.

4. The Court of Appeal expressed doubt about the correctness of another decision of the Upper Tribunal, *Patel (Revocation of Sponsor Licence - Fairness) India* [2011] UKUT 211 (IAC); [2011] Imm AR 5, dealing with the extension of leave to a student under Tier 4 if his college's licence is revoked, but did not overrule that decision. In *Patel*, the principal holding of the Upper Tribunal was that, where the college with which a student with Tier 4 leave is enrolled has its licence revoked and the student has acted in good faith, the common law duty of fairness required that the student should generally be given a 60 day extension to find a fresh sponsorship letter to enable them to apply to vary their existing leave to include study at another college which was licenced. As a result of that decision, the practice of the Secretary of State is now to grant all students in that position an extension of 60 days unless the student has not been a bona fide student or has participated in the practices that may have contributed to the sponsor's licence being withdrawn. In those cases, the student's leave is limited to any existing permission to stay that he has.

5. On this appeal, the Secretary of State does not ask this Court to overrule *Patel* but submits that the basis of the decision was unsound.

6. For the reasons set out below, I consider that it was a breach of the procedural duty of fairness for the Secretary of State not to have informed Mr Pathan that his sponsor's licence had been withdrawn, which meant that his application, as it stood, would be bound to fail. All the members of the Court reach this conclusion and accordingly the appeal succeeds on that issue. I go on to hold that the duty of procedural fairness meant that the Secretary of State had to give Mr Pathan an opportunity to avert that difficulty. Lord Wilson has reached the same conclusion as appears from his judgment, with which as explained below I agree. Lord Kerr and Lady Black in their joint judgment and Lord Briggs in his judgment take a different view. They consider that the grant of an extension of time is a matter of substance and falls outside the duty of procedural fairness. On that issue, the views of Lord Kerr, Lady Black and Lord Briggs as the majority prevail.

Why Mr Pathan's Tier 2 application failed and the proceedings Mr Pathan then initiated

7. Mr Pathan, his wife and son are Indian nationals living in the UK. The ability of Mr Pathan's family to remain in the UK is dependent on Mr Pathan's success in the present appeal. Mr Pathan was granted leave to enter the UK as the dependant partner of a Tier 4 (General) Student on 7 September 2009, with leave to remain ("LTR") until 31 December 2012. LTR was extended from 1 December 2010 to 30 April 2014. Subsequently, Mr Pathan was given further LTR as a Tier 2 (General) Migrant from 23 March 2013 to 15 October 2015 in order to work as a business development manager for Submania, a food outlet with some seven to ten outlets in London and the South East. Submania held a sponsor's licence and provided him with a valid CoS. On 2 September 2015 Mr Pathan made an application for further LTR to enable him to continue working for Submania.

8. The Secretary of State's evidence was that Mr Pathan's application was put on hold whilst officials visited Submania to investigate whether the vacancy was genuine. On 7 March 2016 (following an initial suspension giving Submania a chance to make representations which it did not take) the Secretary of State revoked Submania's sponsor's licence. This invalidated the CoS provided by Mr Pathan in his application for LTR. On 7 June 2016 the Secretary of State, without previously informing Mr Pathan of the revocation, refused his application because his CoS was invalid.

9. Mr Pathan's LTR would have expired on 15 October 2015 but for his application for further leave. In those circumstances section 3C of the Immigration Act 1971 ("the 1971 Act") (as substituted by section 118 of the Nationality, Immigration and Asylum Act 2002) operated to extend his expiring leave pending his further application and any administrative review or appeal of the decision on that application. I will call this leave "section 3C leave".

10. When Mr Pathan applied for administrative review of the decision rejecting his application on 14 June 2016, he sought a 60 day period to enable him to provide a fresh CoS. The Secretary of State maintained the decision to refuse his application, ruling not that no period beyond the 14 days allowed for removal was appropriate but that the 60 day period ("curtailment period") would only have been appropriate if Mr Pathan had had 60 days' leave remaining. As explained, his LTR had by then expired.

11. When Mr Pathan issued judicial review proceedings, he again sought a period of 60 days to provide a further CoS. The Upper Tribunal dismissed his application, as did the Court of Appeal. Mr Pathan now seeks relief from this Court.

Relevant rules and legislation

12. The relevant Immigration Rules are those in force at July 2016. The relevant provisions of these Rules start at paragraph 245H, which states the purpose of Tier 2 (General) is to

> "enable UK employers to recruit workers from outside the EEA [European Economic Area] to fill a particular vacancy that cannot be filled by a British or EEA worker."

13. Paragraph 245HD states:

> "To qualify for leave to remain as a Tier 2 (General) Migrant … an applicant must meet the requirements listed below. If the applicant meets these requirements, leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused."

14. It sets out the requirements for leave to remain in this context. Those requirements include at paragraph (f):

> "If applying as a Tier 2 (General) migrant, the applicant must have a minimum of 50 points under paragraphs 76 to 79D of Appendix A."

15. Appendix A includes a requirement at paragraph 77A that, in order to obtain points for a CoS, the applicant must provide a valid CoS reference number. Paragraph 77C(f) provides that the reference number "must not have been withdrawn or cancelled by the Sponsor or by the UK Border Agency since it was assigned …".

16. From February 2016, the curtailment of leave was dealt with by paragraphs 323 onwards. Leave could be curtailed if, for example, deception was used to obtain leave to remain or a variation of leave to remain (paragraph 323) or if the migrant's sponsor ceases to have a sponsor licence (paragraph 323A(b)(i)).

17. At all material times there was guidance in place for applicants. At the time of Mr Pathan's application, version 04/15 of the guidance was in force and applied to applications made on or after 6 April 2015. This had been superseded by version 04/16 by the time of the decision but this does not affect paragraph 190 of 04/15, which stated:

> "A Certificate of Sponsorship can be withdrawn or cancelled at any time by either the Home Office or your Sponsor. Where your application relies on a Certificate of Sponsorship that has been either withdrawn or cancelled, your application will be refused."

18. As to the consequences of revocation of the sponsor's licence, the version of the guidance dated 04/16 stated:

> "19.9 If we revoke your licence, we will:
>
> - immediately end (curtail) the permission to stay in the UK, or worker authorisation of any migrants whom we believe were actively and knowingly involved (complicit) in the reasons for the revocation of your licence - such as if the migrant agreed that you would arrange a non-existent job for them so they could come to the UK
>
> - shorten the length of the worker authorisation, or permission to stay in the UK of any other migrants who were not actively involved to 60 calendar days - if the migrant has fewer than 60 calendar days of their leave or worker authorisation remaining, we will not shorten it
>
> 19.10 In the first case above, any migrant with leave in Tiers 2, 4 or 5 will have to leave the UK or face enforced removal. In the second case above, they will also have to leave or face enforced removal if, at the end of the 60 calendar days, they have not made an application for leave in a category for which they qualify.
>
> If they were complicit in any abuse of the immigration system, their leave will end (curtailed) with immediate effect."

19. The equivalent passages in the version dated 04/15 were in virtually identical terms.

Evidence on behalf of the Secretary of State

20. Mr Richard Jackson, a senior executive officer in the Migration Policy Unit, which is part of the Immigration and Border Policy Directorate of the Home Office,

filed a witness statement on behalf of the Secretary of State. This was largely directed to explaining what curtailment period is given to Tier 2 migrants and the reasons for treating Tier 2 and Tier 4 cases differently.

21. Mr Jackson states that an applicant for Tier 2 leave will know that his application is dependent on his sponsor having a valid licence and that he "can therefore have no expectation from the Home Office's published guidance that [he] will be given 60 days if their sponsor's licence is revoked." (para 18)

22. He also states that the Home Office considered making available to Tier 2 applicants the curtailment granted in the light of *Patel* to Tier 4 migrants. However, the Home Office concluded that there were differences between the two cases which made it inappropriate to give Tier 2 applicants a similar 60 day period. Migrants already entitled to leave to remain at the time when a sponsor's licence was withdrawn in general have the benefit of a similar 60 day period. On revocation, the sponsor would cease to be able to employ the migrants who had obtained leave to remain on the basis of a CoS issued by that sponsor and this group of migrants would be given a 60 day curtailment period, reducing their leave to 60 days (or such lesser number of days as represented their unexpired leave) unless they had been complicit in the conduct which led to the revocation of the licence. But the curtailment period was not extended to applicants essentially for the following reasons:

i) The curtailment period was given to Tier 4 migrants in those circumstances to allow them time "to sort out their affairs". (This could include submitting another application for leave to remain in Tier 4 or some other category). A Tier 2 applicant was in a different position. They could have no expectation that their stay would continue and could therefore be expected to have put their affairs in order in case their application was refused.

ii) The applicant's position was protected by his section 3C leave. Under the Immigration Rules they were entitled to stay for a further 14 days (previously 28 days) after the administrative review was completed.

iii) To treat the applicant in the same way as a migrant who already has Tier 2 leave would give him an additional 60 days that he would not otherwise have had, while the migrant who already has leave has his leave curtailed to 60 days. If he had less than 60 days remaining, his leave is not curtailed but neither is it extended to allow for 60 days.

iv) There was evidence of manipulation as a result of the *Patel* decision if extra time is given, as there had been found to be students who were exploiting the extra days (this is discussed in the judgment of the Upper Tribunal).

v) An application under Tier 2 will not be successful if the sponsor has not complied with the conditions of his licence in hiring the applicant, even if the licence is not revoked. There are a variety of reasons why a Tier 2 application might fail.

vi) Tier 2 is different from Tier 4 because it is concerned with filling a particular labour market gap experienced by the sponsor and leave is given to fill a particular vacancy. The migrant will not lose wages as a result of the revocation of a licence and there is no guarantee that there is a gap elsewhere which a resident worker cannot fill. The courses provided to Tier 4 students are more generic, and the higher fees which they pay assist in ensuring the availability of courses for UK students. Tier 2 migrants are expected to know if their sponsor loses or is at risk of losing its licence. Mr Jackson expressed the view that where issues relating to the applicant's job is among the reasons for revocation of a licence, it is probable that the employee has been complicit in those issues.

23. In the first of those reasons, Mr Jackson draws no distinction between a Tier 2 applicant who has not yet started his job and a Tier 2 applicant who is currently working for the sponsor and is making an application for leave to extend that existing employment.

Some key arguments

24. Mr Michael Biggs appears for Mr Pathan. His primary complaint is that the Court of Appeal was wrong to treat Mr Pathan's claim as one of substantive unfairness. He does not dispute the lawfulness of the licence revocation but contends that he should have been informed of it. He argues that this case engages common law unfairness, that is (among other matters) the principle that a person should know important information that might significantly impact the decision and have the opportunity to put in more information which would enable him to satisfy the decision-maker.

25. The actions of the Secretary of State were unfair because the rejection of Mr Pathan's Tier 2 application radically impacted his and his family's rights and interests. The licence revocation prevented him from continuing his employment. The decision put him at risk of criminal liability and other restrictions as an overstayer. His article 8 rights and those of his family were engaged. Notice of the licence revocation could have made a difference to the outcome of Mr Pathan's LTR application. If he was aware of it, he could have varied his application to one relying upon a new CoS, or he could have made a new application.

26. Mr Alan Payne, for the Secretary of State, submits that no case suggests that procedural fairness requires notice to be given for any reason other than giving an individual an opportunity to address the merits of the applicable criteria or proposed

decision. No case says an application that is bound to fail must be given a second chance. What Mr Pathan seeks is a substantive benefit (a second chance) and so his complaint is not as to procedural fairness. The Court of Appeal were correct and their decision should be upheld.

Discussion

The complaint is procedural because establishing a procedural impropriety is a necessary first step

27. The judgment of the Court of Appeal hinges on its conclusion that Mr Pathan's complaint was about substantive, and not procedural, fairness. It is easy to see how this conclusion was reached. The overall objective of Mr Pathan in bringing these proceedings is to obtain a 60 day curtailment (see para 10 above). That is effectively to insert an exception into the requirement for a valid CoS, and to qualify the statements made as to the consequences which ensue on licence revocation in the Guidance.

28. However, the preliminary and essential step in Mr Pathan's argument is that as a matter of fairness the Secretary of State should have told him that she had revoked his sponsor's licence. What Mr Pathan really wants to do is to have the opportunity to respond to the licence revocation by putting forward some other application for leave which would ensure that his application was not refused.

Role of section 3C leave

29. Section 3C makes it possible for him to do this because while the application is pending he can make another application for leave to remain on a different basis, and his application will be merged into his original application. Section 3C (as amended) provides:

> "(1) This section applies if -
>
> (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
>
> (b) the application for variation is made before the leave expires, and

(c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when -

(a) the application for variation is neither decided nor withdrawn,

(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), [...]

(c) …

(ca) …

(cb) …

(d) an administrative review of the decision on the application for variation -

(i) could be sought, or

(ii) is pending.

(3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.

(3A) Leave extended by virtue of this section may be cancelled if the applicant -

(a) has failed to comply with a condition attached to the leave, or

(b) has used or uses deception in seeking leave to remain (whether successfully or not).

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a). …"

30. The Secretary of State's practice on timing is not entirely clear. In the present case there was an interval of three months between the revocation of the sponsor's licence and the rejection of Mr Pathan's application. It may be that, where a sponsor's licence has been revoked, the Secretary of State generally takes no step for three months, ie until the usual period for bringing judicial review proceedings has elapsed. But it seems unlikely that the Secretary of State could wait that long before giving notice to other migrant workers since they would be likely to hear about the revocation at work. While it may be difficult for the Secretary of State to link up completely new applications with a particular sponsor, it may well be easier to identify applicants like Mr Pathan who are already working for the sponsor and are making an application for further leave.

31. Because section 3C of the 1971 Act applies to any application for leave, Tier 2 leave applications are always inherently capable of being varied so that the applicant can rely on a different basis for leave, whether a different sponsor or some other basis altogether. It follows that even if the policy objective of the Secretary of State is that an application for Tier 2 leave should only match a particular employer (the sponsor) and that employer alone, the Secretary of State cannot resist a variation application made during the pendency of a Tier 2 application. Moreover, the fact that the primary purpose of section 3C of the 1971 Act was to prevent the proliferation of multiple claims does not prevent the possibility of its being used for the purpose of making an application which is more likely to succeed, and I venture to suggest that it is regularly used by applicants and practitioners for that purpose.

There is an element of substantive unfairness in the complaint

32. It seems to me that there is undeniably also an element of substance in Mr Pathan's challenge, but the way I see it is that it is as a consequence of his argument about procedural fairness, not vice-versa. If the challenge could only be analysed as one of substantive fairness, it would be impossible to bring a challenge on the grounds of procedural fairness unless the rule under which the decision-maker was acting allowed such a challenge.

33. It is not the law that a procedural challenge can be made only if there is no challenge to a substantive provision. In *Cooper v Wandsworth Board of Works* (1863) 14 CB NS 180, the defendant public board took the view that a landowner had failed to notify it of his intention to build a house as he was required to do by statute, and proceeded to exercise its statutory power to demolish his house without giving the landowner any opportunity to explain. The power to demolish was for public benefit, and the statute did not require the board to give the houseowner the opportunity to make representations. Nonetheless, the owner was held to have a right to be heard in case he could give information that might have caused the board not to demolish his house but to take some other step. (The public board did not assert that it did not know who the owner was.) It was no answer that the challenge also involved a challenge to a substantive provision of the relevant statute.

34. Byles J famously cited an example given by Fortescue J in *R v Chancellor, Masters and Scholars of the University of Cambridge* (1723) 2 Ld Raym 1334; 1 Stra 557 ("*Dr Bentley's* case"):

> "The judgment of Mr Justice Fortescue, in *Dr Bentley's* case, is somewhat quaint, but it is very applicable, and has been the law from that time to the present. He says, 'The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. "Adam" (says God), "where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?" And the same question was put to Eve also.'" (pp 194-195)

35. In the present case, if the Secretary of State had given Mr Pathan notice that Submania's sponsor's licence had been revoked, he would have been able to take steps to produce another basis for leave and applied to vary his application. By that means, he would have had the opportunity, equivalent to that of Mr Cooper in the *Wandsworth* case of persuading the board not to demolish his house, of persuading the Secretary of State not to reject his application.

36. It is common ground that the rules of natural justice apply to decision-makers in public law whether or not they are acting judicially. In the *Wandsworth* case it was argued that the board, as successors to the commissioners for sewers, who were a judicial body, also acted judicially. I need not go into that question as I give an example in para 46 below of the Secretary of State being required to observe the rules of natural justice.

The line between procedure and substance

37. Going back to Byles J's famous example of the expulsion of Adam and Eve from the Garden of Eden, that determination was undoubtedly a substantive decision, but the grant to Adam and Eve of an opportunity to provide an explanation was a procedural decision. It might be thought that the distinction between substance and procedure is hard to grasp but that is only because the same substantive decision can give rise to both a claim of procedural unfairness and a claim that a substantive decision is unfair. As stated, both claims in Byles J's example arose out of the same substantive decision of expulsion from the Garden of Eden.

38. This confusing state of affairs also occurs in the common law. For example, in *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407 the Secretary of State increased the tariff for the two young persons convicted of murder beyond that fixed in their case by the Lord Chief Justice. One of the matters which the Secretary of State took into account was the public concern expressed in the media about the nature of their crimes. The House of Lords held that the decision of the Secretary of State was unlawful because (among other matters) this was an irrelevant consideration. The House also decided that it was contrary to the rules of natural justice for the Secretary of State to take these factors into account. The decision should have been made only on the basis of relevant considerations. That case is an example of how the same act of a public body can lead to claims of both procedural unfairness and unlawfulness. Lord Steyn expressly noted the overlap between substance and procedure, which illustrates the point I made in the preceding paragraph:

> "[...] I have come to the conclusion that the decisions of the Home Secretary as contained in his letters of 22 July 1994, which fixed a 15-year tariff for both Venables and Thompson, were unlawful for substantive reasons as well as a breach of the principles of procedural fairness. There are two separate substantive reasons why I conclude that the Home Secretary's decisions were unlawful. First, the Home Secretary regarded a sentence of detention during Her Majesty's pleasure under section 53(1) imposed on a child convicted of murder as in law equivalent to a mandatory sentence of life imprisonment imposed on an adult convicted of murder. His legal premise was wrong: the two sentences are different. A sentence of detention during Her Majesty's pleasure requires the Home Secretary to decide from time to time, taking into account the punitive element, whether detention is still justified. The Home Secretary misunderstood his duty. This misdirection by itself renders his decision unlawful. Secondly, the Home Secretary misdirected himself by giving weight to public protestations about the level at which the tariff in the cases of *Venables* and *Thompson* should be fixed. In doing so the Home Secretary took into account in aggravation of the appropriate level of

> punishment legally irrelevant considerations. This was a material defect in the reasoning of the Home Secretary. It rendered his decisions unlawful.
>
> On the issues of alleged procedural unfairness, I have concluded that the decisions of the Home Secretary were also procedurally flawed by the credence and weight which he gave to public clamour for an increase in the level of the tariff. This point overlaps with my second substantive conclusion. It may be two sides of the same coin: either way the quality of the decision-making was adversely affected in a material way." (pp 518-519)

39. The next section of this judgment develops the question of overlap.

Line between procedural and substantive unfairness need not be rigid

40. The closely reasoned decision of the Court of Appeal in the present case drew a rigid line between procedural and substantive fairness. This distinction harks back to the well-known passage in the speech of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. At pp 410-411, Lord Diplock held:

> "Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
>
> By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

> By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

41. Lord Diplock's speech is not, however, to be read as excluding the possibility that there may be, as counsel argues, a subset of one of the heads (which Lord Diplock calls procedural propriety) which arises only in particular circumstances and which has different attributes from the circumstances in which other cases under that head arise. In my judgment, Mr Biggs is correct in his submission that there is a subset of procedural fairness. This subset applies where there is a rule for the conduct of applications for some benefit, and the alleged unfairness stems from the fact that that rule does not expressly provide an applicant with the right to be heard or to be informed on a point when a significant event occurs which is brought about (rightly or wrongly) by the actions of the executive and which has grave impact on the applicant, who is not otherwise aware of those actions.

42. Lord Diplock's categorisation of grounds for judicial review is important and I do not suggest otherwise. But the real issue is the level of intensity, or sensitivity, to judicial review given the roles and responsibilities of the judiciary under the British constitution. In *R (Talpada) v Secretary of State for the Home Department* [2018]

EWCA Civ 841, para 63, Singh LJ held that "unless kept within clearly defined and predictable boundaries, the doctrine of substantive unfairness risks (even if unconsciously) inviting the court to intrude impermissibly on the province of the executive". I share his overriding concern, but it is in the nature of the common law that the boundaries cannot always be clearly defined in advance or predictable.

Examples of procedural unfairness throwing light on this case

43. One of the cases which illustrates the last point is one which was not cited, namely *FP (Iran) v Secretary of State for the Home Department* [2007] EWCA Civ 13. That was an early decision directed at mitigating some of the hardship brought about when the Immigration Rules are drafted with a view to understandable efficiency, and in absolute terms, without perhaps taking full account of potential procedural unfairness. In some ways the case is close to this one because it too was a case where the Immigration Rules made it impossible for an applicant to make representations to the immigration tribunal rehearing his appeal against a refusal to accept his asylum claim. The rules stipulated that, if an applicant made no representations, the hearing had to proceed in his absence and there was no procedure for reopening that decision to allow the applicant to show a good reason for his absence. The appellant's legal representative had failed to give notice of his change of address so that he was not notified of the hearing at which his appeal was to be reheard. Sedley LJ considered that rules could not stand where they were "productive of irremediable procedural unfairness" (para 48). The Rules deprived the applicant of his right to be heard (para 49). The fact that the rules took the form they did to "to eliminate manipulation of the system" did not justify the breadth of their effect (para 31). The Rules in question were outside the rule-making powers and the purpose for which those powers were given. My judgment was based on the question whether the rules fell within the rule-making power and drew on (among other matters) Professor Lon Fuller's work, *The Morality of Law*, revised ed (1969) which is mentioned again at para 50 below. Wall J agreed with Sedley LJ. The breach of the common law principle of unfairness led to the rules being unlawful.

44. A point to note is that the court considered how the rule would operate across the board and not simply in the instant case before them. So too here. Mr Pathan's complaint is not peculiar to him. It must apply to anyone who is ignorant of a revocation of his sponsor's licence but is working for him in the expectation that he will qualify for a Tier 2 visa. The complaint in this sort of case is about a systemic failure. The particular subset of procedural fairness with which this case is involved is a material systemic failure and the applicant is already in the employment of the sponsor but completely ignorant of the circumstances which led to the revocation of the licence.

45. In my judgment in this subset of procedural fairness, the challenge will inevitably engage the substantive rule as well as procedural unfairness. Once the applicant is

through the procedural gateway, the decision has to be set aside and the question of the rationality of the rule is then demonstrably irrelevant.

46. There are many cases which apply the principle of procedural fairness. In the recent case of *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673; [2019] 1 WLR 4647, the Court of Appeal (Underhill, Hickinbottom and Singh LJJ) held that where the Secretary of State was minded to refuse indefinite leave on the basis of dishonesty, which was likely to be a serious matter, common law procedural fairness required that an indication of that suspicion should be supplied to the applicant to give him an opportunity to respond. Underhill LJ, giving the judgment of the court, stated at para 160:

> "Specifically, we do not believe that it was fair that Mr Kawos should have been expected to give detailed and definitive answers to an accusation of dishonesty without any prior notice. The contrary view seems to us to depend on the assumption that he must have known what the Secretary of State had in mind and should therefore have come prepared to face an interview in which he would have to give a detailed explanation of the original error in order to rebut an allegation of dishonesty; but if he was in fact innocent - which is the very question which the Secretary of State had to decide - why should he have anticipated any such thing?"

47. Another example in the numerous authorities on procedural fairness placed before us is *R v Secretary of State for the Home Department, Ex p Fayed* [1998] 1 WLR 763 (Lord Woolf MR, Kennedy and Phillips LJJ). Mr Al Fayed and his brother had applied to the Secretary of State for naturalisation as a British citizen. Section 44 of the British Nationality Act 1981 stated that the Secretary of State did not have to give reasons for his decision and his decision was not reviewable in the courts. The Secretary of State made an announcement that the applications were especially difficult and sensitive. Both applications were refused. It was held that procedural fairness applied and that the Secretary of State had to give the applicant an indication of the areas that were causing him concern. Lord Woolf explained that there was a long tradition in administrative law that a person should act fairly before exercising a statutory discretion and that inconvenience to the decision-maker was not a bar. This case illustrates the point that the requirements of procedural fairness are affected by issues such as the difficulty for the applicant in identifying the critical matter unless the decision-maker gives him some indication as to what it is. Lord Woolf held:

> "I appreciate there is also anxiety as to the administrative burden involved in giving notice of areas of concern. Administrative convenience cannot justify unfairness but I would emphasise that my remarks are limited to cases where an applicant would be in real

> difficulty in doing himself justice unless the area of concern is identified by notice. In many cases which are less complex than that of the Fayeds the issues may be obvious. If this is the position notice may well be superfluous because what the applicant needs to establish will be clear. If this is the position notice may well not be required. However, in the case of the Fayeds this is not the position because the extensive range of circumstances which could cause the Secretary of State concern mean that it is impractical for them to identify the target at which their representations should be aimed." (p 777)

Values served by procedural fairness

48. In *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115, Lord Reed considered the values served by the requirements about procedural fairness. He mentioned three in particular.

49. The first was that it satisfied a person's intuitive expectations of what a just process involved:

> "The first was described by Lord Hoffmann (ibid) [*Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269, para 72] as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions." (para 68)

50. Lord Reed's second point is particularly relevant to this case. Procedural fairness promotes congruence between decision-making and the law:

> "The second value is the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions: see eg *Fuller, The Morality of Law*, revised ed (1969), p 81, and *Bingham, The Rule of Law* (2010), ch 6." (para 71)

51. Lord Reed's third value concerned cost. While it might appear that the cost of providing a person with an oral hearing (not in point here) increases the cost of decision-making, that may not be the case if the decision reached is a fairer one:

> "The easy assumption that it is cheaper to decide matters without having to spend time listening to what the persons affected may have to say begs a number of questions. In the context of parole, where the costs of an inaccurate risk assessment may be high (whether the consequence is the continued imprisonment of a prisoner who could safely have been released, or re-offending in the community by a prisoner who could not), procedures which involve an immediate cost but contribute to better decision-making are in reality less costly than they may appear." (para 72)

52. Procedural fairness is thus an important matter. It makes the law more just and at the same time improves the standards with which decision-makers are expected to comply in the 21st century.

Substantive unfairness is not in itself a head of judicial review

53. In referring as I do to unfairness, I do not in any way depart from what Lord Carnwath (with whose judgment the other members of this Court agreed) held in *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96, para 41 that substantive unfairness is not a self-standing head of judicial review:

> "In summary, procedural unfairness is well-established and well-understood. Substantive unfairness on the other hand - or, in Lord Dyson MR's words … 'whether there has been unfairness on the part of the authority having regard to all the circumstances' - is not a distinct legal criterion. Nor is it made so by the addition of terms such as 'conspicuous' or 'abuse of power'. Such language adds nothing to the ordinary principles of judicial review, notably in the present context irrationality and legitimate expectation. It is by reference to those principles that cases such as the present must be judged."

54. Lord Sumption made a similar point at para 50 in that case.

What does fairness require in this case?

55. Procedural fairness is adaptable to the environment in which it is applied. Procedural unfairness does not entail that the decision-maker must comply with a pre-designed set of rules. As Lord Mustill held in a very well-known passage in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 560, what fairness requires in any particular case will depend on the circumstances and may change over time. Lord Mustill held:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

56. Here what procedural fairness aims to achieve is that a person who, like Mr Pathan, is applying for further leave in order to continue working for his sponsor, and had a valid CoS at the date of his application, should have notice of the communication to the sponsor of the determination of the Secretary of State that the sponsor's licence is revoked. Where the Secretary of State has initiated the process for the revocation of the sponsor's licence, and revocation is the cause of the invalidation of his application, it is right that the applicant should have that information in order to avert or mitigate the potential fatal blow to his application. This is because, while the applicant can be under no illusion as to the effect of revocation, he is not told in terms that the Secretary of State will take this course without his being informed.

57. In order to give the applicant a meaningful opportunity for the applicant to take averting action if he can, the Secretary of State must give him a further period selected by her (subject of course to any successful challenge to the revocation). The Secretary of State is likely to have to allow three months for a challenge to the revocation in any event and so the reasonable period might be 60 days. Both periods could run together.

58. By the time revocation occurs, an applicant may have no part of their leave left and so he may be relying on the extension to his leave conferred by section 3C of the

1971 Act. But such applicants would have also been expecting to obtain their leave and so it seems to me that the length of the period should be the same for these applicants as it is for those applicants who made their application for Tier 2 (General) leave and continue to have sufficient days remaining to cover the curtailment period.

59. The decision as to the appropriate period will be a matter (subject to any judicial review) for the Secretary of State. It has been represented to us that a shorter period of 28 days would not give the applicant time to find a new sponsor if the new sponsor had to comply with the resident labour market test.

60. Once the Secretary of State has given notice of revocation to Mr Pathan it would be up to him to find out from his original sponsor whether the sponsor proposes to, and does successfully, challenge the revocation. Fairness does not require the Secretary of State to answer questions about that or keep the applicant informed.

61. Averting what I have described as a potential fatal blow to his application may include the applicant seeking to vary his application so that he obtains LTR under the sponsorship of another sponsor; demonstrating that he has other sponsorship to the Secretary of State is but another form of the making of representations to which Lord Mustill refers in his fifth point (point (5)) in the passage which I have set out from *Doody*. It is not right to say, as Mr Payne submits, that, once his sponsor's licence is revoked, his application is doomed and that, because of this, procedural fairness has no role to play and so does not require any steps to be taken. The applicant has a chance (which may be only a small chance) that he may find a new basis for applying for LTR. There is no difficulty in making an application for a variation in these circumstances, as the Upper Tribunal held in *Patel* [2011] Imm AR 5, para 21.

62. Lord Kerr and Lord Briggs conclude that the duty of fairness extends no further than giving Mr Pathan notice of the revocation. Respectfully, I do not share this view. As De Smith 's Judicial Review, 8th ed (2019), states at paras 7-045 and 7-046:

> "7-045 The Court of Appeal has characterised the principle of natural justice or procedural fairness as requiring that any participant in adversarial proceedings is entitled to know the case which he has to meet and to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case.
>
> 7-046 Individuals should not be taken unfairly by surprise. In disciplinary and analogous situations, there will often be a further reason why adequate prior notice should be given to the party to be charged - to give him the opportunity of offering to resign or (for example) surrender his licence, rather than face the prospect of formal

> condemnation. The duty to notify also includes the duty to take into consideration any representations made in response to notification." (footnotes omitted)

63. The first sentence of para 7-046 contrast with para 196 of the judgment of Lord Briggs in this matter. In addition, De Smith references at the end of para 7-046 *R v North Yorkshire County Council, Ex p M* [1989] QB 411. The local authority had failed to disclose to the child's guardian ad litem major changes in the circumstances of the child. Ewbank J held that that the authority had both to notify the guardian of these circumstances and also to listen to the guardian's views. For that purpose, the guardian would have to have been given time to formulate views and submit them to the authority.

64. The examples given in para 7-046 of enabling a defendant to disciplinary proceedings to resign or to surrender his licence are interesting examples of situations in which a person should be given the chance not simply to make further representations in the proceedings but also to take steps which are independent of them. There is no case law footnoted as supporting these examples, but the text clearly expresses the view of the learned editors. There is an obvious parallel between those examples and a case such as this where the applicant wishes to find another sponsor so that he can apply to vary his application for Tier 2 (General) leave. Since an applicant is permitted to vary his application, it is moreover foreseeable that an applicant may properly wish to take steps which are not directly related to his then current application. There is no basis therefore why his further pursuit of his application should be disregarded or treated as substantive, as Lord Briggs considers that it should, simply because the original purpose of the application had failed.

65. The PBS will remain a prescriptive scheme, and the requirements of fairness must take that into account. Unless the applicant can produce an alternative basis for LTR, his application will fail. Under the PBS, the Secretary of State will not have to consider statements of intention by the applicant or applications for further extensions of the Secretary of State's usual timeframe for dealing with his original application, which will presumably be three months from the date of communication of revocation to allow for challenges by way of judicial review.

66. There will be other cases where fairness does not require the applicant to be informed: obvious examples are where he already knows that there are grounds for revocation and where he is complicit in them. In those circumstances, he already knows that the success of his application is in jeopardy. There is also no need for the Secretary of State to give notice to the applicant if the licence is terminated other than as the result of the Secretary of State's actions (see paras 82 to 84 below).

67. Similarly there may be cases where the applicant will be unable to obtain any remedy if the Secretary of State does not give him notice of the revocation, because, for example, it is shown that even if he had had that notice he would still have been unable to find a sponsor (see generally De Smith's Judicial Review, paras 8-065 to 8-072, which cites among other authorities *Cinnamond v British Airports Authority* [1980] 1 WLR 582, which is cited by Lord Briggs in his judgment in this case. We are also only concerned with a person in the sponsor's employment, who is seeking LTR in order to continue working for their sponsor. The Secretary of State has accepted that existing workers are likely to have entered into commitments for which they will need time "to sort out their affairs". The difference said to exist between them and migrants like Mr Pathan who, being existing employees of the sponsor, are seeking further LTR is that the latter group is said to have no expectation that their application will be successful. But this somewhat overstates the position. One of the effects of the PBS is that if a person makes an application and calculates that he has the required number of points he will in reality expect his application to succeed. Paragraph 245HD (set out above) states:

> "If the applicant meets these requirements, leave to remain will be granted."

68. Success in obtaining leave under the PBS, as its name suggests, involves earning sufficient points. I have already described the PBS as prescriptive: see para 1 above. By way of further background, under the PBS the Home Office has a large volume of applications each year: Mr Jackson explains that there were about 90,000 applicants in 2016 for Tier 2 leave involving some 28,000 sponsors. The policy aims are very specific: the Home Office has designed Tier 2 around the principle of sponsorship with the sponsor having a specific vacancy that cannot be filled by a resident worker and undertaking certain duties in relation to the applicant. As explained, the applicant is then awarded points for meeting conditions. As Burnett LJ put it in *Kaur* at [2015] EWCA Civ 13, para 41:

> "41. The points based system for determining whether to grant leave to enter or remain in the United Kingdom, which applies to students as well as a number of other categories of applicant, is designed to achieve predictability, administrative simplicity and certainty. It does so at the expense of discretion, that is to say it is prescriptive. The consequence is that failure to comply with all its detailed requirements will usually lead to a failure to earn the points in question and thus refusal: see eg Sullivan LJ in *Alam v Secretary of State for the Home Department* [2012] EWCA Civ 960 at para 44, Davis LJ in *Secretary of State for the Home Department v Rodriguez* [2014] EWCA Civ 2 at para 100; Sales LJ in *EK (Ivory Coast) v Secretary of State for the Home Department* [2014] EWCA Civ 1517 at para 28 and Briggs LJ at para 59. It was that important background which informed the decision in *EK (Ivory Coast)*."

69. I have considered with care the whole of the evidence of Mr Jackson. In my judgment, it is unreal to suppose that, as he states, if an applicant who seeks LTR so that he can continue working for his sponsor and puts in an application which is apparently in order when submitted, he is going to put himself in a position where he has no commitments so that he can leave if required to do so. Moreover, if he is kept in ignorance as to his sponsor's shortcomings, he will not know about any revocation unless the Secretary of State informs him. There is something deeply unsatisfactory about the Secretary of State being able to take that decision which may have a profound influence on the life of the applicant, without any obligation to tell him. It is after all knowledge which is peculiarly in the Secretary of State's possession.

70. The Secretary of State has accepted an obligation to give a window of opportunity to migrant workers who become unemployed when their sponsor loses his licence. It seems to me that fairness demands that the Secretary of State accepts some similar obligation to tell the applicant, who is also an employee of a sponsor, of the revocation to give him too time "to sort his affairs out". It is not really an answer to say that his leave had expired. He would have been planning his affairs on the basis that he would be granted a new Tier 2 Migrant visa. He is likely to have engaged the same sort of commitments as other migrant workers of the sponsor. Moreover, employees who have already obtained their Tier 2 leave are allowed to look for other sponsors which suggest that the stated aim of Tier 2 to match migrants to particular vacancies can, as one would expect, equally be satisfied by matching resident labour market shortages to migrants.

71. We are not concerned with a new applicant or an applicant for a new position. It would not be reasonable to expect the Secretary of State to assume that such applicants would have commitments.

72. Lord Kerr, Lady Black and Lord Briggs have reached a different conclusion from me on the question whether the applicant would be entitled to a period of time to amend his application or take other steps if informed that the Secretary of State had revoked his sponsor's licence. In my view, the duty of procedural fairness requires the Secretary of State to give a meaningful opportunity to take steps in the light of the information supplied to him. The giving of information to him is largely pointless if this does not happen and the Secretary of State is able to reject his application the very next day as Lord Briggs holds. Likewise the appropriate period of time cannot serendipitously depend on the amount of time which happens to pass in any individual case between the notification by the Secretary of State to the applicant and the rejection of his application, as Lord Kerr and Lady Black hold. However I agree with Lord Kerr and Lady Black that "the duty to give notice of a decision to someone who will be adversely affected by it cannot be defined solely by the consideration that it is pointless for that person to make representations with a view to reversing or avoiding the effect of the decision" (para 131). That is to confuse the duty with the court's discretion to determine the appropriate remedy.

Why the question is not one of substance

73. Singh LJ held that the dispute is about whether the mandatory requirement for a valid CoS is lawful. So put, the question in issue is indeed one of substance but it is not the issue raised by Mr Pathan and for which he was granted leave to bring judicial review proceedings. His case is that the Secretary of State should have given him notice that his sponsor's licence was revoked and time to deal with it. In my judgment, and with respect, the distinction between procedure and substance does not justify recharacterising his complaint.

74. Lord Briggs also reaches the conclusion that the issue is one of substance by looking at the reality of the complaint. He calls it a question of substance "dressed up" as procedure, but I do not read that description as a suggestion that the application was clothed with the label of procedural unfairness but put forward as one of substance, like a wolf in sheep's clothing. Mr Biggs has not sought to challenge either the substantive decision made by the Secretary of State, or the rationality of the rule. Moreover, leave was given for the procedural unfairness argument to be run.

75. As the *Venables* case [1998] AC 407 (see para 38 above) illustrates, where an applicant relies on procedural fairness, the court looks at the process. It is true that if a decision has been taken and procedural unfairness is found, the decision will be set aside. That may or may not show a defect in the rule. In the present case, the rule that the applicant for Tier 2 must have a valid CoS at the time when the Secretary of State makes his decision on his application, which was the substantive rule identified by Singh LJ, is unaffected by the determination of the procedural unfairness claim in Mr Pathan's favour. In other words, that rule is in fact not affected by a conclusion that the process of decision-making - which involved an omission to give notice as in the *Wandsworth* case 14 CB NS 180 - was unfair. A defect in the decision-making process is the hallmark of a procedural dispute. A substantive decision is the decision that determines the application, ie a decision on the merits. As I see it, Mr Pathan's case falls within, not beyond, the phrase used by Lord Briggs: the "true boundaries" of procedural fairness.

Question whether rule irrational does not need to be decided

76. Having found that the challenge was one of substantive unfairness Singh LJ went on to conclude that the Tier 2 rules, which meant that Mr Pathan had no time to seek another sponsor, were not irrational. The aim of Tier 2 was to match a migrant to a particular vacancy. The Tier 4 regime was different because the aim was to encourage foreign students to study in the UK. Tier 4 applicants were given notice that their application would fail because the Secretary of State had revoked their sponsor's licence. Tier 2 applicants could always renew their application from abroad. In that way

they would avoid the risk of criminal liability as an overstayer. Singh LJ considered that the applicant is in a different position from a migrant who is already working for the sponsor.

77. Given that I have found that there was procedural unfairness to a person in Mr Pathan's position, these points do not arise on this appeal.

Unfairness in this case is not displaced by administrative review or the need not to impose burdens on the executive

78. In my judgment, it is not an answer to Mr Pathan's challenge to say that his leave is extended during the administrative review period and for 14 days thereafter. If he wishes to make an application to vary his application for Tier 2 leave because he has a different sponsor, he must do this before his section 3C leave expires. If he makes a variation application before his section 3C leave expires, that application is then automatically merged with his previous application. Making a variation application will hasten the end of his section 3C leave as he will be prevented from continuing with an administrative review if he makes an application for variation.

79. If the applicant's section 3C leave comes to an end and no other leave has been put in his place, the applicant becomes an illegal overstayer. Mr Biggs emphasised the hostile environment in which a migrant finds himself if he becomes an illegal overstayer. He may be expelled and prevented from returning to the UK for ten years. Mr Biggs' submission to this court is essentially the same that he made in *Balajigari*, which Underhill LJ helpfully records as follows:

> "81. Secondly, Mr Biggs relied on the legal consequences for an applicant who remained in the UK without leave, which have been rendered more severe by the so-called 'hostile environment' provisions introduced by the Immigration Act 2014. It is, in the first place, a criminal offence to be in the UK without leave to remain: see section 24 of the Immigration Act 1971. As regards practical consequences, a person without leave faces severe restrictions on their right to work (see section 24B of the 1971 Act), to rent accommodation (section 22 of the 2014 Act), to have a bank account (section 40 of the 2014 Act) and to hold a driving licence (sections 97, 97A and 99 of the Road Traffic Act 1988); nor will they be entitled to free treatment from the NHS: section 175 of the National Health Service Act 2006. He submitted that those consequences are bound to have a serious impact on a migrant's private life irrespective of any removal action."

80. The Secretary of State recognises that a migrant worker needs 60 days to put his affair in order. It cannot be fair to leave an applicant for LTR who is also working for his sponsor with a shorter period of time. That period may indeed be too short as a new sponsor may have to complete a resident labour market test before issuing him with a CoS, and this may require him to advertise the post twice in order to see if there is a resident worker who would fill the vacancy. I appreciate that the Secretary of State sees the position of the applicant simply as matched to the job vacancy with the original sponsor, but the Secretary of State has also to discharge his duty of procedural fairness to the individual applicant as well.

81. As to imposing burdens on the executive, it is well known that the PBS has been devised to enable the Secretary of State to deal efficiently with the number of cases which Britain attracts. Fairness must take full account of this, but the resultant scheme must not sacrifice fairness in order to achieve efficiency. As Sedley LJ, giving the judgment of the Court, held in *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481; [2005] 1 WLR 2219, para 8:

> "The choice of an acceptable system is in the first instance a matter for the executive, and in making its choice it is entitled to take into account the perceived political and other imperatives for a speedy turn-round of asylum applications. But it is not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency; and whether it has done so is a question of law for the courts."

Where revocation is not the result of the Secretary of State's actions

82. Singh LJ considered that Mr Pathan's case was analogous to that of *Talpada* [2018] EWCA Civ 841, mentioned above, but in my judgment that case is distinguishable. The applicant's application was for leave to remain as a Tier 2 migrant, and he received a CoS from his employer. Unfortunately, this was a CoS which had been used and so he could not meet the requirement that he should hold a valid CoS. Singh LJ held, at para 62:

> "… The reality of the complaint is that, despite what the Immigration Rules require, the respondent should have been prepared to accept something else, namely a COS number which in fact had already been 'used'. That has nothing to do with any duty on the respondent to 'hear' the appellant before taking her decision. In reality it is concerned with a matter of substance, namely whether the requirements in the Rules should be complied with in full or whether the respondent should be prepared to dispense with one of those

> requirements. In my view, it makes no difference to this analysis to say that the requirement in the Rules is itself concerned with a matter of procedure rather than, for example, whether a person should be granted leave to remain or a work permit. The important point is that this is nothing to do with procedural fairness in the sense outlined above. It is to do with whether a substantive requirement of the rules themselves needs to be complied with in making a relevant application. …"

83. The officer of the sponsor company who had spoken to an official at the Home Office thought she had got permission to assign a previously used CoS. The Court of Appeal did not accept that there had been unfairness because the reason why the appellant had no valid CoS was not in the system provided by the Home Office. It was due to an error made by the officer of the sponsor company.

84. Likewise, in *EK (Ivory Coast) v Secretary of State for the Home Department* [2014] EWCA Civ 1517; [2015] INLR 287, the Court of Appeal (Sales and Briggs LJJ; Floyd LJ dissenting) rejected an argument that the Secretary of State should have allowed a Tier 4 applicant further time when her college withdrew sponsorship from her by mistake. Another case where the cause of the failure of the application could not be attributed to the actions of the Secretary of State was *R (Raza) v Secretary of State for the Home Department* [2016] EWCA Civ 36; [2016] Imm AR 682, where the applicant's sponsor's licence was withdrawn but the Court of Appeal (Arden, Beatson and Christopher Clarke LJJ) rejected his claim for judicial review as he was already an overstayer when he made his application.

Making an application from abroad

85. In his judgment, Singh LJ accepted the Secretary of State's argument that a person in Mr Pathan's position could always return to their own country and make an application from there. But that course of action may be unreal if the migrant has financial commitments through having already worked for the sponsor.

86. If the applicant went abroad and applied from another country, he would have to pay another fee. Procedural fairness does not of course apply any differently because of this. If the applicant is entitled to receive notification from the Secretary of State that his sponsor's licence has been revoked, and if he is then able to apply for a variation of his application for leave, he will not incur that fee.

Should this Court rule on the question whether the basis of the Upper Tribunal's decision in Patel was unsound?

87. As I have explained, Singh LJ said that he had "considerable reservations" about the decision of the Upper Tribunal (Blake J, President, and Batiste SIJ) in *Patel*, which concerned Tier 4 migrants, but he did not consider that the Court of Appeal in this case should overrule it because the Secretary of State had not appealed in that case and the submissions made in *Raza* to the effect that *Patel* was wrongly decided had been rejected, albeit obiter. Coulson LJ also expressed his concerns about this decision. As previously explained, this Court is not asked to overrule *Patel*.

88. Singh LJ's concerns arose from observations in *Patel* about equal treatment. What the tribunal had held in its decision under appeal in *Patel* to the Upper Tribunal was that the students should have leave but in error did not limit the leave to 60 days' leave. One of the reasons of the Upper Tribunal for allowing the appeal was that the students in that case should be treated as other students were. Singh LJ held that as the law stands equal treatment was not as a self-standing head of unfairness. However, as I read the decision, the reference to equal treatment was only one basis for the decision. Fairness in that case required 60 days to be given to all students of colleges whose licences the Secretary of State took steps to revoke. The point which the Upper Tribunal was making was that the same 60 days should be given to all Tier 4 applicants even if they did not have 60 days leave left. In the second half of para 23 and in para 24, the Upper Tribunal decided the case on the basis of fairness alone:

> "23. Although we accept that there is no such policy for refusal cases, fairness requires that such cases be treated in broadly the same way. The applicant must be given an equal opportunity before refusal of application to amend it in the way we have described. This was clearly not done in this case. The Home Office knew that it had suspended the college in January 2010 but no one else did. The applicant could not have known that subsequently the college's status as an approved sponsor was revoked before his application for an extension of stay was decided.
>
> 24. It is obviously unfair for the Secretary of State to revoke the college's status after the application has been made when it was an approved sponsor and not to inform the applicant of such revocation and not afford him an opportunity to vary the application."

89. Moreover, the Secretary of State in that case had accepted that there was procedural unfairness to that extent.

90. Furthermore, the reality is that the question whether equal treatment was part of the basis for the decision is academic because, as Mr Jackson explains, the Secretary of State accepts (and did accept before the decision in *Patel*) that as a matter of procedural fairness notice of withdrawal of the licence for their college should in general be given to applicants for Tier 4 leave, and the effect of the decision has been absorbed in the Secretary of State's revised practices as regards Tier 4 applications. That was a proper and sensible decision for the Secretary of State to take.

91. In my judgment, it is sufficient to explain *Patel* as I have done, and I do not consider that this Court should indicate that the basis of the decision in *Patel* so explained was unsound. I have not had to rely on *Patel* in reaching my conclusions in this judgment, which of course concerns a different tier of leave for migrants.

Lord Wilson's judgment

92. Since preparing this judgment, I have had the privilege of reading in draft the judgment of Lord Wilson, with which I completely agree.

Conclusion

93. For the reasons and to the extent summarised in para 6 above I would allow the appeal.

LORD KERR AND LADY BLACK:

94. Mr Pathan was granted leave to enter the United Kingdom as the dependant partner of a Tier 4 (general) student on 7 September 2009 with leave to remain until 31 December 2012 (later extended until 30 April 2014). Before the latter date arrived, Mr Pathan applied for and was granted leave to remain as a Tier 2 (general) migrant from 23 March 2013 until 15 October 2015. This was so that he could be employed by a company known as Submania Ltd as a business development manager. The period between March 2013 and October 2015 is known as the period of leave.

95. Before the period of leave was due to expire in October 2015, Mr Pathan applied, on 2 September 2015, for further leave to remain in order to continue to work for Submania in the same capacity as before. The application was made on the basis that he would retain his Tier 2 status. It was made within the time allowed and it was in correct form. His wife and child were named as dependants in the application. It was supported by a certificate of sponsorship (CoS) issued by Submania.

96. Mr Pathan's application was put on hold while a Sponsor Compliance Team of the Home Office investigated Submania. As a result of their investigations, Submania's sponsor licence was suspended on 4 February 2016. The licence was subsequently revoked on 7 March 2016. This had the automatic effect of invalidating Mr Pathan's CoS. Although, as seen below in para 101, his leave was automatically extended until the Secretary of State considered his individual case, he had no opportunity to take steps to deal with the impending, inevitable determination of his application. Mr Pathan was not informed of the revocation until 7 June 2016. He was therefore unaware of the impact that the decision would have on his status until three months after it had been taken.

97. Mr Pathan applied for judicial review. The nature of the judicial challenge has been the subject of, if not dispute, at least discussion, in the Upper Tribunal (Immigration and Asylum Chamber) (the UT) and in the Court of Appeal. The UT judge who dismissed Mr Pathan's judicial review claim characterised the issue in this way at [2017] UKUT 369 (IAC), para 2:

> "Whether an immigration applicant who has applied ... for leave to remain under the Tier 2 (General) Migrant Category of the Immigration Rules and has submitted a Certificate of Sponsorship from their sponsoring employer which is valid at the time the application is made is entitled to challenge the respondent's decision not to provide [him] with a period of 60 days in which to secure an alternative sponsor, in circumstances where the sponsor's Tier 2 Licence was revoked ..."

98. On the appeal by Mr Pathan from the UT judge's dismissal of his claim, it became clear that this formulation went further than the case which the appellants wished to advance. In the course of the hearing before the Court of Appeal ([2018] EWCA Civ 2103; [2018] 4 WLR 161, Sir Andrew McFarlane P, Singh and Coulson LLJ) the issue was framed thus by Singh LJ (who delivered the principal judgment with which McFarlane P and Coulson LJ agreed), at para 5:

> "… [the appellants] contend that they were entitled to notice of the fact that the sponsor's licence had been revoked and a reasonable opportunity (not necessarily 60 days) to re-arrange their affairs, not necessarily to find an alternative sponsor but potentially to do other things, including making an application to the Secretary of State on an alternative basis, for example on human rights grounds or to ask for the exercise of his residual discretion, or even to leave the United Kingdom … voluntarily without the risks associated with being found to have been staying here after their leave to remain had expired." (para 5) (there was another appellant besides Mr Pathan who was in a

broadly similar situation as he but who plays no part in the appeal to this court.)

99. The difference in the two formulations is significant. As articulated or refined in the Court of Appeal, Mr Pathan's case does not specify that he was entitled to a particular defined period between becoming aware of the revocation of the licence and the final decision on his migrant status, the new formulation being that he was entitled to "a reasonable period". And the purpose of the time sought is no longer confined to obtaining an alternative sponsor. His case can be seen to have two elements. The primary case that he advances is that he should have been given notice of the revocation when that occurred. The second element is that he should have had a reasonable period thereafter to rearrange his affairs in response to that.

100. If Mr Pathan had been given notice of the revocation of his sponsor's licence, a number of options would have opened for him: (i) he could have sought to vary his leave application, other than by making a human rights or asylum claim (eg by making an application relying on a new CoS from a different employer); (ii) he could have made an application to vary the terms on which he was entitled to remain so as to rely on human rights grounds; (iii) he could have made practical plans to remove himself, his wife and his child from the United Kingdom to his native India, thereby avoiding the prospect of their becoming overstayers, with all the negative consequences which that entailed; and (iv) he could have decided to take no steps until formally notified by the Secretary of State that his leave to remain was refused.

The possible advantages of early notification

101. By section 3C of the Immigration Act 1971, when a person applies for variation of his leave to remain before that leave expires, if it then expires before a decision is taken, the leave is automatically extended to the point at which the appropriate period for appealing a refusal comes to an end. By virtue of subsection (2), the existing leave will be extended during any period when (a) the application is neither decided nor withdrawn; or (b), if the application has been decided and there is a right of appeal against that decision, an appeal could be brought; or (c), if an appeal has been brought, that appeal is pending, or (d), an administrative review of the decision could be sought or is pending.

102. None of these options was realistically open to Mr Pathan because the first he knew of the problem with his application was when he received the Secretary of State's letter of 7 June 2016 refusing it. Before this was communicated to him, Mr Pathan had no occasion to seek leave to remain other than on foot of what he believed was a valid CoS. Although his leave had been extended (by operation of section 3C) while the Secretary of State considered his application, because he was unaware of the virtually

certain outcome of that consideration, Mr Pathan took no steps to deal with that inevitability. Why would he? He simply did not know what lay ahead. But what unavoidably lay ahead, while his application for leave to remain depended on a CoS which was of no value, was the end of his leave to remain, as from the conclusion of the administrative review period following refusal of his application.

103. If he had known that this was inevitable, Mr Pathan could have applied to vary the application. Even if the variation constituted a significant departure from the original application, it is recognised as a "variation" for the purposes of section 3C of the 1971 Act, so long as the original application for leave had not been determined: paragraph 34BB of the Immigration Rules, section 3C(5), and *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78; [2009] Imm AR 3, para 40. Section 3C(5) has the effect that any new application made by the migrant during the currency of a variation application ("VA1"), operates as a variation of VA1. If, therefore, the new application succeeds, it is tantamount to VA1 succeeding. This can be regarded as akin to the conventional procedural fairness situation of an applicant being allowed to make further submissions with a view to improving the chances of his application succeeding.

104. As Lord Briggs has said in para 170, in appropriate cases, the rules of natural justice may require a party to be afforded time to amend his case in a way that cures an otherwise fatal defect of which he had, without fault on his part, previously been unaware. Whether this is required is, as Lord Briggs says, heavily context-specific, but the question quite obviously arises for consideration where the circumstances are as they were in the present case.

105. A real and distinct advantage would have accrued to Mr Pathan if he had been notified of the revocation of his sponsor's licence as soon as that had taken place and rejection of his Tier 2 application occurred some time later. Between those two dates, all of the options adumbrated in para 100 above and explored in paras 113 and 114 below) would have become available. Crucially for present purposes, he would have become aware of the need to vary under section 3C. By contrast, if someone in his position is notified of the revocation of his sponsor's licence at the time that it is revoked and his application for a Tier 2 licence is rejected at the same time, that range of options is not available to him. Applying for administrative review is the only course.

106. It was not suggested by the respondent that it was necessary that the revocation and the rejection of the Tier 2 application take place concurrently. Indeed, Mr Pathan's case demonstrates that it was not. It was perfectly possible to inform him at the time of revocation and, as appears to be the practice, to consider his application on its merits in due time. The proper discharge of a duty to act in a procedurally fair way recognises the advantage that comes of having notice of a fundamental difficulty in the way of the original application, so that steps can be taken to allow it to be adjusted.

107. Underpinning the duty to act fairly in this context is the notion that a person such as Mr Pathan should be afforded as much opportunity as reasonably possible to accommodate and deal with a decision which potentially has devastating consequences. One only has to envisage how Mr Pathan must have reacted to the news that his Tier 2 application had been rejected because of the revocation of Submania's licence, to understand the fundamental justice in giving him the chance to do something about it. He had every reason to believe that his application would succeed. The reason that it did not had nothing whatever to do with him. But, failure in the application represented a calamitous upheaval for him and his family. To ensure in those circumstances that he had timely notice that, for wholly unanticipated reason his application was bound to fail, *so that he could seek to avoid its consequences* seems to us to be a self-evident aspect of the duty to act fairly.

108. That is not to say that the Secretary of State should be fixed with a positive duty to provide Mr Pathan with that opportunity, much less that he should have allocated a specific period (not already available under the Rules/legislation) within which it might be exploited. The duty to act fairly in these circumstances involves a duty not to deprive, not an obligation to create. It appears to us that requiring of the Secretary of State that he or she should supply a period of time for someone such as Mr Pathan during which to deal with the decision would be to impose a positive duty, and, importantly, a duty that would involve an extra extension of leave beyond that expressly set out in the legislation/Rules. Such an extension is a matter of substance. In contrast, there is nothing incompatible with the legislation or the Rules in allowing the affected person to know, as soon as may be, of the circumstances which imperil their application, so that they may make use of whatever time remains to them under those provisions. This does not confer a substantive benefit. It may be properly characterised as a procedural duty to act fairly. It is not a duty to bestow. It is an obligation not to deprive.

109. Expressed in another way, the Secretary of State did not incur an obligation to give someone such as Mr Pathan an extra period of grace beyond that provided for in the legislation and the Rules but fairness required that she/he did not take steps to frustrate or circumscribe the period during which action might have been taken if timely notice of the revocation of the licence had been given. Thus, the duty to act procedurally fairly comprehends an obligation to tell somebody such as Mr Pathan immediately about circumstances which doomed his current application so that he could avail of the full period which would then have become available to allow him to do something about it.

110. It follows that to contrive to ensure that Mr Pathan was informed of the revocation of Submania's licence at the same time that he was told that his application to renew his Tier 2 status was refused would be procedurally unfair. These decisions are, naturally and conventionally, taken sequentially. To compress them in order to reduce the time available in which to seek to avoid their impact would obviously be procedurally unfair. That is not to say that a decision to revoke a CoS, communicated

at the same time as a refusal of an application to renew a Tier 2 status will inevitably and invariably be unfair. Exigencies, as yet unforeseen, may make such a convergence of decisions and their coincident communication unavoidable. It is only where the coincidence of communication of both *has been contrived* in order purposely to deprive an affected person of the period between learning of the revocation of the CoS and the refusal of the application that procedural unfairness would arise.

111. That theoretical case has nothing to do with the present appeal, however. Here, there was time between the revocation of the sponsor's licence and the determination of Mr Pathan's application, during which he could have sought to do something about the changed circumstances, but the Secretary of State did not provide him with information about the revocation of the CoS which would have opened that door for him.

112. True it may be, as Lord Briggs states in para 148, that there is no evidence that the Secretary of State decided "deliberately [to] keep Mr Pathan in the dark about the revocation of his sponsor's licence, or subject him to some kind of ambush". But what the Secretary of State neglected to do was something that lay squarely within her power, namely, to let Mr Pathan know, as soon as the decision on revocation of the licence was made, that the entire basis of his application was undermined. It might be suggested that this too would involve the imposition of a positive duty and the correlative conferral of a substantive benefit. It does not. This is information which he would have had to be given. A decision that it should have been communicated at the time that revocation occurred involves no more than the assertion of a fair procedure.

113. A window would have existed for Mr Pathan, therefore, if he had learned timeously of the revocation of Submania's sponsor licence and before the Secretary of State's determination of his application for leave to remain. One way in which he might have used this would have been to apply for a new Tier 2 (general) migrant visa with a new CoS from a new employer. Another was to apply for a variation of leave on the basis of a human rights claim. Even if this was initially rejected, Mr Pathan could have appealed under sections 82(1)(b) and 92 of the Nationality, Immigration and Asylum Act 2002. His leave to remain in the United Kingdom would thereby be extended for: (a) the first 14-day period during which such an appeal may be brought: section 3C(2)(b) of the 1971 Act; and (b) the period during which any such appeal remained pending: section 3C(2)(c) of the 1971 Act; section 104 of the 2002 Act.

114. A further option available to Mr Pathan if he had been notified of the revocation of Submania's sponsorship licence was that he could have used the extra time which this afforded him to arrange his affairs so as to make an orderly return for himself and his family to India. The benefit of doing so would have been that he could have avoided the effect on him and his family of becoming overstayers. Acquiring the status of an overstayer carries a number of potentially serious adverse consequences.

The consequences of being an overstayer

115. There are two types of effect of becoming an overstayer: immediate and long-term. If one is knowingly an overstayer, one automatically commits an offence under section 24(1)(b) of the 1971 Act and becomes liable to imprisonment for a term of up to six months or a fine. Overstaying also tips a person into the Home Office's "hostile environment". Since July 2016 it has been illegal for an overstayer to be in employment. That prohibition remains in place even after an overstayer has applied for a visa extension. It persists until (and if) they are granted leave to remain. Overstayers may find it difficult to rent accommodation and may be prevented from driving.

116. Long term consequences may be even more serious. The Home Office would not normally accept an immigration application from an overstayer unless, as was the law in force before November 2016, an overstayer's application is made within 28 days of the applicant's leave expiring - see policy paper, statement of changes to the Immigration Rules HC194, June 2012, and paragraphs 245CD(i) and 245HD(p) of the Rules. (The period of 28 days was reduced to 14 days by Statement of Changes HC 667. This came into force on 24 November 2016.)

117. Individuals who overstay for longer periods may be subject to a re-entry ban under rule 320(7B) of the Rules, preventing them from returning to the UK for between 12 months and ten years depending on the particular circumstances. There will be no re-entry ban if the person overstayed for less than 90 days and left the UK voluntarily and not at the expense of the Secretary of State. The table below summarises the various consequences:

Overstay period	Other circumstances	Consequence
If overstay for 28 days or less		**No effect**
If overstayed for 90 days or less	and left UK voluntarily not at expense of Home Office	**No mandatory ban**
If overstayed for more than 90 days	and left UK voluntarily not at expense of the Home Office	**1 year ban**
If overstayed for any period	and left UK voluntarily at expense of Home Office within six months of being given removal notice or within six months of exhausting appeal or administrative review process	**2 year ban**

Overstay period	Other circumstances	Consequence
If overstayed for any period	and left UK voluntarily at expense of Home Office OR was removed from the UK as a condition of a caution	**5 year ban**
If removed or deported from the UK OR used deception in an application for entry clearance		**10 year ban**

The duty of procedural fairness: the issue of pointlessness

118. We should supplement what we have said already about the duty of procedural fairness by considering a particular question that arises in relation to it. When an administrative body is contemplating a decision which will adversely affect an individual, does the duty to act in a procedurally fair way require the body to inform the individual even though any representations that he or she might make will not affect the outcome? Or, to put it in other words, is the duty to act fairly by giving notice of an impending adverse decision dependent on the existence of the possibility of submissions by the person affected bringing about a change of mind by the decision-maker?

119. Before addressing that question, it should be pointed out that the scope of inquiry into the duty to act fairly cannot be confined, in every instance, to circumstances in which the affected person aspires to change the decision-maker's mind on the precise decision made. Where notice of the decision might prompt a change of direction which would achieve the aim of the person, albeit by a different route, there is an active inquiry to be had as to whether the duty is activated.

120. There is ample authority on the issue of whether the duty to afford the opportunity to make representations arises where any such representations are bound to fail. Thus, as Lord Briggs has pointed out, in *Cinnamond v British Airports Authority* [1980] 1 WLR 582, 593, it was said that no one could complain of not being given an opportunity to make representations if it would have achieved nothing. A somewhat similar view was expressed in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, para 179 in the passage from Lord Neuberger of Abbotsbury's judgment cited by Lord Briggs at para 161 below. (It is noteworthy, however, that in that passage Lord Neuberger was at pains to point out that any argument advanced in support of pointlessness "should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute.")

121. Pointlessness can have two dimensions. The first is that there is no possibility of bringing about a change of mind on the part of the authority on the terms of the decision that has been made. So, for instance, in the present case, Mr Pathan's application, so long as it was based on a CoS issued by a company which had ceased to have authority to issue such a certificate, could not succeed in any circumstances. The second dimension is different. It involves an examination of whether, on becoming aware of the decision, there was simply nothing that the affected person could do to achieve his aim. In other words, there was no other avenue which he or she could explore to avoid the impact of the adverse decision.

122. We are here concerned with the second dimension, and it will already be apparent that, in our view, it cannot be said that, even if notified promptly, Mr Pathan would still have been without avenues to pursue in an attempt to alter the outcome of the decision making process. We have outlined above the various options which we believe would have been open to Mr Pathan if he had been alerted earlier to the decision to cancel Submania's sponsor licence. Before turning again to those options, it is necessary to say something of the nature of the duty to act fairly in the context of bringing to the attention of an individual at the earliest time reasonably possible a decision in relation to revocation of the sponsor licence which is likely to affect him or her adversely.

123. In *Cinnamond* the pointlessness argument was put starkly. Lord Neuberger's exposition of it in *Bank Mellat (No 2)* was more muted. The argument needs to be viewed, however, in the context of other judicial pronouncements where a less stringent view of the requirements of the utility of notice can be discerned.

124. In *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269, para 72, Lord Hoffmann noted that the purpose of the *audi alteram partem* rule "is not merely to improve the chances of the tribunal reaching the right decision … but to avoid the subjective sense of injustice which an accused may feel if he knows that the tribunal relied upon material of which he was not told." And in *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115, para 68, Lord Reed endorsed a normative understanding of the duty to act procedurally fairly:

> "[J]ustice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken. As Jeremy Waldron has written ('How Law Protects Dignity' [2012] CLJ 200, 210):

> ‘Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea - respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.’”

125. In their work *Administrative Law: Text and Materials*, 5th ed (2016), Elliott and Varuhas at para 10.2.5 discuss this passage from Lord Reed’s judgment:

> “Referring to the dictum from *R v The Chancellor of Cambridge* (1723) 1 Stra 557 set out at 10.1, concerning God’s willingness to grant Adam a hearing, Lord Reed continued (at para 69):
>
> > ‘The point … is that Adam was allowed a hearing notwithstanding that God, being omniscient, did not require to hear him in order to improve the quality of His decision-making.’
>
> On this view, the notion of procedural fairness which would ‘make no difference’ becomes a contradiction in terms, since it rests on an exclusively outcomes-oriented view which overlooks the much wider role played by procedural fairness in an administrative state that seeks to build constructive relationships between individuals and public bodies by casting the former as participants in the process of governance.”

126. These statements do not, of course, relate directly to Mr Pathan’s case. But they serve as a useful reminder that utility is not the only yardstick by which to measure the duty to act fairly in communicating to an individual why (and more relevantly in this case *when*) a decision adverse to their interests has been or is to be taken. It cannot have been lost on those who were involved in the decision in this case that it would have a significant impact on Mr Pathan and his family. The duty to inform him at the earliest reasonable opportunity that this effect was due to accrue seems to us to be obvious. Not only should those concerned with the decision have been aware that Mr Pathan and his family would experience a major disruption to their lives, they must also have been alive to the likelihood that he would want to do something to mitigate the effects of the decision. This reinforces the need to inform him timeously.

127. Of course, as Lord Briggs has said (in para 146 below), the rules provide for a very short time between notification of the decision to reject the Tier 2 application and the requirement to leave the United Kingdom. As Lord Briggs put it, "the tight timetable is the consequence of the rules". But the rules are not necessarily comprehensive of the duty to act in a procedurally fair way. They do not inhibit release of information when that can be first provided. True it may be that Mr Pathan would have been taken as much by surprise if he had been notified immediately of the revocation of his sponsor's licence as he was when told of it three months later but he would have had a longer period in which to do something about it if he had been told on the earlier date.

128. At para 10.3.2 of their work, Elliott and Varuhas, referring to cases such as *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531 and *R (B) v Westminster Magistrates' Court* [2014] UKSC 59; [2015] AC 1195, suggest that "the courts have generally taken the view that unless primary legislation so provides (either explicitly or, as in *Bank Mellat v HM Treasury (No 1)* [2013] UKSC 38; [2014] AC 700, by necessarily implication), they may not adopt procedures enabling them to take account of evidence to which one of the parties is denied access". This approach they describe as the principle of open justice to which, they say, the common law has a strong commitment.

129. This is not a case of denying Mr Pathan access to evidence relating to the cancellation of Submania's sponsorship licence, nor even to the material which led to the rejection of his Tier 2 application. But, in a telling passage (also at para 10.3.2) Elliott and Varuhas continue:

> "The open justice principle finds its analogue in the administrative context in 'the duty to give notice'. At its lowest, this means that individuals must know that a matter liable to affect them is going to be decided before any final decision is taken. As Lord Sumption put it in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, at para 29:
>
> > 'The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law'."

130. We freely acknowledge that these observations were made with a different context in mind from that of the present case. The decision to refuse Mr Pathan's application was, in a sense, preordained by the Immigration Rules. By contrast, Elliott and Varuhas were discussing circumstances where the decision was at large. The

outcome depended on a weighing of evidence. One can readily see how, in such a situation, the person to be affected should be given notice of the prospect of a decision so as to be able to contribute evidence which might influence the outcome. But, if I should be given notice of the prospect of a decision which I might be able to influence by the production of evidence, should I not be given notice of that prospect when I might take steps to avoid its impact on me?

Discussion

131. We are of the view that the duty to give notice of a decision to someone who will be adversely affected by it cannot be defined solely by the consideration that it is pointless for that person to make representations with a view to reversing or avoiding the effect of the decision. The duty to give notice is an accepted element of the duty to act fairly. Three months elapsed between Submania's sponsor's licence being revoked and the refusal of Mr Pathan's application. It cannot be suggested that informing him promptly of the revocation of the licence when it had been cancelled would not have made a difference.

132. The options that would have become available to Mr Pathan have been discussed at paras 100 to 105 and 113 to 114 above. To have the three months extra in which to explore those options that prompt notification would have afforded him *would* have made a difference. That conclusion does not rest on any estimate of his likely success in pursuing any of the chances that opened up for him. Nor does it depend on a view as to whether he would have sought to follow up on any of them. The cornerstone here is procedural fairness. What was the fair thing to do, procedurally? In our judgment, it was to tell Mr Pathan as soon as reasonably possible after the cancellation of Submania's licence that this had happened. He would then have known that his application in its current form was bound to fail.

133. He could then have tried to get a different sponsor. Lord Briggs has pointed out (in para 151) that Mr Pathan did make a second Tier 2 application after finding a new sponsoring employer and that he made two applications based on human rights grounds all of which failed. This is true. It is also true that their failure was not due to the fact that Mr Pathan had become an overstayer. But, simply because, *in the event*, the applications were unsuccessful, does not mean that the withholding of the information was fair. It is not possible to know, now, what would have happened had Mr Pathan had the additional time that a timely notification would have afforded him. To take an obvious example, he might have had different opportunities to find an acceptable sponsor which would have enabled him to put in an application on that basis before his original application was determined against him in light of the withdrawal of Submania's licence.

134. Furthermore, the fairness of withholding the information is not to be judged on an *ex post facto* basis. At the time when it was first possible to inform Mr Pathan of the cancellation of Submania's licence, there was no means of knowing whether he would have been able to obtain a new, acceptable sponsor. But, this is the time that the fairness of withholding the information falls to be judged. If it was not fair then, it cannot be converted to a condition of fairness because of Mr Pathan's subsequent failure to put forward an employer who could have provided a CoS acceptable to the Home Office.

135. Quite apart from these considerations, failing to tell Mr Pathan at the time that Submania's licence was cancelled meant that his acquisition of the status of overstayer was accelerated with all the adverse consequences which that entailed. To deny him the greater opportunity to avoid those consequences was in itself unfair. Again, that conclusion does not depend on any judgment as to whether he would have sought to avoid that outcome. Whether he would or not, to deprive him of the chance was unfair.

136. We have concluded, therefore, that the failure to inform Mr Pathan promptly of the revocation of Submania's licence constituted procedural unfairness. It is not a species of the *audi alteram partem* rule in the classic meaning of that rubric. This was not a case of the Home Office making sure that Mr Pathan had a chance to make representations to it about the correctness of its decision to reject his application as originally formulated. Rather, it is an instance of his being deprived of the enlarged period that timeous information would have provided, during which he might have been able to vary his existing application so as to put it into a form that could succeed. There is, however, no material difference between these two situations. Furthermore, in principle, it can be just as unfair, procedurally, to restrict a person's opportunity to take steps to avoid the effect of the decision as it would be to deny him the opportunity to make representations. The objective of the person affected is the same in both scenarios. It is to avoid the adverse consequences of an unfavourable decision.

137. We must turn then to the debate as to whether the duty to act fairly by providing the information promptly is procedural or substantive. At para 178, Lord Briggs says that "… time for the applicant to put his best case forward on the facts already available may be procedural, but time to change or improve the underlying facts to make them more favourable is substantive". We acknowledge the force of this argument and its initial attractiveness. But we cannot agree with it. A distinction must be drawn between the duty to act in a procedurally fair way and the use which the beneficiary of the discharge of that duty will avail of it. Leaving aside the pointlessness argument, it is generally accepted that the duty to give a person affected by an adverse decision the opportunity to make representations is procedural. If, by making the representations, the affected person secures a change of mind by the decision-maker, the favourable result may be regarded as a substantive benefit.

138. The procedural duty to act fairly by giving the opportunity to make representations exists whether or not that opportunity is availed of. Likewise, in the case of the duty to provide relevant information promptly. In both cases the agency responsible acts in contemplation that the person affected will take a particular course to avoid the impact of the decision and that it is fair that he or she should have the chance to do so. This is what underpins the duty. If the opportunity is taken and a different outcome is obtained, that can be regarded as a substantive benefit. But it does not make the duty to inform or to allow representations to be made any less of a procedural duty.

139. It can be argued that the making of submissions on the decision to be taken is integral to the decision-making process, whereas the opportunity to avoid the effect of an adverse outcome by taking a course not directly connected to that process is not. But why should this make a difference to the characterisation of the duty? Again, the notion of what is fair holds the key. If there is a duty to allow representations to be made for the purpose of bringing about a result favourable to the representor, why should it not also be fair to allow the affected person to have the chance by a different means to secure that outcome? In both cases the duty to act fairly involves allowing the opportunity to influence the result. And in both cases, in our opinion, the duty is properly to be regarded as a procedural duty.

140. The answer to this difficult issue lies, we believe, in maintaining a strict segregation between the procedural duty to act fairly at the time when the decision is taken or is imminent and the steps which a person affected might take to achieve a different result. Once the opportunity to make submissions or the chance to take different steps has been provided, the procedural duty has been fulfilled. To deny the chance to make submissions or to fail to inform promptly involves breach of that duty.

141. By contrast, an obligation positively to confer a particular period of grace during which to take action would, as we have explained at para 108 above, amount to the imposition of a substantive rather than a procedural duty. Essentially, the procedural duty extended to the maintaining of a fair procedure. Telling Mr Pathan at the earliest reasonable opportunity that his sponsor's licence had been cancelled preserved the fairness of that procedure. Giving him an allotted time thereafter in which to take action would involve a modification of the processes laid down by the Rules and the legislation, rather than conducing to the intrinsic fairness of the stipulated procedure. As Lord Briggs says in para 186, the provisions in the Rules and the legislation which define when migrants have permission to remain, and when they become overstayers are matters of substance implementing immigration policy.

Conclusion

142. We would therefore allow the appeal on the basis that the failure promptly to inform Mr Pathan of the cancellation of Submania's licence was a breach of the respondent's procedural duty. We would hold, however, that the Secretary of State was not under an obligation to allow him a particular period within which to make an alternative application.

Postscript

143. We consider that it is necessary, in a case where all members of the court have provided judgments, to identify the core of the decision of the court. Here, it consists in (1) the decision that the appeal must be allowed (as agreed by us in our joint judgment and by Lord Wilson and Lady Arden in their respective judgments, albeit that there are differences of reasoning), (2) the determination (agreed by at least four members of the court) that there was a duty on the Secretary of State to notify Mr Pathan promptly of the revocation of his sponsor's licence, it being procedurally unfair not to do so, and (3) the determination (agreed by us and Lord Briggs) that there is no positive obligation on the Secretary of State to provide a period of time following notification to enable an applicant to make an alternative application or otherwise to react to the revocation of the sponsor's licence.

LORD BRIGGS: (dissenting)

144. Although I broadly agree with Lord Kerr's and Lady Black's analysis of this difficult case, I would nonetheless have dismissed this appeal. It is best therefore that I set out my reasons in full.

Overview

145. In summary, when the considerable complexity is properly analysed, Mr Pathan's entirely understandable perception that he has been treated harshly does not amount to a basis for quashing the rejection of his Tier 2 application on the grounds of procedural unfairness. For the reasons given by Lord Kerr I am inclined to agree that it was procedurally unfair for the Secretary of State not promptly to inform Mr Pathan of the revocation of his sponsor's licence rather than, as actually happened, to delay informing him of that important event for three months. But his real grievance is not simply that he should have been informed more quickly than he was. Rather it is that, once his application became bound to fail because of the revocation of his sponsor's licence, the Secretary of State should have given him more time after notification of it

than allowed by the rules to make alternative arrangements, either to extend his leave to remain by other means (including an amendment of his application) or to bring it to an orderly end, before he and his family incurred the very real disabilities of becoming overstayers. He says that time should have been given to him, as it is given under current departmental policy to Tier 4 students in a similar predicament, by extending the life of his original Tier 2 application after he had been told of the revocation of his sponsor's licence, so that he could pursue those arrangements under the protection of the extended leave to remain afforded by his pending Tier 2 application.

146. Many would agree with Mr Pathan that the time to make alternative arrangements, given by the Rules to a Tier 2 applicant who is taken completely by surprise by the rejection of his application, is very short indeed and that it would often be impracticable for him for example to find a new sponsor, or even to pack up and leave the UK, before becoming an overstayer. But that is what the Rules provide for a person in his position. No direct attack is made upon the Rules in these proceedings. But it is said that the discretionary grant of an extended period, say 60 days, after notification of the revocation and before the refusal of his original application would provide the necessary extended time to remain lawfully for him to have a fair chance to make those arrangements. But the tight timetable is the consequence of the Rules, which make no more lenient provision for a person taken by surprise by the rejection of a Tier 2 application than they do for any other unsuccessful applicant for extended leave to remain. Applicants for leave to remain under the PBS system are quite frequently taken by surprise when their application fails, but thus far (subject to two exceptions referred to below) the courts have not treated being taken by surprise as a reason for requiring the Secretary of State to find some discretionary way of giving them some means, outside the Rules, to achieve a recovery of their position, or an extension of their leave to remain, before becoming an overstayer.

147. It was not irrational or *Wednesbury* unreasonable (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) for the Secretary of State to decline to exercise such a discretion in this case, by giving advance notice of the impending failure of Mr Pathan's application. Even if under a "fairness duty" to give prompt notice of the revocation of his sponsor's licence, she could, for example, lawfully have notified him of the revocation on the day it happened, and rejected his Tier 2 application on the same or the following day. There is therefore no basis upon which her not giving him time can be subjected to judicial review. The fact that the Secretary of State provides just that kind of relief to Tier 4 students in a similar situation does not enable a Tier 2 migrant to complain by way of judicial review about being treated differently, because the two classes of permitted immigration are there for different political and economic reasons.

Analysis

148. It is necessary to begin by dispelling some myths which have arisen from the way in which this appeal has been presented. The Secretary of State did not deliberately keep Mr Pathan in the dark about the revocation of his sponsor's licence, or subject him to some kind of ambush. Nor was the failure of his original Tier 2 application in substance brought about by something done by the Secretary of State. An employing sponsor has to be licenced, and the continuation of its licence depends upon compliance with conditions. In this case the sponsor was warned that its licence was liable to be revoked, invited to make representations why it should continue, and failed to do so. Revocation followed as a matter of course, with unfortunate but inevitable consequences for all its sponsored employees, including Mr Pathan. Although the Secretary of State necessarily played a part in that process, the real cause of the failure of Mr Pathan's Tier 2 application was the conduct (or rather misconduct) of his employing sponsor. The limited involvement of the Secretary of State was insufficient, in my view, to serve as the basis for identifying a new sub-category of procedural fairness, encapsulated in a requirement to give 60 days' advance notice of the revocation of the sponsor's licence before refusing any Tier 2 application which had been based upon it.

149. Nor is this case in substance about whether a party to a pending matter is in fairness obliged to give the other party immediate or early notice of some fact of which it is aware which will be fatal to the application when decided at a pre-arranged date in the future, like a County Court trial for which a date or a window has already been set. The Secretary of State is in principle entitled to choose the date upon which to determine a Tier 2 application, subject perhaps to the margin permitted by the dictates of good public administration, which may render unreasonable delay unlawful. In principle, the sooner a Tier 2 application is determined (once the relevant examination of the facts has been completed) the better for all concerned. When asked by the Court what would have been Mr Pathan's position if the Secretary of State had immediately notified him of the revocation of his sponsor's licence, and then, or on the same or the following day, refused his by then hopeless application (rather than three months after the revocation, as actually happened), Mr Biggs submitted that his case would be just the same. The immediate refusal of the Tier 2 application would be unfair, because Mr Pathan would not have a fair opportunity to make alternative arrangements, after being taken by surprise. The resolution of this appeal does not therefore depend in any way upon the mere happenstance that the application was refused three months after the revocation of the licence. Mr Pathan would have been taken just as much by surprise in either case and is in no different a predicament.

150. Nor did Mr Pathan have some legitimate expectation, the denial of which of itself entitles him to the court's assistance by way of judicial review. He had been informed in writing that the success of his Tier 2 application depended, among other things, upon his sponsor maintaining its licenced status. His immigration status as a Tier 2 migrant

depended upon him continuing to be employed by his licenced sponsor. The purpose of the written warning in paragraph 190 of the Guidance (quoted in Lady Arden's judgment) was to make it clear that the sponsor's licence could be withdrawn or cancelled "at any time" either by the Home Office or by the sponsor, and that if this occurred it would cause the Tier 2 application to be refused. A Tier 2 migrant can check on the Government website whether his sponsor remains licenced and is encouraged by published Guidance to do so, for example before travelling to the UK to work for a sponsor.

151. Mr Pathan has not shown that not being given prompt notice of the revocation of his sponsor's licence, followed by time to respond to it before the determination of his application prevented him from taking any of the steps which he says he would have wished to take to obtain extended leave to remain. Thus in fact he could and did make a further Tier 2 application after finding a new sponsored employer. He could and did make two applications based on human rights grounds. For complicated reasons none of these applications were adversely affected by his having become an overstayer by the time when he made them. They all failed for other reasons. Rather his complaint is that he could not at the same time preserve himself and his family from becoming overstayers while he took those steps, by postponing the determination of his original Tier 2 application in the meantime.

152. The defining feature of this appeal is that the Tier 2 applicant was taken by surprise by the failure of his application, at a time when (because of the expiry of his earlier leave to remain) the lawfulness of his continued stay in the UK depended solely upon his outstanding application, which he understandably expected to succeed, but which failed due to an event for which (on the assumed facts) he was in no way to blame, and of which he was unaware until informed about it by the Secretary of State. The defining nature of the unfair prejudice which he alleges is being unable to postpone becoming an overstayer beyond the time when that would otherwise occur in accordance with the Rules, by obtaining the discretionary grant of time between being told of the revocation of his licence and the determination of his application. For reasons which follow, that is not procedural unfairness.

The Law - Procedural Unfairness

153. In respectful agreement with the Court of Appeal, and with Lady Arden, I do consider that procedural unfairness (as it is now called) is a distinct ground for judicial review, not a sub-set of some general ground of unfairness, and that its boundaries need to be carefully defined if it is not to operate as a gateway through which the courts can pass judgment on the substantive merits, rather than the lawfulness, of administrative action. The parties to this appeal were therefore right to raise, as the first issue to be decided, whether not being given extra time to respond to the revocation of his sponsor's licence gives rise to a case of procedural unfairness at all. In my judgment, and largely

for the reasons given by Singh LJ in the Court of Appeal, it does not. I put on one side the question whether he should in any event have been given prompt notice of the revocation, and concentrate for the moment on the main question, whether he should have been given further time, after that notification, before the determination of his Tier 2 application.

154. The reason why it is necessary to decide whether an allegation of unfairness is procedural or not is that it is only if it is, that it amounts to a distinct ground for judicial review. If it is not, then the allegation of unfairness is just an aspect of a case based upon irrationality, *Wednesbury* unreasonableness or denial of a legitimate expectation. In this respect Lady Arden and I are at one: see *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96 per Lord Carnwath at para 41, in a passage cited by Lady Arden at para 53 of her judgment.

155. The ordinary principles of judicial review have been developed over many years to ensure that the courts confine themselves to a review of the lawfulness of administrative decision-making, rather than an appeal against its substantive merits. Irrationality and *Wednesbury* unreasonableness are stern tests. They are by no means satisfied merely because the court thinks that it would have reached a different decision. The legitimate expectation principle has its own internal checks and balances. By contrast, where procedural unfairness is alleged, the court is the final arbiter of what is, or is not, fair. This is because a decision made by a process which is in fact procedurally unfair is for that very reason unlawful. Thus it is necessary for the court to be satisfied that an allegation of unfairness falls squarely within the true boundaries of procedural unfairness, if its dominion over the answer to the unfairness question is not to lead it into an inappropriate role as the final arbiter of an appeal on the merits of administrative action.

156. In *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115, Lord Reed said, at para 65:

> "The first matter concerns the role of the court when considering whether a fair procedure was followed by a decision-making body such as the board. In the case of the appellant *Osborn*, Langstaff J [2010] EWHC 580 at para 38 refused the application for judicial review on the ground that 'the reasons given for refusal [to hold an oral hearing] are not irrational, unlawful nor wholly unreasonable'. In the case of the appellant *Reilly*, the Court of Appeal in Northern Ireland stated [2012] NI 38, para 42: 'Ultimately the question whether procedural fairness requires their deliberations to include an oral hearing must be a matter of judgment for the Parole Board.' These dicta might be read as suggesting that the question whether procedural fairness requires an oral hearing is a matter of judgment for the board,

> reviewable by the court only on Wednesbury grounds: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. That is not correct. The court must determine for itself whether a fair procedure was followed: *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, para 6, per Lord Hope of Craighead. Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required."

157. "Procedural unfairness" is a modern title for a form of unlawfulness which used to be called "breach of the rules of natural justice". That phrase collected together a number of traditional doctrines, the most important of which were the requirement that a decision should be unaffected by bias ("*nemo judex in causa sua*") and the principle espoused by the Latin tag "*audi alteram partem*" or, literally translated, "hear the other side". The rules of natural justice served originally to protect the integrity of decision-making by courts but have been applied for more than 150 years to maintain the lawfulness of administrative decision-making: see eg *Cooper v Wandsworth Board of Works* (1863) 14 CB NS 180.

158. For present purposes the court is concerned only with the second of those main principles, which enshrines the healthy notion that a matter should not be decided against a party without that person being offered a fair opportunity to present their case to the decision maker. It is to be noted that all but one of the cases referred to by Lady Arden in her elucidation of the principles of procedural fairness are about the *audi alteram partem* principle: see *Cooper v Wandsworth* (concerning the right to be heard to stop a building being demolished); *FP (Iran)* [2007] EWCA Civ 13 (the right to be heard at a substantive asylum hearing); *Balajigari* [2019] 1 WLR 4647 (the right to reply to dishonesty allegations); and *Fayed* [1998] 1 WLR 763 (the right to be informed of proposed reasons for rejecting a nationality application in order to reply to them). The right to be heard assumes that there is some case, however weak, that the party might actually advance, and has no application to a situation where the decision is inevitable, whatever the party adversely affected by it may say. Presentation of a case need not, of course, necessarily be oral.

159. The one case relied upon by Lady Arden in which a finding of procedural unfairness was not squarely within the *audi alteram partem* principle is the *Venables* case [1998] AC 407. But there the main ground for the quashing of the increased tariff was that the Secretary of State had acted unlawfully in making the decision itself by taking an irrelevant matter into account. That was not itself a procedural ground at all, but a separate ground for review. It was merely described as procedural as well. Here there is no attack on the lawfulness of the refusal of the original Tier 2 application.

160. In *Cinnamond v British Airports Authority* [1980] 1 WLR 582, 593, Brandon LJ said:

> "no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."

161. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, para 179 Lord Neuberger said, speaking of the *audi alteram partem* rule in the administrative context:

> "In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical *or pointless* to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality *or pointlessness* should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute." (My emphasis)

162. The present case is a perhaps rare example of pointlessness, although one which may well arise quite frequently under the mainly mechanical provisions of the PBS scheme. Mr Pathan had at the outset been fully heard, as contemplated by the rules, on the basis of his on-line application for extended leave under Tier 2. It was common ground, and inevitable, that it depended critically upon him continuing to be employed and sponsored by a particular licenced sponsor, namely Submania Ltd. The question is whether he should have been heard further when the central plank of his application was swept away by the revocation of his sponsor's licence. It was common ground before this Court that nothing he could have said could have affected the negative outcome of the original application.

163. *Audi alteram partem* is usually relied upon as a means of challenging the decision made after the alleged departure from fair procedure. Here there is no such challenge. Mr Pathan accepts that, following the revocation of his sponsor's licence, there could only have been one outcome to his original Tier 2 application, whatever the procedure subsequently adopted by the Secretary of State. Nor does he complain about having been unable to make representations to the Secretary of State. Rather he complains about not being given a period of time when, knowing of the revocation of the sponsor's licence, he could have taken alternative steps to protect (or bring to an orderly end) his status as a lawful migrant, while protected from becoming an overstayer by the continuing pendency of his by then hopeless application. Using Brandon LJ's formulation, being told of the revocation of the sponsor's licence, together with being

given time before the refusal of his Tier 2 application, would have availed Mr Pathan something rather than nothing, just as does the same facility when granted to students who lose their educational sponsor.

164. But this sort of collateral advantage from the adoption of a particular procedural step is not in my view something which the *audi alteram partem* principle is designed to protect. On the contrary, the integrity of a decision-making process is in general damaged rather than preserved by enabling a participant to buy time by the prolongation of a hopeless case. That is why, in the private law sphere, there exists a regime for the grant of summary judgment when there is no real issue needing to be tried. I do not mean by describing the advantage as collateral to imply that it is not a real advantage, or that it might not be usefully deployed, even by the Secretary of State, for the purpose of giving an applicant time to respond to an unexpected failure of his application. It is now something which the Secretary of State does routinely, as a matter of policy, to assist Tier 4 applicant students who lose their educational sponsor. Buying time in that way is a common practice. For example it was common ground between counsel that, under the rules, a disappointed applicant in Mr Pathan's position could buy a minimum of an extra 14 days' leave to remain, by applying for an administrative review of the refusal of his Tier 2 application, however hopeless that might be. But the question is whether it can be procedurally unfair, in the sense of being a breach of the rules of natural justice, for the Secretary of State not to grant such time, beyond that provided by the Rules, as a matter of discretion.

165. It is plain that this inaction by the Secretary of State did not amount to a breach of the *audi alteram partem* rule. Mr Pathan was not seeking to be heard in support of his application, after being informed of the revocation of his licence. Further submissions would have been pointless. The integrity of the outcome was in no way affected by the refusal of his original application at a time when he was unaware of the revocation of his sponsor's licence. I have searched in vain for some other aspect of the rules of natural justice which might have assisted him, and none were suggested. Rather, the case is put on the broad basis that the boundaries of procedural fairness are not fixed and that the taking, or not taking, of any step which might loosely be described as procedural falls within the purview of procedural fairness, even if it amounts to nothing more than letting the existing rules which apply to a given situation take their course, rather than interfering with them by the exercise of some residual discretion, such as delaying the determination of a pending application.

166. The only authorities which might appear to support such a basis for judicial review are the decisions of the Upper Tribunal in *Thakur (PBS decision - common law fairness) Bangladesh* [2011] UKUT 151 (IAC) and *Patel (Revocation of Sponsor licence - Fairness) India* [2011] UKUT 211 (IAC); [2011] Imm AR 5. In both cases the relevant appellant was a Tier 4 student applicant whose educational sponsor lost its licence while his application was pending, and who (like Mr Pathan) only found out that this had occurred when (or shortly before) his application was refused. The decision

in the *Thakur* case was heavily based on the well-known dicta of Lord Mustill about procedural fairness in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 560, cited by Lady Arden at para 55 of her judgment. The decision in both *Thakur* and *Patel* was that Tier 4 students in the position summarised above should be informed of the loss of their sponsor's licence and (by analogy with departmental policy in a different but related factual situation) given 60 days in which to attempt to find an alternative sponsor with which to complete their education, and vary their application for leave to remain by substituting the new sponsor for the old one.

167. It is convenient to focus on the reasoning in the *Patel* case, rather than on *Thakur*, because most of the controversy which has followed those two cases, at Court of Appeal level, has done the same. At para 22, Blake J said:

> "Where the applicant is both innocent of any practice that led to loss of the sponsorship status and ignorant of the fact of such loss of status, it seems to us that *common law fairness and the principle of treating applicants equally* mean that each should have an equal opportunity to vary their application by affording them a reasonable time with which to find a substitute college on which to base their application for an extension of stay to obtain the relevant qualification." (My emphasis)

168. It is apparent that Blake J relied in combination on what he called common law fairness and the supposed principle of equal treatment. The latter principle was not relied upon before this Court, following cogent criticism of it by Singh LJ in the Court of Appeal, and it is doubtful whether, as a separate principle, it survives the detailed analysis of it in the *Gallaher* case [2019] AC 96. It appears to have arisen from a misreading by Blake J of the way in which leave to remain is cut down to 60 days upon the failure of an application for Tier 4 extended leave, where (unlike in Mr Pathan's case) the applicant still has leave to remain for longer than that.

169. Shorn of equal treatment, Blake J's reliance on common law fairness is not further developed by way of legal analysis. Perhaps the best aspect of Mr Pathan's argument that both his and Mr Patel's cases were cases of procedural unfairness is because of the way in which the rules deal with the making of a fresh application for extended leave to remain, when an earlier application is pending. Blake J spoke in the quoted passage and elsewhere in his ruling about Mr Patel needing to be given the opportunity to vary or amend his application. Mr Pathan says that he was deprived of the same opportunity, because he was given no time in which to vary or amend his application by substituting a new sponsoring employer, before it was refused.

170. I would readily accept that, in appropriate cases, the rules of natural justice may require a party to be afforded time to amend his case in a way that cures an otherwise fatal defect of which he had, without fault on his part, previously been unaware. Such time is frequently given to a party in civil proceedings, whose statement of case is found to disclose no cause of action, to attempt to amend it to cure that defect, before his claim is struck out. Whether the rules of natural justice do or do not impose that requirement is heavily context-specific, and in the sphere of civil proceedings the position has changed significantly in recent years, following changes in the detail of the Overriding Objective governing civil procedure generally.

171. In the immigration context there is (now) a special deeming process whereby a second application for extended leave to remain, made during the pendency of an earlier "first" application, is treated as if it were a deemed variation of the first application, however completely different it may be in substance. It is designed to avoid an applicant obtaining, in effect, an endless extension of leave to remain by making a series of successive applications, however ill-founded on the merits, each new one just before the determination of its predecessor. It applies equally to Tier 2 and Tier 4 applications, and to applications on human rights grounds. Thus for example, a pending Tier 2 application may be deemed to be varied by a fresh Tier 2 application based on employment by a different sponsor, or even by a fresh application based on human rights grounds, and *vice versa*.

172. Section 3C of the Immigration Act 1971 (as amended) provides, so far as relevant, as follows:

> "(1) This section applies if -
>
> (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
>
> (b) the application for variation is made before the leave expires, and
>
> (c) the leave expires without the application for variation having been decided.
>
> (2) The leave is extended by virtue of this section during any period when -

(a) the application for variation is neither decided nor withdrawn, …

(d) an administrative review of the decision on the application for variation -

(i) could be sought, or

(ii) is pending …

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).”

173. The Immigration Rules provide, in this connection, as follows:

“**Multiple Applications**

34BB(1) An applicant may only have one outstanding application for leave to remain at a time.

(2) If an application for leave to remain is submitted in circumstances where a previous application for leave to remain has not been decided, it will be treated as a variation of the previous application …

Variation of Applications or Claims for Leave to Remain

34E If a person wishes to vary the purpose of an application or claim for leave to remain in the United Kingdom and an application form is specified for such new purpose or paragraph A34 applies, the variation must comply with the requirements of paragraph 34A or paragraph A34 (as they apply at the date the variation is made) as if the variation were a new application or claim, or the variation will be invalid and will not be considered.

> 34F Any valid variation of a leave to remain application will be decided in accordance with the immigration rules in force at the date such variation is made."

174. Paragraph 34BB was not in force at the relevant time, but it merely reflected that which the courts had already worked out: see *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78; [2009] Imm AR 3, paras 34-46 per Richards LJ. I will call it the deemed variation rule. The result is that, for example, a Tier 2 application which has become hopeless because the employing sponsor has had its licence revoked may nonetheless be "saved" by the making of what is in substance a fresh Tier 2 application on a completely new form, based upon employment by a new licenced sponsor, because (provided that the new application is made before the previous application has been determined), it will (however artificially) be deemed to be a variation or amendment of the previous application. It is a very artificial form of variation, because the rationale of the Tier 2 process is that each applicant seeks to fill a distinct gap in the labour market identified by their sponsoring employer.

175. Thus if, for example, the original sponsor immediately informs the applicant that its licence has been revoked, and the applicant has time to find employment by a new sponsor before his application is determined, he can make a fresh application based on employment by the new sponsor and it will be deemed to be a variation of his original application. But if the applicant only discovers that his sponsor's licence has been revoked from reading the Secretary of State's letter refusing his application, he cannot of course save it by a new application which is deemed to be a variation of his original application. This is for two reasons. First, he has no time to complete the new application. But secondly he will not have left the employment of his original sponsor, still less found a new one. And the new employer, once found, may well (if it has not already done so) have to carry out the resident labour market test, which takes a minimum of 28 days.

176. In the present case it must be assumed that Mr Pathan was still employed by his original sponsor when his application was refused, and he discovered that its licence had been revoked. Mr Biggs submitted that he needed time, following that discovery but before the refusal of his Tier 2 application, to take one or more of three alternative steps, in each case with a view to avoiding becoming an overstayer: first, finding employment with a new licenced sponsor and making a fresh Tier 2 application; second, seeking a right to remain on human rights grounds; third, making an orderly departure from the UK. None of these alternatives could, he submitted, realistically be achieved before Mr Pathan became an overstayer, even if he obtained a 14 day (or a little longer) window by making a hopeless application for administrative review.

177. The question whether the failure to provide time for the taking of any of those steps can amount to procedural unfairness, rather than unfairness in any more general

sense, does not necessarily admit of a uniform answer. Although the grant or refusal of an adjournment (ie time before an application is determined) is in one sense a question about procedure, it is relevant to ask, what is the giving of time for? If it is for time simply to take a procedural step, such as amending a claim or application, in a way that may affect its outcome, then a refusal may, depending on the facts and the context, amount to procedural unfairness. But if time is sought to do something more, or different, than that, then the question is likely to be about substantive rather than procedural fairness. In short, time for the applicant to put his best case forward on the facts already available may be procedural, but time to change or improve the underlying facts to make them more favourable is substantive.

178. Time before determination to enable an applicant facing a refusal to prepare for an orderly departure from the UK (Mr Pathan's third alternative) is in my view clearly substantive. It can have no effect on the outcome of his application and is not sought to give him time to take a procedural step in the process. It is just a way of getting a longer time as a lawful migrant than provided by the Rules, before becoming an overstayer. It is like an occupier of a home seeking the adjournment of a possession application to which he has no defence, in order to give him more time to move out than permitted by the court's limited jurisdiction to postpone enforcement of a possession order once made. It is, at best, substance dressed up as procedure.

179. Time simply to raise an existing human rights ground for an extension of leave to remain, which would presumably require no longer than time to find a lawyer, make the application and pay the fee, may be procedural, so that a refusal might amount to procedural unfairness. If sought by a fresh application before the Tier 2 application was refused, it would amount to a deemed variation of the original application, and therefore be capable of affecting its outcome.

180. Time to seek fresh employment with a new licensed sponsor, and then to make a new Tier 2 application on that basis, again by way of the deemed variation rule, is something of a hybrid. To the extent that it is designed to give Mr Pathan time to alter the available facts by finding new sponsored employment so as to qualify for Tier 2 leave to remain, I consider it to be substantive. If it had merely been to give him time to complete a fresh application based on qualifying employment which had already been begun or offered, it might have been procedural. The former might well require something like the 60 days now afforded to Tier 4 students in a similar predicament, not least because of the employer's need to carry out a resident labour market test. The latter would not generally require more than a working week. Both could in fact be done within the period of grace following the refusal of his Tier 2 application, within which a fresh application could be made despite being an overstayer (then a minimum of 42 days, ie 28 days after the end of the minimum 14 days protection afforded by an administrative review). But it would expose him to becoming an overstayer while the fresh application remained pending, whereas the same application made by way of deemed variation, before the determination of his first application, would not.

181. The fact that the Secretary of State did not give Mr Pathan any time at all by way of a breathing space between informing him of the revocation of his sponsor's licence and refusing his Tier 2 application may therefore in a strictly limited and rather artificial sense be described as procedural. However, this does not mean that it was therefore procedurally unfair. It is convenient at this point to examine what actually happened following the refusal, and the then legal consequences, in order to identify the prejudice which not being given such a breathing space may have caused him. His Tier 2 application was refused on 7 June 2016. He had 14 days in which to mount an administrative review, which he did, in time. It was refused on 7 July, whereupon he became an overstayer. But the rules then in force gave him a further 28 days' grace (now reduced to 14 days) in which to make a further application for leave to remain, without the fact that he was by then an overstayer being taken into account to his disadvantage. On 3 August, within the period of grace, he made an application for leave to remain based on article 8. He made a further application on 29 November, and a further Tier 2 application on 12 December, (presumably having by then found further employment with a licenced sponsor, although there is no evidence about this). They were both treated as successive variations of his 3 August application, to which the period of grace therefore applied, although it had by then expired. He made a further article 8 application on 27 May 2017, again treated as a variation of his 3 August application. That final article 8 application was refused on 11 October 2018 on grounds wholly unrelated to his being by then an overstayer.

182. Two factors clearly emerge from this factual description. The first is that being given no breathing space between discovering that his sponsor's licence had been revoked and having his original Tier 2 application refused did not in fact have any adverse effect upon Mr Pathan's ability to pursue alternative ways of obtaining extended leave to remain.

183. Secondly the combined effect of the period for administrative review and the (then) 28 day period of grace thereafter within which to make a fresh application (typically 70 days in total if the response to the application to the request for administrative review was in accordance with the 28 day departmental target) was actually ten days longer than the full 60 days now afforded to Tier 4 students in a similar predicament. Even if the Secretary of State conducted the administrative review within a single day it would still be 42 days. In the present case Mr Pathan actually secured 58 days. It was (for good reason) no part of Mr Pathan's case before this Court that fairness required nothing less than a full 60 days rather than some other reasonable period. The adverse effect was only that for the period of the pendency of those alternative applications, Mr Pathan would (if he chose to remain in the UK) be an overstayer rather than a migrant with leave to remain. I do not by that description mean thereby to belittle that adverse effect. Being an overstayer has very serious consequences, although leaving is always an alternative to being an overstayer, and Mr Pathan was not an asylum seeker. But the point is that they are consequences of substance rather than procedure. The consequences of being an overstayer had no effect (procedural or

otherwise) upon the outcome of his repeated applications for extended leave to remain. They all failed for other reasons.

184. They are also consequences which flow from a statutory framework and from Rules approved by Parliament which (for example by providing for the 28 day period of grace during which being an overstayer is not to prejudice a fresh application) expressly contemplate that migrants whose first application for leave fails may have to pursue alternative applications while an overstayer (or after a return to their country of origin). Parliament has, in short, provided a tough, rigid regime for migrants who wish to pursue multiple applications for leave to remain, and the Rules treat a person taken by surprise by the refusal of an original application in exactly the same way as an applicant who is not taken by surprise. The lawfulness of those Rules (however tough in their effect) is not challenged in these proceedings.

185. Furthermore, the only reason why the giving of time between communicating the revocation of the sponsor's licence and the refusal of the Tier 2 application is capable of being viewed as procedural at all is because of the deemed variation rule. But that rule is part of a structure designed, as explained above, to hinder rather than facilitate the obtaining of extended leave to remain by the making of multiple applications. And these are relevant specific details within the context of a PBS scheme which is itself deliberately designed to be operated mechanically, in accordance with strict rules, with minimal scope for discretionary adjustment. They matter because they constitute the contextual framework within which, as Lord Mustill explains in the *Doody* case, an allegation of procedural unfairness has to be evaluated.

186. I would acknowledge that procedural unfairness might arise from the imposition of hurdles which, while not absolutely preventing the taking of further procedural steps to achieve the original objective, may properly be characterised as designed to render the taking of them impracticable. But the provisions in the Immigration Act 1971 and Rules which define (with great particularity) when migrants have permission to remain, and when (if they do not depart) they become overstayers are matters of substance which implement immigration policy, not (generally at least, and not in the present case) procedural bars in the way of obtaining extended leave to remain by further applications, even if they may have the consequence (although not in this case) that further applications have to be made from abroad.

187. Drawing together the threads of this unavoidably complicated analysis, I reach the following conclusions about the class of case where a Tier 2 migrant, whose status as lawfully present in the UK hangs on the slender thread of an outstanding application for extended leave to remain, learns of the revocation of his sponsor's licence only at the same time as his application is refused:

i) The migrant will have the opportunity to seek employment with a new licensed sponsor and make a new Tier 2 application within a minimum of (then) 42 days, and typically 70 days, without his having become an overstayer during that period adversely affecting its outcome. He will suffer the disadvantages of becoming an overstayer, but this is not procedurally unfair since both:

(a) His requirement to find a new sponsored employer is substantive rather than merely procedural, and

(b) His loss of the status of being entitled to remain while pursuing his fresh application is itself a matter of substance rather than procedure and does not generally render the making of his further application impracticable, although there may be cases, on different facts from those affecting Mr Pathan, where it might do so.

ii) It is not therefore procedurally unfair for the Secretary of State not to volunteer to such a migrant a time between the communication of the revocation of the sponsor's licence and the refusal of his Tier 2 application.

iii) Nor is the absence of the conferral of such a time period otherwise judicially reviewable because:

(a) There is no wider principle of common law or substantive fairness, outside the rules of natural justice, which supports it,

(b) It is not irrational or *Wednesbury* unreasonable for the Secretary of State in such circumstances to allow the Act and the Rules to take their ordinary course, for the purpose of giving effect to an immigration policy approved by Parliament in circumstances where specific provision is made for what is to happen, and

(c) The migrant is denied no legitimate expectation, because of the written warning about the consequences of the revocation of the sponsor's licence in the Guidance, and the migrant's ability to check on the Government's website whether his sponsor remains licenced.

188. It remains to check whether this outcome falls within the general thrust of the authorities which address similar apparently hard cases arising under the PBS. With the exception only of the *Patel* and *Thakur* cases they present an austere jurisprudence which gives effect to the requirements of a rigid rules-based scheme, at considerable

cost to individual applicants who, in circumstances demanding at least sympathy, frequently fall foul of it, and often to their surprise. While a full analysis would be beyond the scope of this dissenting judgment, the following cases will serve as sufficient examples.

189. First, the Rules impose very strict requirements on applicants in terms of documentary evidence. Thus where a Tier 1 applicant failed to provide payslips to prove that he had employed the requisite number of workers, but had submitted amply sufficient other forms of proof of the same facts, this gave rise to no obligation on the Secretary of State to give him time to correct the error, otherwise than as very narrowly required by the Rules: see *Singh v Secretary of State for the Home Department* [2018] EWCA Civ 2861, following *Mudiyanselage v Secretary of State for the Home Department* [2018] EWCA Civ 65; [2018] 4 WLR 55.

190. Secondly where, through no fault of his own, a Tier 4 student applicant was taken by surprise by the accidental cancellation by her college of her CAS letter due to an administrative error, the Secretary of State was under no obligation of fairness to give the student time to obtain another valid letter from the same college before deciding her application, even though (in sharp contrast with the present case) that would have made her original application good: see *EK (Ivory Coast) v Secretary of State for the Home Department* [2014] EWCA Civ 1517; [2015] INLR 287.

191. In that case the Court of Appeal recognised a line of authority which justified a different outcome where the Secretary of State bore substantial responsibility for the happening of a mistake which, unless corrected, threatened to undermine an otherwise perfectly well-founded PBS application: see *Naved v Secretary of State for the Home Department* [2012] UKUT 14 (IAC). The Court of Appeal was minded to treat the *Patel* and *Thakur* cases as falling within the same category because, in each of them, as in the present case, the Secretary of State had been instrumental, although not in any way at fault, in bringing about the revocation of the Tier 4 sponsor's licence. But the Court did so under the clear caveat that the duty to give the applicant an opportunity to respond would not apply where, as here, the relevant defect was "obviously irremediable" (per Floyd LJ, at para 49, dissenting but not on this point).

192. In my judgment both the *Patel* and *Thakur* cases were wrongly decided. This is because:

i) The combined use of the twin supposed general principles of common law fairness and equal treatment were shaky foundations, for reasons already given.

ii) Mere involvement without fault in the process of the revocation of a licence does not impose on the Secretary of State a fairness duty to go outside the Rules in

affording recovery time to an applicant to find another sponsor, still less by enabling the migrant to take advantage of the deemed variation rule to achieve a result which it was not designed to facilitate. Revocation of a sponsor's licence is an irremediable defect in any Tier 4 (or Tier 2) application based on a relevant relationship of education or employment with that sponsor. In both those cases (as in the present case) the relevant fault lay squarely with the sponsor, no less than in *EK (Ivory Coast)*.

iii) In any event the general unfairness which may be inherent in the applicant being taken by surprise is not procedural in nature, for the reasons already given.

iv) The supposed parallel with the "curtailment" situation (where an existing period of leave is shortened to 60 days where a sponsor loses its licence) is not a true comparable from which a supposed principle of equal treatment could properly be applied.

193. The fact that those two cases were wrongly decided, at least as far as laying down any general principle in a fact and context-sensitive field, makes no practical difference in Tier 4 cases on the same facts, since it is now departmental policy to give disappointed applicant students 60 days to find another sponsor. But the elevation of what is in truth a non-existent legal duty into an administrative policy provides no alternative means of support for the existence of an equivalent duty in Tier 2 cases. It is not in question whether the Secretary of State could, if she thought fit, now decide to give Tier 2 migrants who unexpectedly lose their licenced sponsor while their application for extended leave is pending further time in which to find another sponsor, without risking becoming overstayers. The question is whether she is obliged to do so, in the sense that any other decision would be irrational. The Court of Appeal thought not, and I agree, for the reasons given by Singh LJ at para 71. In short, the evident policy behind Tier 4 is to provide students with education, whereas the policy behind Tier 2 is to enable specific employers to find suitable employees where (after due enquiry) the local labour market is found to be deficient. Those policy differences are sufficient to prevent a different policy approach to giving time to find another sponsor being stigmatised as irrational, regardless whether others, including the Court, would disagree.

Remedy

194. I began this judgment by acknowledging the force of Lord Kerr's and Lady Black's opinion that it was in any event procedurally unfair for the Secretary of State not to have informed Mr Pathan promptly of the revocation of his sponsor's licence. The question then arises whether, if so, that of itself rendered her decision, three months later, to refuse his Tier 2 application unlawful. Mr Pathan's claim is to have that decision

set aside. If one assumes that (for some unexplained reason to do with internal administrative delay) she would, after giving such prompt notice of revocation, still have done nothing about determining his Tier 2 application for another three months, it is easy to see that, in the events which have happened, Mr Pathan could and probably would have done something to improve his position by making the series of applications which in fact he did make, but earlier, before his original application was determined. Critically, he would have done so by way of successive deemed amendments of his original application, and thereby have avoided becoming an overstayer in the meantime. In theory he might even have improved upon one or more of the applications which he did make, so that he might have succeeded in obtaining Tier 2 permission to remain, although no factual basis for that possibility has ever been suggested. On any view the opportunity to delay becoming an overstayer would have been a solid advantage of which he was deprived, on those assumed facts.

195. But the reality is that, on those assumed facts, the reason why Mr Pathan's position would have been improved is not because of the promptness of the notification per se, but because of the time which the Secretary of State did in fact let pass, following the revocation, before refusing his application, even though, for the reasons already given, she was under no duty to give him such a breathing space. I have deliberately described that three months' gap as a mere happenstance. Mr Pathan would have obtained no such benefit if, as she was entitled to do, the Secretary of State had followed up a prompt notice of revocation with an equally prompt refusal of his application.

196. That analysis raises the stark question: if the Secretary of State was not obliged to give Mr Pathan time between the notification of the revocation and the determination of his application, so as to avoid him being taken by surprise by the revocation, why should an unfair delay in notification in this case mean that the refusal of his application was unlawful? He had no right not to be taken by surprise, and it was the surprise, not the time-lapse between revocation and notification of it, which caused him the detriment which I have described.

197. It is I think no coincidence that, upon enquiry by the court, counsel for Mr Pathan based his appeal squarely upon a right not to be taken by surprise, ie an entitlement to a breathing space, rather than simply upon a right to prompt notification. Like Lord Kerr and Lady Black I have concluded that the case for a right to a time between notification and refusal fails, because it is a matter of substance governed by the Act and the Rules, with solid consequences for his immigration status, rather than a matter of procedure. By contrast the denial of his right to prompt notification of revocation, although procedurally unfair, had no adverse consequence of its own, save when aggregated with the Secretary of State's purely voluntary (and probably unconscious) delay in dealing with Mr Pathan's application for three months after the revocation. I do not consider that, where causation of detriment rests upon such a happenstance, the court should intervene by striking down the refusal of Mr Pathan's Tier 2 application as unlawful.

LORD WILSON: (partly dissenting) (with whom Lady Arden agrees)

198. We should with precision identify the issue raised on this appeal.

199. The issue is not whether Mr Pathan should have been notified of the revocation of Submania's licence. For he *was* notified of it. In the letter dated 7 June 2016, by which she refused his application for extension of leave to remain as of that date, the Secretary of State told him that she had cancelled the CoS reference number which he had provided; and in the letter dated 7 July 2016, by which she determined his application for administrative review, she added that she had cancelled the number because, following investigation, she had revoked his sponsor's licence.

200. The issue is whether notification to Mr Pathan of the revocation of the licence should have occurred prior to the determination of his application for extension. The issue is therefore not notification but what, for short, I will call "prior notification".

201. Like Lady Arden, I agree with that part of the judgment of Lord Kerr and Lady Black ("the joint judgment") in which they explain why the Secretary of State owed to Mr Pathan a duty of what, for short, I will call "prompt notification" of her revocation of the licence; and, in the light of her delay of three months in notifying him, she was clearly in breach of it. So there is a majority of four members of the court in favour of that conclusion. But, with respect, I disagree with that part of the joint judgment in which they reject Mr Pathan's submission that the Secretary of State also owed to him a duty of prior notification. In effect like Lady Arden, I conclude that, concomitant with the duty of prompt notification, the Secretary of State owed to Mr Pathan a duty

> "not to determine his application for extension of leave to remain until a reasonable period had elapsed following notification to him of the revocation of the licence."

Irrespective of the precise parameters of a "reasonable period", it is clear that the determination of Mr Pathan's application on the very day on which he was notified of the revocation falls outside it.

202. A judgment qualifies as a dissenting judgment if it disagrees with any significant part of the actual order to be made by the majority. Lord Kerr, Lady Black and Lord Briggs understandably propose that the actual order of the court should record not only the conclusion of four of its members that the Secretary of State was in breach of her duty to Mr Pathan of prompt notification but also the conclusion of the three of them that she had no duty of prior notification. It follows that the judgments of Lady Arden and myself qualify as partly dissenting judgments.

203. In *Lloyd v McMahon* [1987] AC 625 Lord Bridge of Harwich said at pp 702-703:

> "… it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

Lord Bridge's reference to "the procedure prescribed by the statute" must include the procedure prescribed by a rule made pursuant to a statute. There is no doubt that his statement of principle applies to the rules relating to the points-based system in the law of immigration. In *SH (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 426 Beatson LJ, in the course of addressing the public duty of fairness at common law, said at para 29:

> "It is common ground that this may impose obligations on the Secretary of State in addition to those under the Rules concerning the points-based system …"

204. So in this context the duty of fairness at common law provides *additions*. It cannot displace a rule unless, as in the joined *FP (Iran)* and *MP (Libya)* cases cited by Lady Arden at para 43 above, the rule was made outside the powers given to the rule-maker or unless it can be disapplied under the Human Rights Act 1998.

205. Lord Kerr and Lady Black at paras 108 and 141 above and Lord Briggs at paras 146, 164 and 197 above suggest that a duty of prior notification would be inconsistent with statute or the Immigration Rules. I beg to differ. There is no such legislative provision as requires the Secretary of State to determine an application for extension within a specified period. Equally there is no such provision as requires her to determine an application for extension at the same time as she notifies the applicant of an irremediable defect in the application as then framed. There are of course numerous legislative provisions which address the consequences of the ultimate refusal of an application for extension. But Mr Pathan's assertion of a duty of prior notification does not relate to the period following refusal. Nor, crucially, does it amount to an attempt to extend his leave to remain beyond the terminal point specified in section 3C(2) of the Immigration Act 1971 ("the 1971 Act"), namely the refusal of his application and the negative conclusion of any associated appeal or review.

206. In his judgment in the present case Singh LJ relied heavily on observations which he had made in the *Talpada* case, cited by Lady Arden at para 42 above. In his

application for extension Mr Talpada had furnished a Certificate of Sponsorship reference number which he had already furnished in a prior unsuccessful application. Para 77C(e) of the Immigration Rules provided that a reference number could not be re-used in such circumstances. So his second application was also refused. The Court of Appeal dismissed his appeal against an order declining to grant him permission to apply for judicial review of the second refusal. The court's decision is, I suggest, readily explained on the basis that, although the requirement of a fresh reference number was procedural, it was contained in a rule and that accordingly there was no room for the duty of procedural fairness at common law to fulfil its auxiliary function. Singh LJ, however, chose to describe the requirement as substantive. Having explained in para 57 that procedural fairness was the modern term for the two hallowed principles of natural justice, he suggested in para 58 that Mr Talpada's complaint had nothing to do with procedural fairness in that sense. "It is", he said, "to do with whether a substantive requirement of the rules themselves needs to be complied with in making a relevant application."

207. Every observation of Singh LJ on a matter of public law commands particular respect. But how helpful was it for him to have stamped Mr Talpada's complaint as one of substantive rather than procedural unfairness?

208. In his judgment in the present case Singh LJ enlarged the meaning which in the *Talpada* case he had ascribed to the concept of substantive unfairness. He said, at para 62, that the two cases then before the court were analogous to the *Talpada* case and, at para 63, that "the complaint in the present case is properly to be analysed as one of substantive rather than procedural unfairness". But was a complaint that notice of revocation had not been given prior to the determination of the application analogous to a complaint about a rule which prohibited re-use of a reference number? And how, without departure from ordinary meaning, could Mr Pathan's complaint be described as not being procedural?

209. In paras 177 to 181 above Lord Briggs addresses in detail the conclusion of Singh LJ that Mr Pathan's complaint was one of substantive unfairness and he subjects it to generally favourable analysis. Lord Briggs there draws various distinctions between substance and procedure which, I confess, I find challenging. Then at para 197 he concludes:

> "… the case for a right to a time between notification and refusal fails, because it is a matter of substance governed by the Act and the Rules, with solid consequences for his immigration status, rather than a matter of procedure."

I have already suggested, with respect, that the matter is not governed by statute or rule. I now suggest, with equal respect, that the matter is not one of substance.

210. What, however, no one can dispute is that the ultimate refusal of Mr Pathan's application had, in the almost understated language of Lord Briggs above, "solid" consequences for his immigration status. Upon the negative determination of his request for administrative review of the decision to refuse his application, Mr Pathan at once became an overstayer. The consequences were that, while he remained in the UK, he

(a) committed a criminal offence punishable with imprisonment;

(b) became liable to detention pending forcible removal;

(c) committed a criminal offence if he continued to work for Submania or worked elsewhere;

(d) ceased to be entitled to state benefits;

(e) became disqualified from occupying rented accommodation;

(f) became subject to NHS charging provisions;

(g) became subject to the freezing of funds in his bank account;

(h) became subject to revocation of his driving licence; and

(i) in the various circumstances identified in para 117 of the joint judgment above, became subject to a ban on later re-entry into the UK.

211. It follows that, when on 7 July 2016 Mr Pathan became an overstayer, legal disabilities at once precluded his continued pursuit of normal life in the UK. It is in this light that a controversial part of Lord Briggs' reasoning falls to be considered. In para 181 of his judgment he sets out a history of applications made by Mr Pathan to the Secretary of State between 3 August 2016 and 11 October 2018; and earlier, in para 151, Lord Briggs states that none of the applications was adversely affected by the fact that Mr Pathan was an overstayer at the time when he made them. Lord Briggs would be the last person knowingly to pile procedural unfairness on top of procedural unfairness. It must, however, be noted that the history of later applications plays no part

in these proceedings issued on 4 August 2016 now before the court. The Court of Appeal did not refer to the history. It is not included in the agreed Statement of Facts and Issues. Lord Briggs has located it in a brief footnote to the Secretary of State's written Case, to which neither counsel made reference in their oral argument before the court. So the question arises: in the absence of any invitation to Mr Pathan's counsel to address the later applications, is it fair for Lord Briggs to conclude that the disabilities which, as an overstayer, stunted his ability to function in so many respects played no part in his failure to pursue them successfully?

212. In para 166 of his judgment Lord Briggs cites the decisions of the Upper Tribunal in 2011 in the *Thakur* case (Simon J and Latter SIJ) and in the *Patel* case (Blake P and Batiste SIJ); and in para 192 he concludes that they were wrongly decided. Mr Thakur and Mr Patel were students rather than employees so the revocations in their cases were of the licences of their colleges to act as sponsors under Tier 4 of the system, rather than of the licence of an employer to act as a sponsor under Tier 2. In every other respect their cases are materially identical to that of Mr Pathan: all three of them had applied for extensions prior to the expiry of their leave and prior to the revocation of the licences.

213. The *Thakur* and *Patel* cases have been regarded as good law for more than nine years. In *Alam v Secretary of State for the Home Department* [2012] EWCA Civ 960 Sullivan LJ, at para 44, cited the *Patel* case, then recently decided, with apparent approval but distinguished it from the case before him on the basis that Mr Patel had not contributed to the reasons for the revocation of his college's licence and was unaware of it until informed of the refusal. In the *EK (Ivory Coast)* case, cited by Lord Briggs (who had been a member of that court) in para 190 above, the decisions in the *Thakur* and *Patel* cases were again cited with apparent approval at para 38 and, in relation to the *Thakur* case, by Lord Briggs himself at para 54. But they were distinguished from the facts of Ms EK's case in which her college had, albeit accidentally, withdrawn its confirmation of her acceptance for studies and in which therefore the Secretary of State had not been instrumental in rendering her application no longer valid. Indeed, in the *Raza* case, cited by Lady Arden in para 84 above, Christopher Clarke LJ, who gave the only substantive judgment, at para 1 expressly identified one of the issues before the court to be whether the *Patel* case had been rightly decided. In conclusion, at para 38, he rejected any suggestion that it was not good law; but he held that the case was distinguishable because Mr Raza's application had been made following the expiry of his leave.

214. Indeed the standing of the decisions in the *Thakur* and *Patel* cases is, in practical terms, even stronger than that which arises from their endorsement by the Court of Appeal. For, within a year of the later decision, the Secretary of State had reflected the effect of the decisions in her Policy Guidance. It is currently reflected in para 11 of Annex 1 to "Tier 4 of the Points-Based System - Policy Guidance" for use in respect of applications made on or after 29 October 2019. Many will take the view that, if Lord

Briggs now considers that the decisions in the *Thakur* and *Patel* cases are wrong, he is right to say so. But some may harbour concern about whether the doubts now cast on them by so authoritative a voice might influence the formulation of future guidance and impair the ability of students and their lawyers confidently to analyse their rights.

215. For my part, I consider that the decisions in the *Thakur* and *Patel* cases are correct. I also consider that they help to indicate the proper resolution of the present appeal. I do not understand how the different reasons of policy which lead the UK to admit students to study at particular colleges, on the one hand, and employees to fill particular vacancies, on the other, can affect the level of unfairness which each group suffers when the Secretary of State takes action which renders their subsisting applications for extension no longer valid. There is, however, one factor which, so I acknowledge, increases the level of unfairness upon students in that situation. For they will have come to the UK in order to gain a qualification and, if required to leave prior to the expiry of their course, their work will have yielded nothing for them, whereas employees will at least have been remunerated for the work that they did. But that extra level of unfairness on students does not in my view eradicate the unfairness on employees. If a strong level of unfairness operates on A, it is not diminished when an even stronger level of unfairness is seen to operate on B.

216. Lord Briggs concludes at para 197 above that Mr Pathan's appeal should be dismissed. We other four members of the court agree that it should be allowed. But, as already explained, we do not agree about the basis on which it should be allowed. The basis favoured in the joint judgment is a breach of a duty only of prompt notification. The basis favoured by Lady Arden and myself is a breach of duties not only of prompt notification but also of prior notification. It remains for me to address that difference.

217. To hold that the Secretary of State owes a duty to Mr Pathan to give, and therefore that he has a reciprocal right to receive, prompt notification of the revocation is, I respectfully suggest, to give nothing of value to Mr Pathan unless it is accompanied by a duty, and a reciprocal right, of prior notification. The law should not impose a duty nor confer a right if they are of no value.

218. The reasoning in the joint judgment appears to me to be as follows:

(a) It was fundamental to the duty of procedural fairness that, prior to the determination of his application, Mr Pathan should be afforded a reasonable opportunity to avoid the consequences of the revocation of his sponsor's licence: paras 106 and 107 above.

(b) But the Secretary of State had no positive duty to afford that opportunity to him: para 108 above.

(c) For the effect of any such positive duty would be to extend Mr Pathan's leave beyond that for which the rules provide and any such duty would therefore be substantive rather than procedural: paras 108 and 141 above.

(d) The natural and conventional practice of the Secretary of State is to determine an application for extension after she has notified the applicant of revocation of the licence: paras 106 and 110 above.

(e) Exceptionally she will determine the application at the same time as she notifies the applicant of the revocation but, were she to contrive to do so in order to deprive him of the above opportunity, she would be in breach of the duty of procedural fairness: para 110 above.

(f) In the present case prompt notification would have afforded to Mr Pathan "three months extra in which to explore [his] options": para 132 above.

219. With the brevity apt to dissenting observations, I respectfully respond to each stage of the above reasoning as follows:

(a) There are four statements to this effect in paras 106 and 107 above and I entirely agree with them.

(b) I disagree and question whether this is consistent with (a).

(c) I do not accept that Mr Pathan seeks an extension of leave beyond the provisions of section 3C(2) of the 1971 Act.

(d) I am unaware of the evidence of the suggested practice. The facts of Mr Pathan's case belie it.

(e) I disagree with the first proposition and, in relation to the second, question whether enquiry into the Secretary of State's motive for taking action is a satisfactory determinant of breach of duty.

(f) I seek to unpack the reference to "three months extra" in the following paragraph.

220. In referring to "three months extra" Lord Kerr and Lady Black clearly have in mind that revocation of the licence occurred on 7 March 2016 and that refusal of Mr Pathan's application occurred on 7 June 2016. So, for convenience, they surely here adopt a hypothesis of notification on the date when the revocation actually occurred; and then they take the hypothetical date of refusal to be the date when the refusal actually occurred. This yields the three months to which they refer. But the question, already posed by Lord Briggs in paras 194 and 195 above, is whether, were the Secretary of State to have had a duty of prompt notification but not also a duty of prior notification, she would, following prompt notification, have delayed for three months before refusing Mr Pathan's application. I can see no reason why she would have delayed her refusal to any extent at all.

221. If one adopts the convenient hypothesis that the Secretary of State should have notified Mr Pathan of the revocation on 7 March 2016, then in my view, in the absence of a concomitant duty of prior notification, she would be likely to have refused his application on the same day. He would then no doubt have applied for administrative review, as he later did; it would no doubt have been determined negatively to himself, as it later was; and all this would probably have been concluded within the space of a month from the date of refusal, as it later was. So, instead of his becoming an overstayer on 7 July 2016, Mr Pathan would have become an overstayer on 7 April 2016. The limited duty recognised in the joint judgment is therefore not just valueless to Mr Pathan: it is likely to be prejudicial to him. It is a curious result of his forensic success.

222. In my view counsel for Mr Pathan is right to submit that, in fairness, the duty of prompt notification must be accompanied by a duty of prior notification. This alone would yield to Mr Pathan a reasonable period in which, while not being an overstayer, he could seek to vary his application under section 3C(5) of the 1971 Act by identifying a fresh employer licensed, able and willing to sponsor him, or by asserting a human right not to be removed from the UK, or by seeking leave to remain outside the rules.