



Neutral Citation Number: [2019] EWHC 3884 (Admin)

Case No: 5093/2018

**IN THE HIGH COURT OF JUSTICE**  
**QUEENS BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 3<sup>rd</sup> September 2019

**Before :**

**Miss Alison Foster QC sitting as a Deputy Judge of the High Court**

**Between :**

**R(oao) OPERATION HOLDINGS LTD (trading  
as GOLDCARE HOMES)**

**Claimant**

**- and -**

**THE SECRETARY OF STATE FOR THE  
HOME DEPARTMENT**

**Defendant**

**Mr Gavin Dingley (instructed by Gulbenkian Andonian) for the Claimant**  
**Mr Jack Holborn (instructed by the Government Legal Department) for the Defendant**

Hearing date: 20<sup>th</sup> June 2019

**Miss Alison Foster QC sitting as a Deputy Judge of the High Court:**

1. This is a claim for Judicial Review, brought by Operations Holdings Limited trading as Goldcare Homes (“Goldcare”), of a decision made by the Secretary of State for the Home Department (“SSHD”) on the 30<sup>th</sup> November 2018 revoking Goldcare’s Sponsor Licence with immediate effect.
2. Goldcare was established in 1999 and offers residential nursing, frail, elderly and dementia care. It runs 21 care homes, acquiring approximately 1,500 new patients each year, with about 1,200 discharges per year. The evidence of the Claimant was that it has a turnover of some £37 million a year. The Director is Mr Ravinder Singh Gidar who has for a number of years held a Tier 2 Sponsor licence which has allowed him to employ non-EEA migrants in his business. At the present time, amongst the approximately 1,000 employees are 3 migrants subject to the Licence scheme. Mr Tiwari, about whom this case has arisen, is one of them, and has been employed in this way since at least 2014.

**BACKGROUND**

3. An unannounced compliance visit took place on behalf of the SSHD at the Claimant’s premises at Gidar House in Uxbridge, Middlesex, on the 19 June 2018. Mr Gidar was interviewed, as were two migrants – a Mr Aditya Tiwari, described as a Business Analyst, and Mr Vivek Goradia, described as a Senior Business Development Manager. As a result of what transpired at that visit, the SSHD came to the view that Goldcare had not fulfilled its obligations under the Sponsor Licence scheme, so, on the 6<sup>th</sup> September 2018, made a preliminary decision to suspend Goldcare’s Licence. Goldcare were given an opportunity to submit further evidence and an explanation before further steps were taken. On 16 October 2018 Goldcare did so but a revocation decision was issued on the 30<sup>th</sup> November 2018. A Pre-Action Protocol Letter was sent on 10 December but the SSHD maintained the revocation decision.
4. At an interim relief hearing on 21 December 2018, Michael Fordham QC, sitting as a Deputy Judge ordered that the Sponsor Licence be returned to Suspended status and gave Directions. Permission for judicial review was

granted by him on 11 January 2019 and the interim relief extended. The sponsored migrants were thus, under the Home Office policy, not affected whilst the claim was heard.

5. The letter of 6<sup>th</sup> September suspending Goldcare's Licence provided materially as follows:

***“General sponsor duties 1***

...

2. *You assigned a Certificate of Sponsorship (COS) to Aditya Tiwari (C2G8046039B) in the role of Business Analyst under Standard Occupational Classification (SOC) Code 2423 Management Consultants and Business Analysts. You stated that the duties of the role would be:*

- *Assess the functions, objectives and requirements of the organisation or financial projection;*
- *Development of underlying and ad-hoc fees pricing policy for public / private clients;*
- *Determines the appropriate method of data collection and research methodology, analyses and interprets information gained and formulates and implements recommendations and solutions;*
- *Attending seminars and workshops to identify process improvements and development process efficiency;*
- *Providing detailed analytics on key metrics and understanding how these impact cash-flow and management accounts;*
- *Integrating the finance module in the MIS and assisting senior management providing financial performance reports.*

3. *However, during our visit our officer asked you about this role and you stated the duties as:*

- *Accounting for daily cash flow;*
- *Providing analyse [sic] of money in and out to the Financial Director;*

- *Accounting for care provide [sic] based on pay versus hours worked;*
4. *You provided our officer with emails as evidence of Mr Tiwari's work, which included a balance summary, cash flow analysis and list of PAYE payment record. These documents contained data only and did not show evidence of detailed analytics or consideration within the scope of a larger financial performance report, as per the duties stated on Mr Tiwari's COS. In addition, they did not provide any evidence that Mr Tiwari had been involved in developing pricing policy or had attended seminars of similar development events in line with the duties stated on his COS. Given these issues, we are not satisfied that the rolol [sic] Business Analyst represents a genuine vacancy in line with Mr Tiwari's assigned COS."*
6. The letter, which was addressed to Mr Gidar, the Director of Goldcare, who had given those answers to the Secretary of State's officer, then cited provisions of the SSHD's Sponsor Guidance. It continued as follows.

***"General Sponsor Duties 2***

9. *You confirmed that Mr Tiwari's role was positioned between the roles of Financial Assistant and Financial Manager in terms of level and provided an organisational hierarchy which confirmed you also employ Vivek Hamukhbhai Goradia (C2G4Y45615L) as a Senior Business Analyst within the same department. Given this, and the job description you provided, we believe that Mr Tiwari's role is actually that of a Finance Officer as covered under SOC Code 4121 Finance Officers. Duties under this SOC code are considered lower-skilled and so are below the level required for sponsorship under Tier 2 (General). In addition, by allowing him to perform a role which does not need the Tier 2 skills criteria, you are permitting Mr Tiwari to work in breach of his Visa conditions.*
7. This was followed by further sections of the Guidance. The letter continued:

***"General Sponsor Duties 3***

16. *As you have failed to demonstrate that the role of Business Analyst, for which you employ Mr Tiwari, represents a genuine vacancy at the required skill level, we believe you provided false information when assigning a COS to him for this role."*

8. The passages from the Guidance then cited emphasised that significant trust was reposed in sponsors, and explained the consequences of knowingly providing false statements or false information.
9. The letter offered an opportunity to explain the issues within 20 days and required, if representations were to be made, documents concerning all managers and staff, and evidence of the work completed by Aditya Tiwari. The letter also asked for certain other materials such as P60 documents and payslips; no issue arises on this employment documentation.
10. A response to the SSHD's 6<sup>th</sup> September 2018 letter came from Goldcare's solicitors on 16 September 2018. They made a number of observations about the reputation of the Goldcare Homes Group, observing it had been established for more than 18 years, had won numerous awards and ran 21 care homes. It pointed to the general need for care homes explaining that Mr Gidar maintained vehemently that he had not abused the Sponsor Licence, nor done anything "*untoward or misleading*". The letter pointed to the reputation and background of the Goldcare Group as militating against any deliberate manipulation of the sponsor scheme and made a number of allegations concerning the fairness of the interviews that took place with the migrants, and enclosed a series of documents said to evidence the claim that Mr Tiwari did indeed carry out the role for which he had been sponsored.
11. Their case was that the interview with Mr Tiwari was unfairly brief. They said it gave him no time to "*find his stride*" and to properly explain his role. The Claimant submitted Mr Tiwari was a genuine Business Analyst in a genuine vacancy. Together with the letter were six appendices comprising spreadsheets of figures, under various headings and several emails. Each of the sets of data were said to evidence individual aspects of Mr Tiwari's role named under the relevant job code including his involvement in meetings. For example, Appendix 1 was a snapshot of the forecast cash flow which it was said was "*monitored, updated and analysed*" by Mr Tiwari. It was said the Regional Operations Team collected the data and provided it to Mr Tiwari, who examined and dissected it with "*the appropriate methodology and analysis*". Similarly,

the other appendices were said to show detailed analytical work, including analytics on key metrics and understanding of how they impacted cash flow in the management accounts. Assistance was given, the Claimant explained, to the billing team, identifying pricing policy. They included sheets which summarised the expected gross profit performance of each home based on numbers of hours extracted from the clocking software and also, they said, an analysis of the budgeted hours for holidays against actual manpower availability hours. It was said that only a Business Analyst who had full knowledge of the business data and good interpretational and analytical skills could carry out this analysis, and offered two emails as illustration of Mr Tiwari attending workshops and of training other staff to implement process efficiencies, as set out in the sponsored role description. The exhibited emails showed one occasion on which Mr Tiwari was the meeting organiser for a new purchase order system and the other included his name on a list of staff from Head Office who were attending an admin day organised by the company.

12. The last appendix sent to the SSHD consisted of an email with further spreadsheets. The email post-dated the inspection in June 2018 and attached a “*price comparison analysis*” from Mr Tiwari, sent to others in the office. The appended spreadsheet showed numerous items, listed with a price differential and a potential saving set out across the page. It should be said that none of the pages contain any identifying feature that tied them to Mr Tiwari, or indeed, to anyone else.
13. The SSHD’s response in the final revocation letter dated 30<sup>th</sup> November 2018 followed closely the format and repeated the content of, the Suspension letter of 6 September. It repeated the section under the heading “*General Sponsor Duties I*”, and also what was said during the inspection visit. It repeated verbatim, the criticism that had been levelled in September. The letter then continued:

“9. *In your representations you state that Mr Tiwari’s answers were brief and synoptic as he was interviewed spontaneously for approximately ten minutes, therefore the interview was brief and did not involve a hands-on scrutinising exercise, as in the case of Mr Vivek Goradia, whereby substantial time was spent interviewing him.*

10. *You submit that Mr Tiwari is a genuine Business Analyst in a genuine vacancy. As evidence of the work undertaken by Mr Tiwari, you have provided [the materials in the accompanying appendices].*
11. *You state that the actual and forecast cash flow spreadsheet is monitored, updated and analysed by Mr Tiwari, however the spreadsheet cannot be attributed to Mr Tiwari and no evidence of him monitoring, updating or analysing the spreadsheet has been provided.*
12. *You stated that there are approximately 125 new clients every month and 100 discharges that Mr Tiwari must contend with. You also stated that the Regional Operations Team collects the relevant data that is then given to Mr Tiwari to examine and dissect with the appropriate methodology and analysis. No evidence has been provided to support this claim.*
13. *You state Mr Tiwari then translates this analysis into forecast cash flow for the current month and months going forward to the end of the financial year. You state following his analysis he will meet with the directors who will then invariably implement his recommendations. No evidence has been provided to support this claim.*
14. *You state that Mr Tiwari works closely with the Billing Team and helps them to identify pricing policy for public and private clients; however, no evidence has been provided of this.*
15. *You state that Mr Tiwari analyses the direct expenses and assists the Payroll Manager to interpret information gained from payroll and time checking software, however no evidence has been provided of this.*
16. *The email dated 26<sup>th</sup> October 2017 only confirms that Mr Tiwari requested certain employees to attend a workshop / training course that had been organised for them. It does not confirm Mr Tiwari conducted the workshop or training course.*
17. *The email dated 28<sup>th</sup> November 2017 merely confirms Mr Tiwari's attendance at an administrative day, it does not confirm what work he undertook as part of this day.*
18. *You state that following detailed analysis of key metrics data from various suppliers, Mr Tiwari develops efficiencies in the procurement process. No evidence has been provided to support this claim.*
19. *The email exchange confirms that Sumit Arora requested Mr Tiwari looks at the attached revised office depot pricing and advises. Mr Tiwari simply returns the spreadsheet with the*

*potential savings worked out in the final column. No advice was offered and there is no evidence of any further action was taken [sic] as a result of this analysis. There is also no evidence that Mr Tiwari developed any process.*

20. *There is no evidence that Mr Tiwari was responsible for the creation of the following documents: [and there are listed the appendices materials containing documents said to be analysis of target private funder etc. and fees for various institutions submitted to the SSHD in September 2018].*
21. *These documents contain data only and did not show evidence of detailed analytics or consideration within the scope of the larger Financial Performance Report, as per the duties stated on Mr Tiwari's COS.*
22. *You have failed to provide any evidence that Mr Tiwari has undertaken the following roles as stated on his COS:*
  - *Assesses the functions, objectives and requirements of the organisational financial projection;*
  - *Development of underlying and ad hoc fees pricing policy for public / private clients;*
  - *Determines the appropriate method of data collection and research methodology, analyses and interprets information gained and formulates and implements recommendations and solutions;*
  - *Attending seminars and workshops to identify process improvements and develop process efficiency;*
  - *Providing detailed analytics on key metrics and understanding how these impact cash flow and management accounts;*
  - *Integrating the finance module in the MIS and assisting senior management providing Financial Performance Reports.*
23. *Considering Mr Tiwari has worked for your client's organisation for over 12 months, we would expect your client to have an abundance of evidence at their disposal to demonstrate the duties and responsibilities undertaken by him as described on his COS.*
24. *Having taken into consideration the representations and evidence provided above, we believe that the role undertaken by Mr Tiwari does not match the job as described on his COS or as is stated in Appendix J of the Immigration Rules.*
25. *We therefore assert that a genuine vacancy at the correct skill level does not exist and the post has been created in order to*



*facilitate Mr Tiwari's continued Leave to Remain in the UK. This matter is not addressed.*

26. *Annex 5(ee) of the Tier 2 and 5 Sponsor Guidance states:*

*'We will revoke your licence if...'*

*[The relevant parts of Annex 5 are cited - as to which see further below.]*

14. The letter continues in the same vein as the Suspension Letter. It repeated the material under "General Sponsor Duties 2", and added:

*"32. In your representations, you state that your client's business does indeed require two Business Analysts and the presence of Mr Goradia does not undermine the need for a second Business Analyst.*

*33. You also confirm that Mr Tiwari's role is below that of Mr Goradia in the analytic chain and that Mr Goradia's work is more complex in nature and this reflects his seniority in the role.*

*34. Having taken into consideration the representations you have made and the evidence provided, we do not believe that the role that Mr Tiwari is currently undertaking meets the Tier 2 General Skills criteria and we believe the work Mr Tiwari undertakes is more akin to that of a Finance Officer, as covered under SOC Code 4124 Finance Officers. This matter is not addressed."*

15. Under the heading 'General Sponsor Duties 3', again the SSHD set out what had been set out in the Suspension Letter. He then continued:

*"42. In your representations, you state that your client issued a COS for a genuine vacancy and has not been dishonest in any way.*

*43. You have failed to provide evidence which demonstrates Mr Tiwari has carried out the duties as stated on his COS or at the appropriate level for Sponsorship. You have also failed to demonstrate that the role Mr Tiwari undertakes matches the job description as stated in Appendix J of the Immigration Rules.*

*44. This compounds our belief that your client has failed to meet their obligations as a licenced sponsor, by providing false information when assigning Mr Tiwari his COS. In the absence of any evidence to the contrary, we conclude that your client has provided false information in order for them to meet the requirements for Sponsorship under Tier of the Points Based System. This matter is not addressed.*

...

*'Decision'*

46. *We have considered the possibility of downgrading your client's licence and issuing them with an Action Plan. However, we will only downgrade a licence and issue an Action Plan where there is scope to rectify shortcomings or omissions in systems or retained documents.*
47. *As already stated, your client has acted in contravention of Annex 5(k), 5(r), 5(t), 5(ee) and 5(gg) and Annex 6(j) of the Tier 2 and 5 Sponsor Guidance. Downgrading your client's licence is not appropriate due to the seriousness of their non-compliance with their sponsor duties.*
48. *We believe the issues described above constitute a failure by your client to comply with their sponsor duties.*
49. *As a result, your client's Sponsor Licence has been revoked. There is no right of appeal against this."*

16. The gist of the Claimant's challenge is that SSHD has misdirected himself when revoking the Tier 2 Licence by maintaining a decision that was tainted by an unsustainable finding of dishonesty; further he has failed to recognise and exercise his discretion in the matter, has reached a perverse overall conclusion, and acted in a procedurally unfair manner. Some submissions were also addressed to me, although they were not strongly urged, concerning the applicability of Article 8 ECHR and Article 1 Protocol 1 to the Convention in this case. I shall turn to the submissions after setting out the context in which consideration of the issues must take place.

## **Tier 2 SPONSORSHIP SCHEME**

17. There was no dispute between the parties, either at the time of correspondence or in Court as to the structure or the general scope of the relevant scheme.
18. I take with gratitude from the Witness Statement of John Windle, a Grade 7 Civil Servant at the Home Office, the following outline of the Sponsor Licensing system and its policy context. Mr Windle is currently Head of the

Tier 2 and 5 Sponsor Casework Operations in UK Visas and Immigration. No issue was taken with his evidence.

19. The current system of sponsorship was introduced in 2008, after the Work Permits System ceased. The fundamental difference between sponsorship and the earlier system is that the Home Office transferred a greater level of responsibility to employers, that is to say sponsors, for protecting the UK border. This is explained by Mr Windle as allowing employers more freedom from up-front checks in exchange for the employer's guarantee that they would act appropriately, honestly and in full and complete compliance with the rules set out from time to time in guidance provided by the Home Office.
  
20. The introduction of the Points Based System was a major change. It consolidated approximately 80 other routes of entry into the UK and in November 2008 Tier 2 for Skilled Workers came into operation. The scheme allows those with a Sponsor Licence to issue a "*Certificate of Sponsorship*" ("COS") for its own employees. There is no dispute but that the grant of a licence imposes significant and onerous responsibilities. In effect, the individual employers become a part of Border Control with a positive obligation to familiarise themselves with the obligations arising under the scheme, and to ensure strict compliance with it.
  
21. It is clear that sponsorship is based on two fundamental principles:
  - (i) Those who benefit most directly from migration, that is to say employers, education providers or other bodies who bring in migrants, must play their part in ensuring that the system is not abused; and
  
  - (ii) The Home Office needs to be sure that those applying to come to the UK to undertake work or to study are indeed eligible to do so and if a reputable employer or education provider genuinely wishes to take them on.

22. This provides the context for the application of the scheme, and reflects, as was said by McGowan J in *London St. Andrew's College v SSHD* [2014] EWHC 4328 (Admin) at [13], that the obligation of a sponsor is to carry out its responsibilities “*with all the rigour and vigilance of the immigration control authorities*”. This approach is found throughout the case law (as to which, see further below) and applies equally to the Tier 2 Skilled Workers scheme.
23. The Guidance contains warnings that compliance action will be taken where a licenced sponsor is considered to have failed to meet its duties and responsibilities.
24. It is emphasised within the SSHD’s description of the scheme that the Home Office seeks to recruit highly skilled workers. The Regulation Qualifications Framework (“RQF”) System, contains eight levels of qualifications and is regulated by the Office of Qualifications & Examinations Regulation (“Ofqual”). The majority of jobs for which a migrant is recruited are expected to achieve Level 6, that is to say at Bachelor’s Degree level, with or without honours, however it is the case that the Home Office focusses more on whether the work that is done is pitched at the appropriate level, rather than on the qualifications that may be held by the worker doing it. In this case, the relevant description of the post in issue was SOC Code 2423, Management Consultants and Business Analysts. The essentials of this particular code are those set out by the SSHD in its Suspension and revocation letters. Whether or not a SOC Code has been misapplied is said to be an important consideration for the judgements that are exercised by the Home Office as to whether or not a sponsor poses a risk to immigration control.
25. The relevant guidance (and see further below) provides in this regard:

*“25. When you assign a Certificate of Sponsorship (COS) you must choose the Standard Occupational Classification (SOC) code which contains the job description that best matches the role you want to recruit for. The ‘Codes of Practice’ contain information about each SOC code and sample job titles and duties that fit within each code. You should be able to find the correct SOC code by searching the Codes of Practice for job titles or key words.*

*25.1 You may find that if you search for job titles, the SOC code containing that job title does not match the duties that the migrant will perform. This is because different employers use the same job title to describe different jobs or use generic job titles that cover several different jobs. If this happens, you should search further, for example using key words for a job description that matches the migrant's duties."*

26. It is emphasised on behalf of the SSHD that it is a common misunderstanding amongst sponsors and workers that because the workers are qualified to the required level and the job description is at the required level, this means that they are necessarily working at the required level. The consequences of not actually *working* at the required level are serious: the worker will be in breach of his or her terms of their grant of leave and the sponsor will not be adhering to their sponsor duties. The SSHD describes it as a "*known problem*" that sponsors over-state or mis-state the level of a job.

## GUIDANCE

27. The relevant Guidance for the purposes of the decision in issue was version 04/17 of "*Tiers 2 and 5: Guidance for Sponsors*". The Guidance provides relevantly as follows:

*"1. Tiers 2 and 5 of the points-based system of the primary immigration routes for non-European Economic Area (EEA) migrants who wish to work in the UK. These migrants must be sponsored by an organisation or company that holds a Tier 2 and / or Tier 5 Licence. A licence is a permission given to an organisation to sponsor workers in its business. The organisation is known as a sponsor. Individual persons are not recognised as sponsors.*

*1.1 A sponsorship is based on two principles:*

- Those who benefit most directly from migration;*
- Employers, education providers or other bodies who are bringing in migrants, should play their part in ensuring the system is not abused;*
- We need to make sure that those applying to come to the UK for work or to study are eligible and that a reputable employer or education provider genuinely wishes to take them on.*

...

1.4 *When a sponsor is granted a Tier 2 or Tier 5 licence, significant trust is placed on them. With this trust comes a responsibility to act in accordance with the Immigration Rules and all parts of the Tiers 2 and 5: Guidance for Sponsors. We have a duty to ensure that all sponsors discharge these responsibilities, and will take compliance action when it is considered that a sponsor has failed to do so, or otherwise poses a risk to immigration control. The 'Sponsor Duties' section has more information on the duties sponsors must fulfil.*

...

2.9 *You have a duty to act honestly in any dealings with us, such as not making false statements and ensuring all essential information is disclosed when applying for a sponsor licence or assigning or applying for a COS, or while you are a sponsor.*

2.10 *If we believe you have knowingly provided false statements or false information, or not provided information that you held when required to, or pose a threat to immigration control, we will take action against you. The 'What will happen if I don't comply with my sponsor duties' section has more information.*

...

15.1 *You must give us, when asked, any documents relating to your sponsored migrants or the running of your organisation that we consider relevant to assessing your compliance with your duties as a sponsor. ... If you fail to provide the documents when asked or within a specified time frame we will take action against you.*

...

15.12 *To make sure you are complying with our immigration laws, you must:*

...

- *Not assign a COS where there is no genuine vacancy or role which meets the Tier 2 or 5 criteria – if you assign a COS and we do not consider that it is for a genuine vacancy, we reserve the right to suspend your licence, pending further investigation which may result in your licence being revoked.*
- *Only allow the migrant to undertake the specific role set out in their COS –*

- *Only assign a COS to migrants who you believe will meet the requirements of the tier or category and are likely to comply with the Conditions (Rules) of Leave.*

...

- *Only assign a COS to a migrant if you are satisfied that they intend and are able to fill the role.*
- *Where applicable, only assign a COS for a role which is at or above the minimum skill level, as set out in this Guidance.*

*15.13 A genuine vacancy is one which:*

- *requires the job holder to perform the specific duties and responsibilities for the job and meets all of the requirements of the tier and category – if you have already assigned a COS, the vacancy must be for the period of employment stated on the COS;*
- *does not include dissimilar and / or lower-skilled duties;*

...

*Examples of vacancies that are not considered to be genuine include but are **not** limited to:*

- *one which contains an exaggerated or incorrect job description to deliberately make it appear to meet the requirements of the tier and category when it does not;*
- *for a job or role that does not exist in order to enable a migrant to come to, or stay in, the UK;*
- *advertisements with requirements that are inappropriate for the job on offer, and have been tailored to exclude resident workers from being recruited.*

...

*19.3 If any circumstances in Annex 5 of this Guidance arise, we will revoke your licence and may do so immediately. We will write to you to tell you that your licence has been revoked. There is no right of appeal and you will not be allowed to apply again for a Sponsor Licence until the end of the appropriate cooling off period from the date your licence is revoked. If we do not revoke your licence immediately, we will suspend your licence pending further investigation.*

...

*19.4 For information on the circumstances in which we may revoke your Sponsor Licence, see Annex 6 of this Guidance.*

...

19.7 *If any circumstances in Annex 4 of this Guidance arise and we do not believe it is necessary to suspend your licence, we may downgrade it to a B-rating.”*

28. Annex 4, concerning circumstances in which the SSHD may downgrade a licence to a B-rating include a failure to comply with any of the sponsor duties.

29. Annex 5, entitled “*Circumstances in which we will revoke your licence*” sets out the circumstances where the SSHD will revoke (relevantly for the purpose of this case) as follows [emphasis added]:

“(k) *You have knowingly provided a false statement or false information, or not provided information that you held when required to, to us, the former Immigration and Nationality Directorate... etc.*

...

(r) ***You employ a migrant in a job that does not meet the skill level requirements as set out in this Guidance.***

...

(t) *You use a Tier 2... COS to fill a vacancy other than the one specified on the COS you assigned for that role.*

...

(ee) ***You assign a COS for a vacancy that was not genuine. For example, where:***

- ***it contains an exaggerated or incorrect job description to deliberately make it appear to meet the requirements of the tier and category you assigned to it under when it does not [sic]***
- ***it is for a job or role that does not exist in order to enable a migrant to come to or stay in the UK.***

(gg) *The role undertaken by a migrant you have sponsored does not match one or both of the following:*

- *the job description in Appendix J of the Immigration Rules containing the SOC Code stated on the COS you assigned to them;*
- *the job description on the COS that you assigned to them.”*



30. “Annex C: Circumstances in which we may revoke your licence” also indicates that SSHD may revoke the Sponsor Licence where:

“(f) you failed to comply with any of your sponsor duties.”

## APPLICABLE PRINCIPLES

31. The principles applicable to the Sponsor Licence Regime are now well established. They have been drawn, in particular from a first instance decision of Mr Justice Haddon-Cave, (as he then was), in *R (Raj & Knoll Limited) v SSHD* [2015] EWHC 1329, at paragraphs 13 to 19 as supplemented by the Court of Appeal in that case ([2016] EWCA Civ 770). Those principles have been applied in a number of cases, and I take with gratitude the encapsulation of them in *R (Liral Veget) v SSHD* [2018] EWHC 2941 (Admin) at paragraph 39:

- “(1) *The essence of the system is that the Secretary of State imposes a higher degree of trust in sponsors in implementing and policing immigration policy in respect of migrants to whom it grants a Certificate of Sponsorship.*
- (2) *The authority to grant a Certificate is a privilege which carries great responsibility: the Sponsor is expected to carry out its responsibilities with the same rigour and vigilance as the Immigration Control Authorities.*
- (3) *The Sponsor must maintain its own records with assiduity.*
- (4) *The Points Based System has created a system of immigration control in which the emphasis is on certainty in place of discretion, on detail rather than broad guidance.*
- (5) *The Certificate (COS or CAS) is very significant: the possession by a migrant of a requisite Certificate provides strong, but not conclusive, evidence of some of the matters which are relevant upon the migrant’s application for Leave to Enter or Remain.*
- (6) *There is no need for UKBA to wait until there has been a breach of immigration control caused by the acts or omission of a Sponsor before suspending or revoking the sponsorship, but it can, and indeed should, take such steps if it has reasonable grounds for suspecting that a breach of immigration control might occur.*

- (7) *The primary judgement about the appropriate response to breaches by Licence Holders is that of the Secretary of State. The role of the Court is simply supervisory. The Secretary of State is entitled to maintain a fairly high index of suspicion and a 'light trigger' in deciding when and with what level of firmness he should act.*
- (8) *The Courts should respect the experience and expertise of UKBA when reaching conclusions as to a Sponsor's compliance with Guidance, which is vitally necessary to ensure that there is effective immigration."*

32. It is worth emphasising one aspect of the jurisprudence that derives from the Judgment of Neil Garnham QC (as he then was) in *R (London Reading College) v SSHD* [2010] EWHC 2561 (Admin) at paragraph 60:

*"It has to be remembered that the primary judgement about the response to breaches of a College's duty is the Defendants, and the Court's role is simply supervisory. It also has to be remembered that the underlying principle behind this scheme is that the UKBA entrusts to Colleges the power to grant Visa letters on the understanding and with their agreement that they were acting in a manner that maintains proper immigration control.*

*The capacity for damage to the national interest in the maintenance of proper immigration control is substantial if Colleges are not assiduous in meeting their responsibilities".*

*In those circumstances, it seems to me that the Defendants are entitled to maintain a fairly high index of suspicion as they go about overseeing Colleges and a like trigger in deciding when and with what level of firmness they should act."*

33. That case was decided in the context of a Tier 4 Licence, but it is not in dispute that the principles apply in the present case.
34. Further principles of relevance may be derived from the Judgment of Tomlinson LJ in *Raj & Knoll*, at paragraph [32]:

*"The mere fact that the decision making in this area may have serious commercial consequences for licenced sponsors is not of itself a reason to impose heightened scrutiny. The circumstance that the SSHD has special expertise in and experience of decision-making in this field, and that the Court possesses no particular institutional competence and can claim no special constitutional*

*legitimacy, militates against that submission – see per Lightman J in R (Cellcom) v DJ of Telecoms [1999] ECC 314 at paragraph 26, and per Laws LJ in R (Law Society) v London Criminal Court Solicitors' Association [2015] EWHC 295 (Admin) at paragraphs 32 and 33. It is also clear that the exercise in which the SSHD is engaged involves no fundamental right of the Appellant, but on the contrary a right contingent upon adherence to the Rules: (cf. per Lord Sumption R (New London College Limited v Secretary of State for the Home Department)).*

35. The reference to *New London College Limited* was to a citation in which Lord Sumption said this at paragraph 29 of R (New London College Limited v Secretary of State for the Home Department [2013] 1 WLR 2358:

*“There are substantial advantages for sponsors in participating [in the Tier 4 Scheme] but they are not obliged to do so. The Rules contained in the Tier 4 Guidance for determining whether applicants are suitable to be sponsoring institutions, are in reality conditions of participation, and sponsors seeking the advantages of a licence cannot complain if they are required to adhere to them.”*

36. In light of the submissions that are made in this case, it is worth recalling that public law decisions affecting individual’s rights are subject to common law requirements of procedural fairness. Procedural propriety depends on the subject matter of the decisions, the executive functions of the decision-maker and the particular circumstances in which the decision is made (CCSU v Minister for Civil Service [1985] AC 374) and also that what fairness requires depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates (R (o/a Easyjet) v Civil Aviation Authority and ors [2009] EWCA Civ 1361 and see also Lloyd v McMahon [1987] AC 625; and R v SSHD ex parte Doody [1994] 1 AC 531). These principles were applied in the similar context of a Tier 4 Licence in the London Reading College case.

37. The issue as to whether a heightened level of scrutiny applies has also been considered in Taste of India v SSHD [2018] EWHC 414 (Admin) by Richard Clayton QC, sitting as a Deputy Judge of the High Court. In that case the Claimant contended that a proportionality rather than a Wednesbury approach was appropriate. In referring to Keyu v Secretary of State for Foreign and

Commonwealth Affairs [2016] AC 1335, the Learned Deputy Judge said as follows:

“61. In Keyu, Lord Neuberger, Lord Mance and Lord Hughes held it would not be appropriate for a five judge panel of the Supreme Court to accept or reject the Claimant’s argument that a traditional rationality basis for challenging executive decisions should be replaced by a more structured and principled challenge based on proportionality, which potentially has implications which are profound in constitutional terms and very wide in applicable scope, because it would involve the Court considering the merits of the decision at issue and would require the Court to consider the balance which the decision-maker had struck between the competing interests and the weight according to each interest. In those circumstances, it is not open to me determine the question of whether proportionality has replaced rationality at common law.”

38. In another case concerning the Sponsor Licence system Datamatics UK Limited v Secretary of State for the Home Department [2016] EWHC 1780 (Admin), Natalie Lieven QC, sitting as a Deputy Judge of the High Court refused to accede to a submission that questions arising out of SSHD Guidance were properly to be regarded as questions of precedent fact. She said, at paragraph 20:

“The questions in issue were not ones of precedent fact. The test is not set down by Parliament as a statutory test, but rather in Guidance; there is no issue of liberty or equivalent impact; there is a high degree of judgement for the decision-maker, i.e. the Secretary of State, in deciding whether an individual is an ‘agency worker’ or the Claimant a ‘recruitment agency’. There is no one factual answer as there would be to whether a person was or was not a child.”

39. In the Taste of India case, a submission was also made that Article 1, Protocol 1 was engaged in a case involving Tier 2 sponsorship. In rejecting that submission at paragraph 72 of his judgment the Learned Deputy cited from the Court of Appeal in R (o/a New London College Limited) v Secretary of State for the Home Department [2012] EWCA Civ 51. Richards LJ:

“94. In my judgement, Wyn Williams J was plainly correct to find that a Sponsor Licence is not itself a possession within AIP1. The analysis of Kenneth Parker J in Nicholds [R (Nicholds) v Security Industry Authority [2007] 1 WLR 2067, paras. 70 to 76], which met with a strong measure of approval [by the Court of Appeal] in Malik

*[R (Malik) v Waltham Forest NHS Primary Care Trust [2007] 1 WLR 2092] and [by the House of Lords] in Countryside Alliance [2008] 1 AC 719] strongly supports that conclusion. A Sponsor Licence is not marketable or even transferrable, nor is it obtained at a market price. I reject Mr Gill’s contention that on the sale of a business, having the benefit of a licence there would in substance be a transfer of the licence. The new owner would have to satisfy UKBA that the conditions for grant of a licence were met under the new ownership.*

95. *The principal factor leading Wyn Williams J to find that the suspension and withdrawal of a Sponsor Licence nevertheless engaged AIP1 was the apparent parallel with the withdrawal of the liquor licence in Tre Traktörer. There is obvious attraction in that line of reasoning, given the undoubted effect on the business in each case. The Judge did not grapple, however, with the question whether the adverse effect in the present case amounts to an effect on goodwill, in the sense used in the authorities, or only to a loss of future income (albeit a loss with serious economic consequences for the business). I agree with [Counsel] that he needed to do so. The distinction is far from clear, but one has to decide which side of the line the case falls, since the relevant possession is the goodwill of the business, and the suspension or withdrawal of a licence will not amount to an interference with the right to peaceful enjoyment of possessions within AIP1 unless it has an adverse effect on that goodwill.*

96. *Kenneth Parker J in Nicholds was of the view that ‘goodwill’ in this context means the capitalised value of the business as a going concern. Mr Gill did not seek to challenge the correctness of that view. While there is evidence in this case of the economic disruption caused by the suspension of the College’s licence, and liable to be caused by the withdrawal of the licence, the evidence does not deal with the goodwill of the business in the sense identified in Nicholds. Thus, there is no concrete evidential basis on which to found a conclusion that the goodwill of the business has been or would be adversely affected by suspension or withdrawal of the licence. Nor, as it seems to me, can such an effect be inferred from the information available to us.”*

40. Potential infringements of Article 8 have been considered also. As was further stated by Richard Clayton QC in Taste of India, at [75]:

*“I am, therefore, bound to have regard to the approach taken by Nicol J in Birdshill Nursing Home v Secretary of State for the Home Department [2015] EWHC 2241 (Admin) which was a judicial review of the revocation of a sponsorship licence brought by the nursing home for elderly residents. Nicol J considered whether the ability of frail elderly residents to live in the nursing home would engage Article 8. Although he found on the evidence that the revocation of the licence could not mean the home would close, he considered the case further*

*on the basis there was in fact an interference with Article 8. He dealt with proportionality in these terms:*

*'43. In my judgement the answer is plain. Any such interference would be proportionate and would be justified in a democratic society.*

*44. The SSHD has lawfully concluded that employees of the First Claimant, to whom it had issued COS, were not working in accordance with the job descriptions which the First Claimant had assigned to them. That was a serious default on the part of the First Claimant. It had taken place in relation, not just to one, but to three employees. The Points Based System places considerable trust in the hands of licenced sponsors. This has been said previously in connection with the issue of Confirmations of Acceptance for Studies by colleges who sponsor students as part of Tier 4 [cases].”*

41. With regard to the challenge to the SSHD’s approach to dishonesty in the present case it is helpful to note that *Taste of India* (at paragraph [114]) applied a rationality test to the SSHD’s conclusion of dishonesty.
42. Furthermore, when addressed concerning a submission based upon *Ivey v Genting Casinos (UK) Ltd* [2017] 3 WLR 1212 to the effect that the SSHD was obliged to “figure out the state of mind” of the individual employer and employee when reaching a conclusion as to dishonesty, the Richard Clayton QC concluded that this analysis introduced a complication that did not exist in the provisions of the Guidance.

## **SUBMISSIONS**

43. The Claimant raises in essence four heads of challenge derived from their Skeleton Argument and elaborated upon orally. There were some subsidiary arguments raised that were not necessarily in these four categories but the gist of and general framework for the Claimant’s submissions was that:
- (i) The decision was unreasonable or otherwise unlawful because it was based on the flawed perception that Goldcare Homes had acted fraudulently, and with deception.

- (ii) There was procedural unfairness on the part of the SSHD and general unfairness in how he approached his decision.
- (iii) It was unlawful and irrational to find no genuine vacancy on the basis of failure to produce evidence that the Claimant was not in fact required to produce or couldn't reasonably be expected to possess.
- (iv) Article 1 Protocol 1 to the ECHR is engaged, and potentially, Article 8. At the very least this meant the Court had to consider with particularity and anxiously the elements of decision-making by the SSHD.

**Ground 1 – Dishonesty as precedent fact, and, in any event, dishonesty tainting the SSHD's conclusions**

44. The Claimant's primary submission on Ground 1 was to the effect that the SSHD was required to determine, as a matter of precedent fact, whether or not there had been dishonesty. In reliance on *R v Secretary of State for the Home Department ex parte Khawaja* [1984] AC 74, at page 110[e], to the effect that;

*“Where the exercise of executive power depends upon the precedent establishment of an objective fact, the Courts will decide whether the requirement has been satisfied. The Claimant asserted in the present case that the Secretary of State was obliged to prove to the Court that dishonesty had been involved in the Claimant's behaviour.”*

45. It was also argued that the finding as to dishonesty could not be sustained in any event. Further, the Claimant says that the SSHD, in stating that there was no evidence Mr Tiwari was responsible for the creation of the submitted documents, was in fact alleging that the claimed work had been done by somebody else, and it was impossible, the Claimant said, to support a contention that the work was done by somebody else.

46. It was also said that, necessarily, where deception was the centre of the decision-making, a judicial review process would be unfair in reliance on the case of *R(o/a Mohibullah) v Secretary of State for the Home Department* (TOEIC-ETS-Judicial Review principles) [2016] UKUT 00561 (IAC).

**Ground 2 – Procedural (and general) unfairness**

47. In respect of the Claimant’s second contention, it was argued not only that the process of decision making was unfair but that the SSHD was generally unfair in that he did not appreciate or exercise properly the discretion he had not to revoke the licence.
48. Mr Dingley complained that in the context of three previous visits where there had been investigation without adverse outcome, and in a case where there was, it was asserted, little incentive to fabricate a COS for gain, the discretion should have been exercised differently in any event. It was asserted that Human Rights considerations were in play, and that that would make a difference to the nature of the decision making. The conduct of the interviews of both members of staff revealed procedural unfairness the Claimant said, and there was no sufficient explanation as to the discrepancy in the length of the two interviews: that of Mr Tiwari had lasted only, it was said, about ten minutes, whereas that of the Senior Officer, Mr Goradia, had lasted for closer to 50.

**Ground 3 -Dishonesty - the finding of ‘No Genuine Vacancy’ requires it, and the in any event such an inference cannot be made**

49. The essence of this submission was that, on a proper interpretation of the Guidance, the ‘Genuine Vacancy Test’ could not be breached by anything short of intentional deception on the part of the licence holder and that paragraph 15.13 of the Sponsor Guidance, suggested this. Accordingly, the SSHD, in asserting that a finding of “no genuine vacancy” under the Guidance did not require intentional deception, had fallen into error. In any event on the facts of this case, he submitted that it was impossible lawfully to find that there had been dishonesty here, whether by inference or otherwise.

**Ground 4 - Article 1, Protocol 1 ECHR**

50. The Claimant’s fourth ground concerned the engagement of Article 1, Protocol 1. It was stated that a business in the position of the Claimant, as a large care



home provider with a good rating from the industry regulator, and a prize-winner, and no adverse regulatory findings, the marketable goodwill would be affected because the operations would be hampered by the loss of key staff members. It was explained in the Skeleton Argument that Article 1, Protocol 1 was not argued to be a complete bar on the decision, but imposed rather a restriction on how the SSHD would approach it and an expectation that the Defendant would use its discretionary powers with care.

### **The Defendant's Response**

51. The essence of the SSHD's answer to the Claimant's claim is founded on the primary submission that there were three separate and independent breaches of Sponsor Duties upon which the SSHD relied when revoking the Tier 2 Sponsor Licence. These were breaches of the Guidance as follows:
- (a) Annex 5(k): Deception in the form of false statements. This was "*General Sponsor Duties 3*" in the Revocation Letter.
  - (b) Annex 5(ee) and (gg): Mr Tiwari's role was not a "*genuine vacancy*". This was "*General Sponsor Duties 1*" in the Revocation Letter.
  - (c) Annex 5(r) and (t): The fact that Mr Tiwari's work was at a lower skill level than was stated in the COS. This was "*General Sponsor Duties 2*" in the Decision Letter.
52. Importantly, Mr Holborn points out, each of these reasons for revocation is freestanding. Any one of them, if made out, was sufficient to found revocation. The SSHD stood by each of them as lawfully applied, and asserts each as a reasonable basis for revocation on the facts of this case.
53. The SSHD's submissions emphasised that Annex 5 of the Sponsor Guidance indicates the circumstances in which the SSHD will revoke a Sponsor Licence. Annex 6, by contrast, gives examples of where the SSHD may revoke a licence. The relevant provisions relied upon here are those contained in Annexe 5 which

include within them a simple proscription on employing a migrant in a job that does not meet the skill levels required for the job by the relevant tier and category.

54. Mr Holborn relied upon the principles set out earlier in this judgment that derive from the cases of *Westech*, *Raj v Knoll* etc. He submitted that absent a failure to comply with public law duties, a decision to revoke a Tier 2 Sponsor Licence may only be reviewed by this Court on *Wednesbury* grounds, and appropriate weight must be given to the expertise of the SSHD in the matters under consideration.
55. The SSHD points in particular to the fact that the role of business analyst under Standard Occupational Classification (“SOC”) Code 2423, Management Consultants and Business Analysts, included tasks that he says differed significantly from those which were stated to be completed by Mr Tiwari.
56. The essence of Mr Holborn’s submissions is that the materials produced after the suspension decision clearly failed to show that Mr Tiwari in fact undertook the roles that were specified in the COS under the appropriate classification.
57. He characterised the data produced in Appendices 1 to 6 as failing to provide any evidence of assessment of functions, objectives and requirements of organisational financial projection; the ad hoc fees pricing policy at Appendix 3 was simply a table of private funder and public funded fees with guideline fees and had no evidence of work by Mr Tiwari relating to the development of relevant policy. Similarly, the requirement for determining the appropriate method of data collection and research methodology, and analysis and interpretation of information gained to formulate and implement recommendations and solutions, was not evidenced by the provision of mere data. There was no evidence of Mr Tiwari analysing and interpreting, nor of him recommending solutions: “*It is just data*” was the submission.
58. Generally speaking, it was the absence of detailed analytics that bore upon the SSHD’s view that there were lower skilled duties involved in the job performed

by Mr Tiwari, compared with the requirement of his COS, which was an occupation at a considerably higher level.

59. Further, it was submitted that the emails did not evidence attending seminars and workshops to identify process improvements and to develop process efficiencies, rather there was an attendance at a training session for a new purchasing system that was being introduced.
60. Mr Holborn defended the lawfulness of the SSHD's decision by reference to the decisions in *Liral Veget* (supra) and *R(Sri Lalithambika Foods Limited v SSHD* [2019] EWHC 761 (Admin) at [81]. The latter case, he submitted, supported his case on the inference of dishonesty. In the circumstances of that case Charles Bourne QC sitting as a Deputy Judge of the High Court had held that, on the facts of that case, the disparity between the actual job done and the sponsored role was sufficient to infer that the sponsor must have known, and had been dishonest in relying on the original job description.
61. As to the Claimant's case that the SSHD was irrational and / or failed to exercise a proper process of discretionary decision making, he accepts that the SSHD retains a residual discretion not to revoke, and points to the passage in the revocation letter that expressly considers this. Further, the SSHD remarks in his Skeleton Argument, that in a case such as the present, where the Claimant still maintains the migrant was indeed doing a job that met the requirements of the sponsored role, it has to be said that that Sponsor does not show any acceptance or understanding of the breach of the Sponsor Licence Duties, it is not possible to see how any steps short of revocation could work. He submits it is impossible to see how any action plan to ensure future compliance could possibly be effected.
62. The SSHD further submits that under the genuine vacancy test, actual dishonesty does not need to be proven for the requirement to be infringed. He asserts that the paragraph 15.13 the definition of *Genuine Vacancy* means any vacancy that does not include dissimilar and / or lower-skilled duties. Whilst Mr Holborn accepts that dishonesty is included in each of the examples given,

he points to the fact that they are stated not to be exhaustive, and to the fact that his witness, Mr Hugh McCollam, an Immigration Officer, in his statement in these proceedings, interprets the Guidance as meaning that an exaggerated or incorrect job description, due to a misunderstanding of the Codes or indeed an honest mistake, would nonetheless constitute a vacancy that was not “genuine”. The SSHD says that the policy effectively requires a guarantee from the Sponsor that the requirements of the Guidance will be fulfilled, including that a vacancy is genuine.

63. The SSHD also points to the fact that the purported duties are, word for word, the same as the SOC Code and says they appear to have been simply copied by the sponsor into his job description. . This is prayed in aid as evidence that the job description was drafted with a view to enabling a migrant dishonestly to remain in the UK, rather than with a view to enabling a vacancy to be filled: the sponsor must provide an accurate job description of a job that exists and then apply the code, not attempt to draft a job description to fit the code. In the circumstances, it was not irrational of the SSHD to conclude there was a dishonest intent.
64. Importantly, however, the SSHD also argues that in any event it was sufficient and he would have revoked the licence on account of the fact that, as a matter of fact, the job being performed was not consistent with the description within the code for which the COS had been granted.
65. In answer to the argument that the different interview length showed procedural unfairness, the SSHD said that in truth it was the paucity of detail and information forthcoming from Mr Tiwari that dictated a shorter interview. In any event, a short interview does not demonstrate unfairness. The senior officer also interviewed- with whose role the SSHD had no query- had much more to say for himself and had evidence to produce in support.
66. Mr Dingley lightly sketched an oral argument -not at the forefront of his paper case -to the effect that Article 8 was engaged because this is a care home involving the personal care of the elderly and infirm. Furthermore, migrants’

status could be adversely affected. The real thrust of the submissions under this head, however, were to the effect that because it could be said Human Rights were engaged, there was therefore a higher standard applied in a review of the Secretary of State's decision - making. The SSHD responded to these points, aside from noting that they were not explicitly pleaded, in terms that Article 8 rights were not engaged because the decision would not curtail the migrant's leave, nor was any further evidence adduced. He pointed out that a migrant is given 60 days to find a new sponsor in any event.

67. With respect to the Article 1 Protocol 1 argument, the SSHD says, relatively shortly, whether or not the article is engaged, revocation is a proportionate interference with any right that arises and in any event, no evidence has been provided to corroborate the assertion that there is an impact on the marketable goodwill of the business. It is a matter of agreement that of the current thousand employees, only three are migrant workers. It is fair to say that the ECHR point was not pressed by Mr Dingley.

### **Consideration**

68. The Claimant asserts that the decision to revoke the Sponsor's Licence is *Wednesbury* unreasonable because it is founded upon a flawed dishonesty finding. In my judgement this submission is erroneous. The decision is not founded solely on a finding of dishonesty, nor has any finding of dishonesty "infected" the reasoning of the revocation decision. The decision of the SSHD is, as submitted by Mr Holborn, plainly founded on three separate pillars, as he describes. The difficulty for the Claimant is that any one of those pillars would support a case for which the Guidance directs revocation.
69. I shall turn to the dishonesty issue in due course. Dealing first with the allegations concerning precedent fact, in my judgement it is clear that this is not a case to which *Khawaja* applies. This is not a case that depends upon the exercise of a statutory power dependent on a finding of dishonesty. The law, as set out in the cases of *Datamatics UK Limited v Secretary of State for the Home Department* and *Taste of India v SSHD*, as set out above, makes clear that there

is no room for a *Khawaja* submission in Sponsor Licence removal cases such as the present one. There is no suggestion that there is clear fault in the reasoning of the other cases of equal jurisdiction and I am bound by them.

70. The decision that there was no evidence that Mr Tiwari was responsible for the creation of the documents is not, without more, a finding of dishonesty. It does not postulate their creation by another; that misunderstands the SSHD's reasoning. The issue in this case was that having raised the point that neither Mr Tiwari, nor the Sponsor had demonstrated that the scope of the duties carried out was the same as the scope of the sponsored role, this point needed to be shown to the SSHD's satisfaction. It was up to the Sponsor to prove it to the SSHD when challenged on the fact. The opportunity given to provide materials was the chance to provide acceptable proof that Mr Tiwari did do what the role required under the particular designation. In this case, that was a sophisticated role involving analysis, projection and assessing the functions and objectives of organisational financial projection as described. The inability of the company to provide any material which was, on its face, incontrovertibly connected with Mr Tiwari or was evidence of those higher level duties was the nub of the issue.
71. It is quite impossible, in my judgement, to characterise the SSHD's failure to be satisfied that Mr Tiwari carried out the sponsored role, as *Wednesbury* unreasonable. It is, with respect, plain from the answers given by the sponsor, as well as those by Mr Tiwari, that what he was understood to be doing was of a lower order than substance of the role for which a COS had been obtained. The materials produced did not, for the reasons given by Mr Holborn, dispel that dissatisfaction. Accordingly, it is the case that the SSHD cannot be challenged on his factual conclusion that the provisions of the Guidance contained in Annex 5(r), "*You employ a migrant in a job that does not meet the skill level requirements as set out in this Guidance*", was breached.
72. It is absolutely clear and stated in terms that breach of Annex 5(r) constitutes a circumstance in which the SSHD will revoke a Sponsor Licence absent special circumstances. It was not here suggested that there were special circumstances. The provisions could not be clearer, nor could it be said, on the evidence and in

the circumstances of the current case, that any argument founded upon Article 8 would constitute special circumstances. It was not argued to be so.

73. The SSHD is, in my judgement, correct when he says the Applicant misapprehended the purport of his decision on revocation.
74. This is also an answer to the suggestion that there was procedural unfairness in the case. In my judgement the Claimant has misunderstood or at least underestimated the scope and rigour of his obligations to satisfy the SSHD that the scheme was being properly applied. The character of the decision-making body and the kind of decision it has to make together in the framework in which it makes it, dictate the contours of fairness. As the extracts for the cases above demonstrate, the Sponsor Scheme is rigorous in its demands and it affords a particular respect to the judgement of the SSHD. In the present context I can detect no unfairness of process. The interviews, even if one was shorter than the other, were sufficient under this scheme to give the Sponsor and the migrant in question a chance to answer.
75. The Applicant has further, also with a light touch, relied upon the decision in *R(oao)Mohibullah v SSHD (TOEIC – ETS – judicial review principles)[2016] UKUT 00561 (IAC)* to suggest that it would always be unfair for a judicial review to be the sole recourse in a case where deception founded the revocation.
76. Not only is deception not the only ground of revocation in this case, but *Mohibullah* is a wholly other case.
77. In that matter, the challenge was to the SSHD having chosen one available procedural route over another available procedural route in order to determine a case. This choice compelled the Applicant to use only judicial review for a challenge, rather than affording him a right of appeal. It was the fairness and rationality of that decision that was in issue. In the present case, the SSHD has evolved a single system of decision -making concerning Sponsor Licences which is subject to the policy and the approach as set out above. There is no room for the contention made by the Claimant in this case.

78. The SSHD has a complete answer to the challenge to revocation. The SSHD was entitled to revoke the Sponsor's Licence on the grounds that the Sponsor had "*employed a migrant in a job that does not meet the skill level requirements set out in [the] Guidance*" as set out in under Annexe 5(r), for which breach the Guidance makes clear, the SSHD will revoke a licence. That cannot be characterised a perverse or otherwise tainted. It does not involve an allegation of dishonesty.
79. There is nothing in the allegations of procedural unfairness. In my judgement the SSHD gave the Sponsor and his employee every opportunity to put forward persuasive material either orally, or on paper, or by other means to demonstrate that the job being performed did match the sponsored role.
80. Likewise there is nothing in the point that the SSHD unfairly did not consider the exercise of his discretion not to revoke. As was pointed out by Mr Holborn, the decision letter expressly referred to the fact that this case was not suitable for a different outcome because the Sponsor did not agree with the SSHD analysis that Mr Tiwari's job did not comply. That conclusion cannot be challenged as perverse.
81. I am unpersuaded that there is anything in the points raised regarding the ECHR. The submissions were, perhaps understandably in the light of the authorities, not developed, and they were unsupported by evidence. Accordingly, I propose to say no more than that, on the facts of this case, where 3 of 1000 employees stand to be potentially adversely affected by the loss of the licence, an Article 8 case in respect of residents could not be made out. Further and in any event, any interference with rights would be proportionate. For the reasons given by Mr Holborn, a case based on infringement of employees rights, likewise. There is nothing to add to the analysis of A1P1 in this context set out in the cases referred to at the beginning of this judgment.
82. Turning more fully for a moment to the allegations of dishonesty. Whilst, given the findings above, it is not strictly necessary to reach a conclusion for the purpose of this judgment, I find that the SSHD is wrong to assert that the notion



of a genuine vacancy as it is used in the Guidance under paragraph 15.13 does not connote an element of dishonesty.

83. Whilst plainly the Guidance is not a statute, nor should it be construed as such, the only examples given of its *operation* concern cases in which an intention to deceive is present. What is referred to by Mr Holborn as “*the definitions*” are in my judgement not definitive in nature but are descriptive of certain of the characteristics of a vacancy that is not genuine. The first two bullet points under para 15.13 of the Guidance say nothing about the state of mind required to fall foul of the stricture requiring a genuine vacancy to be in existence for the purposes of this part of the rule. The inclusion of the three example bullet points is however is instructive on exactly this point.
84. The first bullet example is a case where there has been “*deliberate exaggeration*” to make it look as if a job meets the requirements “*when it does not*”, according to the second bullet, for “*a job or role that does not exist in order to enable a migrant*” to come to or stay in the UK. The last bullet talks of advertisements “*tailored to exclude resident workers*”. This is the language of deliberate deception and of dishonesty. Further, the SSHD himself draws a distinction between, on the one hand, a role that does not meet the relevant Tier 2 criteria, and, on the other, a role that (obviously does not meet those criteria either) but in addition, is properly described as not a “*genuine vacancy*”. This distinction appears from the wording of Annexe 5(r); 5(ee) and 5(gg).
85. Further, I do not accept that the SSHD was lawfully entitled in this case to infer dishonesty from the facts as he found them. The relevant part of the decision letter, set out also above, read as follows:

*“43 You have failed to provide evidence which demonstrates Mr Tiwari has carried out the duties as stated on his COS or at the appropriate level for Sponsorship. You have also failed to demonstrate that the role Mr Tiwari undertakes matches the job description as stated in Appendix J of the Immigration Rules.*

*44. This compounds our belief that your client has failed to meet their obligations as a licenced sponsor, by providing false information when assigning Mr Tiwari his COS. In the absence of*

*any evidence to the contrary, we conclude that your client has provided false information in order for them to meet the requirements for Sponsorship under Tier of the Points Based System.”*

86. In my judgement the inference of dishonesty was, in the circumstances, irrational and not open to the SSHD. I agree, it is a matter for the SSHD’s judgement in the first instance, but any decision must be rationally reached. This was a Sponsor with, ostensibly a large, very successful business. Mr Gidar had an unblemished reputation, indeed a significant profile in his industry. Further, of his cohort of 1000 workers, only three were reliant upon a role under the Tier 2 Sponsorship Scheme. These factors in my judgement point away from an inference that a dishonest attempt to manipulate the system was being made. During the process Mr Gidar had himself described the role that was carried out, saying he had clearly understood it to come within the appropriate scale. On more than one occasion over recent years inspections had passed without adverse comment on the role, which had not changed, performed by Mr Tiwari under the Scheme. Whilst of course not binding as to any future finding on inspection, that factor does not point towards a deliberate fraud.
87. I accept that in certain cases it will be possible to draw an inference of a deliberate and dishonest attempt to circumvent the system from the mere fact of the differences between the job carried out and the sponsored role. That was not this case, given the circumstances described, or the scale of the differences.
88. Accordingly, whilst I have found that the decision to revoke is unimpeachable and so Mr Gidar has lost his judicial review challenge, he comes out of the case with the finding of dishonesty against him quashed.