Neutral Citation Number: [2023] EWHC 3193 (Admin)

CO/495/2023

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

B e f o r e :
HHJ KRAMER
Sitting as a Deputy Judge of the High Court

BETWEEN:

PRESTWICK CARE LIMITED
MALHOTRA CARE HOMES LIMITED
MALHOTRA CARE HOMES (SUNDERLAND) LIMITED
TRADING AS PRESTWICK CARE

Claimant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

Hugh Southey KC and Marian Cleghorn (instructed by the Head of Legal Services, Malhotra Care) for the Claimant
David Manknell (instructed by Government Legal Department) for the Defendant

Hearing dates: 12, 13, 17 July 2023, and 14 November 2023

JUDGMENT

1. The claimants are challenging the decision of the defendant, made on 3 February 2023, to revoke the claimant's sponsor's licence. This confers, upon the claimant, the power to issue Certificates of Sponsorship (" CoS") which enable it to recruit foreign nationals more efficiently than is the case for other employers, who rely upon their staff, to obtain immigration leave to enter and remain outwith the sponsorship scheme.

2. On 7 February 2023 Bryan J granted the claimants an injunction with the effect of preventing the revocation decision taking effect until the permission decision or further order. I was told that the parties have agreed that they are treating the revocation as remaining in suspense until judgment on this application.

3. Permission to apply for judicial review was granted by Fordham J on 21 April 2023, when directions were given, including permission for the claimants to rely upon a Reply and adduce fresh evidence, with the question of admissibility deferred to the judge dealing with the substantive hearing.

4. The claim, with the grounds of challenge, were issued on 7 February 2023. The detailed Grounds of Reply are dated 22 May 2023 and are supported by a statement from the decision maker, Daniel Magee. The claimants rely upon the witness statements of Anupama Kaura, described as the Head of Legal at Malhotra Group PLC, dated 7 and 24 February 2023. They also filed as statement from Evelyn Tierney (Director of Care), dated 7 February 2023, to which no reference was made in the hearing before me. I was told by the claimants that the relevance of these statements is to demonstrate what information they would have put before the decision maker if they had been given a fair opportunity to answer the allegations which led to the revocation.

5. The claimants are represented by Hugh Southey KC and Marian Cleghorn, of counsel, and the Defendant by David Manknell, of counsel.

Background

6. The claimants, a group of 3 companies operating under the collective name 'Prestwick Care', operate 15 care homes, providing a total of 813 beds. They employ 857 staff, 219 of whom have been employed under the visa sponsorship scheme. The group became a licensed sponsor for the purposes of the scheme on 27 November 2008. As the businesses operate as a group under a single name, I shall refer to them as the claimant.

7. In the period 24 to 27 October 2022 the defendant's Sponsor Compliance Team attended homes operated by the claimant to assess their adherence to the defendant's 'Guidance for Sponsors'. In the course of the visits the team interviewed Michelle Boyd, of the claimant, described as a licensed Level 1 User and PA to the Board of Directors and 29 other members of staff. A Level 1 User is someone nominated by the sponsor to have full access to the Sponsor Management System through which the scheme is operated.

8. On 6 December 2022, James Dickens, of the Sponsor Compliance Team, wrote to the claimant suspending their sponsorship licence on the grounds of alleged failures in compliance which had been revealed during the visits. The grounds may be summarised in this way, with references to the Defendant's guidance taken from the text of the letter:

    a. Sponsorship Duties 1: The defendant was not satisfied that the role of Senior Care Assistant, to which the claimant had assigned a number of staff on Certificates of Sponsorship represented genuine vacancies. This assertion was the result of interviews with Senior Care Assistants whose account of their work do did not match the job description provided by the claimant in the certificates. The job description in the Certificates of Sponsorship for the role was expressed as follows:

    "Leading, supervising and training the care team; General Nursing duties; Being responsible for ordering, storing and administering medication; Keeping precise, up to date records; Maintaining the client's dignity and respect at all

times; Achieving the highest possible standard of care in a professional manner through direct nursing care and effective supervision of staff; Taking management responsibility for shift as directed; Ensuring that all Prestwick Care and project specific Policies and Procedures are adhered to, including but not limited to, Safeguarding, Incident reporting, Risk Assessment and Care plans; Working appropriately with your line manager in all matters and that he/she is notified on any matter that has caused, or has the potential to cause, harm to anyone in our care or any member of staff or any issue that affects significantly the continuing quality of service delivery."

The defendant identified 5 care assistants who told the inspector that they did not undertake a number of these duties. Jinu Chacko said she did not supervise or train care staff, did not administer medication and did not produce risk assessments or care plans. Lily Puthenpurackal Joy stated that she did not order, store or administer medication and did not lead, supervise or train other members of staff. Jomol George, Kawaljeet Kaur and Ambily Jose said that they did not train or supervise staff or administer medicine.

The letter referred the claimant to the relevant guidance for sponsors, as follows:

"8. Paragraph C1.27 of the Workers and Temporary Workers: guidance for sponsors part 3 states:

A genuine vacancy is one which:
• requires the jobholder to perform the specific duties and responsibilities for the job and meets all of the requirements of the relevant route
• does not include dissimilar and/or predominantly lower-skilled duties
• is appropriate to the business in light of its business model, business plan and scale
9. Paragraph C1.29 of the Workers and Temporary Workers: guidance for sponsors part 3 states:
Examples of vacancies that are not considered to be genuine include, but are not limited to:
• a role that does not actually exist
• one which contains an exaggerated or incorrect job description to deliberately make it appear to meet the requirements of the route when it does not, or is otherwise a sham
• a job or role that was created primarily to enable an overseas national to come to, or stay in, the UK
• advertisements with requirements that are inappropriate for the job on offer (for example, language skills which are not relevant to the job) or incompatible with the business offering the employment, and have been tailored to exclude settled workers from being recruited

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

The role undertaken by a worker you have sponsored does not match one or both of the following:
• the occupation code stated on the CoS you assigned to them

• the job description on the CoS you assigned to them"

b. Sponsorship Duties 2: A nurse, Tessa Joseph had not been paid the salary stated in her Certificate of Sponsorship as reductions had been made whilst she was training. (Guidance for sponsors, part 2, paragraph S4.5 and part 3 Annex C1 aa)

"14. Paragraph S4.5 (bullet point 1) of the Worker & Temporary Worker Guidance for Sponsors (part two) states:
When you assign a CoS to a worker, you must give the following information about the salary package:
• the gross salary figure, which must:
o represent the total amount paid to the worker, gross of any tax paid, whether paid in the UK or overseas
o if the worker is being sponsored on the Skilled Worker route, not include any allowances, unless an exception applies – see Sponsor a Skilled Worker for information
o for routes other than Skilled Worker, include any permitted allowances and guaranteed bonuses

15. Annex C1 aa) of the Worker & Temporary Worker Guidance for Sponsors (part three) states that we will revoke a licence if:
You pay a sponsored worker less than you said you would on the worker's CoS, and:
• you have not notified us of the change in salary or;
• the reduction is not otherwise permitted by the Immigration Rules or the Workers and Temporary Workers: guidance for sponsors"

c. Sponsorship Duties 3: The defendant was not satisfied that other workers were being paid to the level stated in the Certificates of Sponsorship. This was based on examination of staff payslips which showed a deduction marked as salary sacrifice. During interviews with a number of staff, two of them, Remya Varghese and Jobymol Sebastian said they did not know what this was for. The latter said they had asked a supervisor who had not been sure what it was. Following the visit Mrs Boyd had provided to the defendant a letter to workers dated 8 April 2022 indicating that the claimant was introducing a Pension Salary Exchange Scheme under which there was automatic enrolment, leaving it to the employee to opt out. The defendant's letter states that the two employees who expressed ignorance as to the justification for the deduction seemed to be unaware of the 8 April letter. Reference was made to Guidance for sponsors, part 2, paragraph S4.5 and part 3 Annex C1 aa, and it was said:

"20. This contravenes paragraph S4.5 (bullet point 1) of the Worker & Temporary Worker Guidance for Sponsors (part two) as stated above.

21. This is in breach of Annex C1 aa) of the Worker & Temporary Worker Guidance for Sponsors (part three) as stated above."

d. Sponsorship Duties 4: The defendant was not satisfied that the claimant was complying with UK employment law in relation to staff sick pay. Three of the employees interviewed said they did not receive sick pay. Reyma George had said that she had taken 2 weeks of sick leave but only received sick pay for the first week and had been told by a manager that no sick pay was available. Lily Puthenpurackal Joy said that she had been told that sick absences would not be paid. Amily Jose said that she did not receive sick pay. Reference was made to Guidance for sponsors, part 3 paragraph 1.31 ad Annex C1 and C2 a. The letter went on:

"Paragraph 1.31 (bullet point 1) of the Workers and Temporary Workers: Guidance for Sponsors (part three) states:
You have a Duties to comply with wider UK law (other than immigration law). This includes, but is not limited to:
• *complying with UK employment law, such as National Minimum Wage, Working Time Regulations and paid holiday entitlement*
25. Annex C2 a) of the Workers and Temporary Workers: Guidance for Sponsors (part three) states that we will normally revoke a licence if:
You fail to comply with any of your sponsor duties set out in section C1 of this document."

e. Sponsorship Duties 5: The claimant breached the guidance by seeking to recoup from its employees the Immigration Skills Charge it was obliged to pay to the defendant in respect of sponsored workers. This information was derived from a Schedule of Recoverable costs provided by the claimant at inspection which showed recoupable costs "including £3,199 'CoS´ cost under the section Visa Costs." The suspension letter went on *"We note that the current cost of a CoS is £199 and that, apart from your most recent CoS assigned 2 December 2021, you had previously assigned CoS for 3 years. As such we believe this figure consists of the £199 Certificate costs plus £3,000 immigration Skills charge that would cover a three year sponsorship period."* Mrs Boyd had, post visit, provided a template letter relating to recoupment of costs which showed the cost of the CoS at £199 but also included an additional line for undefined costs which was labelled at UKVI. The defendant believed this to be the Immigration Skills Charge as the only other noted charge on the Schedule was the Immigration Health Surcharge, which had its own line. Here the reference was to Guidance for sponsors, part 2 Paragraph S5.7 and part 3 paragraph C2 q. The letter stated:

"30. Paragraph S5.7 of the Worker & Temporary Worker Guidance for Sponsors (part two) states:
You must not pass any of the charge on to the sponsored worker. If we find out that you have done so, we may revoke your licence.

31. Paragraph Annex C2 q) of the Workers and Temporary Workers: guidance for sponsors part 3 which states we will normally revoke your licence:
You are, or were, liable to pay the Immigration Skills Charge in respect of a worker whom you are, or were, sponsoring, and you have asked that worker to

pay some or all of the charge, or you have recouped, or attempted to recoup, some or all of the charge from them."

f. Sponsor Duties 6: The defendant was not satisfied that the claimant was demonstrating practices and procedures in line with the values of the sponsorship regime as set out in the guiding principles for sponsorship. This was said to arise from the fact that employees were required to repay recruitment expenses incurred by the claimant for five years following the start of employment but were not made aware of the level of these fees, if at all, until they had arrived in this country. 5 employees, Messrs Chacko, Varghese, Thomas, Jose and Thapa said they had either been told that there would be no cost for their employment or were not informed that there would be until their recruitment. Nisha Jacob said that in her contract, at the time of first employment in 2019, there had been no repayment provision but on renewal of her visa she was required to sign a contract which provided that she repay a £3,000 agency fee, even though no agency had been used. Daljit Kaur's contract provided for repayment of £3,000 agency fee whereas she had said that no agency had been used as she had been in the country on a previous visa and had paid her own legal expenses. Blessie Anil Jacob's contract required her to repay £3,000 agent's costs and £650 of legal and administrative costs if she left within 5 years of the date of her NMC (Nursing and Midwifery Council) PIN even though she had been working for the claimant for just under 3 years at the date of the contract. Her previous contracts had not included a costs schedule claiming these amounts. The defendant said that this information pointed to the terms and conditions of employment heavily favouring the employer and employees being left in the dark as to their repayment liabilities prior to arriving in the UK. The claimant was referred to Guidance for Sponsors, part 3 paragraph C1.3 to C1.5) and Annex C2a, in the following:

"40. The guiding principles of sponsorship outlined in paragraphs C1.3 to C1.5 of the Worker & Temporary Worker Guidance for Sponsors (part three) state that:

C1.3 Sponsorship is a privilege not a right. The sponsorship system reflects that those who benefit directly from migration (employers, education providers or other organisations who bring in overseas nationals) should play their part in ensuring the immigration system is not abused. Significant trust is placed in sponsors and they must ensure they comply with immigration law and wider UK law, and not behave in a manner that is not conducive to the wider public good.

C1.4. To achieve these aims, all licensed sponsors must fulfil certain duties. Some of these duties apply to all sponsors, whilst others are specific to those licensed under certain routes.
C1.5. The objectives of these duties include, but are not limited to:
• preventing abuse of immigration laws and sponsorship arrangements
• capturing early any patterns of behaviour that may cause concern

• addressing possible weaknesses in process which can cause those patterns
• monitoring compliance with the Immigration Rules, all parts of the Worker and Temporary Worker sponsor guidance, and wider UK law (such as employment law)
• ensuring sponsors do not behave in a way that is detrimental to the wider public good"

g. Monitoring Immigration Status: The defendant was not satisfied that the claimant was complying with its duties to monitor that its sponsored employees continued to have a right to work in the UK. This was the result of a random sample review of the claimant's HR software, called 'Coolcare', which revealed that there were no entries for eight sponsored employees. The software included an alert option for visa expiry dates. The letter referred Guidance for sponsors, part 3 paragraph C7.28 and Annex and C2 b and stated:

"44. Paragraph C7.28 of the Workers and Temporary Workers: guidance for sponsors part 3 states:
You must do this check before the relevant employment starts. If you employ someone who has no restrictions on their right to be in the UK and work (for example, if they have indefinite leave to remain), you only need to make this check once. If the employee has restrictions on their right to be in the UK and to do the work in question (for example, if they have limited permission to enter or stay under a Worker or Temporary Worker route), you need to conduct follow-up checks.

45. Paragraph Annex C2 b) of the Workers and Temporary Workers: guidance for sponsors part 3 which states we will normally revoke your licence:
As a result of information available to us, we are not satisfied you are using a process or procedure necessary to fully comply with your sponsor duties."

h. Maintaining Worker Contact Details: It was alleged that the claimant had failed to keep an effective system of recording keeping. A review of the Coolcare system found it to contain errors as to the staff residential addresses. What was said to be a back-up system contained on an Excel spreadsheet was also reviewed. The defendant's review of both these documents was said to reveal that both databases contained incorrect addresses for seven sponsored employees. Reference was made to Guidance for sponsors, part 3 paragraph C1.16, Part 1 of Appendix D and Annex C2 b and the letter went on:

"Paragraph C1.16 of the Workers and Temporary Workers: guidance for sponsors Part 3 states:

You must keep certain documents for each worker you sponsor. Appendix D of the sponsor guidance lists these documents and how long you must keep them. The documents can be kept in paper or electronic form. If kept electronically, you must make sure that all the relevant parts of the document are visible as described in Appendix D.

49. Part 1 d of Appendix D keeping documents - guidance for sponsors states you must keep and make available on request:
A history of the worker's contact details (UK residential address, personal email address, telephone number (mobile and/or landline). This must always be kept up to date.

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

Under the hearing "Next Steps" the letter stated:

"51. We believe the issues described above constitute a failure to comply with your sponsor duties.
52. To give you the opportunity to explain the above issues before we begin revocation action, we have suspended your licence with immediate effect. You have 20 working days from the date of this letter to make representations including, submitting evidence, in response to this letter. If you do choose to submit representations, as well as responding to the points above you must provide the following supporting documents:" There followed a list of the requested documents.

9. The claimant replied to the letter on 22 December 2022 and provided the requested documents. Their responses may be summarised as follows:

a. General Sponsor Duties 1: Ms Chacko was found to have difficulties with communication due to her English and for that reason had been taken off various of her duties temporarily, though they remained part of her role. Of the other staff identified by the defendant, Ms Joy had not completed her induction training but would be performing her full role when she had. She had been allocated a mentor for this purpose and was to be reminded of those duties she was able to undertake. Ms Jose would be doing her full role in relation to providing medication but her training was an ongoing process and she did supervise staff. Ms George was spoken to since the inspection and she said that she needed more training before she could take responsibility for medication, care planning or communication with other professionals and her manager was working with her closely in those areas. Ms Kaur did work in accordance with the job description but must have misunderstood what she was asked by the inspector when she answered that she did not.

b. General Sponsor Duties 2: As regards Nurse Joseph the claimant was entitled to pay a lesser rate whilst she sought registration as is accepted by the defendant's own guidance.

c. General Sponsor Duties 3: Letters were sent to all those employed prior to April 2022 regarding the introduction of a salary sacrifice scheme. The two employees who claimed not to know what the deductions were had been informed of the scheme. A copy of the standard letter to staff with this

information was enclosed with the reply. Employment contracts and letters were also sent to post 1 April 2022 employees. The intention of the scheme is to pay employees more into their pension scheme though they have the right of opt out. Evidence was produced showing that some have opted out thus demonstrating they are aware of the new scheme.

d. General Duties 4: The records of the employees who claimed they did not receive or were told they would not receive sick pay had been checked. The employee who said she had been off for 2 weeks but only paid for 1 had not been off for two weeks and she had received all the sick pay due to her when she had been off. The second employee had not been off sick. She had only been off for suspension hours for which her pay slips showed she had been fully paid. The third had no sickness absence recorded and her time sheets showed that she had worked all her contracted hours.

e. General Sponsorship Duties 5: The cost labelled as UKVI was not the Immigration Skills Charge. The master contract was amended to reflect that the charge could not be recovered.

f. General Sponsorship Duties 6: The claimant could not insert figures for the recovery of recruitment expenses in the pre -arrival contracts as they could not calculate the exact figure. An example was given that the visa cost is paid at the equivalent currency exchange rate and this can fluctuate.

g. Monitoring Immigration Status: A system is in place whereby reminders are sent to Care Homes on a monthly basis to check if any visas are expiring.

h. Maintaining Worker Contact Details: One error in the recorded details was due to an administrative error. The others resulted from the supply of incorrect information by staff or staff failure to notify the claimant of a change of address.

10. On 24 January and 1 February 2023, the defendant emailed the claimant indicating that it would take longer to respond to its response than as provided for within the defendant's guidance. On 5 February 2023, the defendant wrote to the claimant revoking the sponsor licence. The defendant accepted that there had been compliance with General Sponsor Duties 2, in relation to Nurse Joseph, but not as regards the other allegations giving rise to the suspension. The letter sets out the defendant's decision with the reasons under the heading "Consideration" as follows:

General Sponsorship Duties 1

" 12 In your representations you state:
Providing personal care, assisting with bathing, and showering and assisting with meals all fall within the duty of maintaining the client's dignity and respect at all times. Not assisting with any of things would significantly reduce the quality of care provided to our Residents and would be a breach of the worker's duty to maintain the client's dignity and respect.
And
Unfortunately, due to the recruitment shortage that we continue to experience,

a lot of the workforce at Hadrian are Senior care staff who also cover the floor as care…

13. Whilst we acknowledge that workers may have to perform duties other than those listed on their CoS, sponsored workers are still expected to perform the job duties listed on their CoS for the majority of the time. We would therefore expect there to be evidence of the workers performing these job duties. You have still not provided evidence of performing job duties at the level of Senior Care Worker (SOC code 6146) for the following workers:

• Jinu Chacko (C2G9S47780T);
• Litty Puthenpurackal Joy (C2G2W57800E);
• Jomol George (C2G9G67786W);
• Kawaljeet Kaur (C2G0F27802G);
• Ambily Jose (C2G4I97773R);

14. For each of the sponsored workers above, you have provided emails which confirm that they have not performed the job duties listed on their CoS due to recruitment difficulties, problems with their English language ability, and gaps in their training. You confirm this in your response letter.

15. Firstly, as the sponsor, you are responsible for your recruitment. Any gaps in English language ability should have been identified and addressed. This is because according to Paragraphs SW 7.1 – 7.3 of the Workers and Temporary Workers: sponsor a Skilled Worker guidance, all skilled workers must demonstrate English language ability on the Common European Framework of Reference for Languages in all 4 components (reading, writing, speaking and listening) of at least level B1 (intermediate).

16. Your response letter and the attached emails state that Miss Chacko and Miss Rose (*sic-should be Jose)* have gaps in their English language ability. However, you have not provided any evidence that English language training is being provided and have not provided any evidence that they are progressing towards being able to perform the job duties listed on their CoS.

17. Secondly, whilst your response letter and the email chains state that duties training is now being provided to Miss Joy, Miss Geroge, and Miss Rose, you have provided no evidence of the training being delivered and the emails are vague and do not provide any details of the training.

18. Regarding Kawaljeet Kaur (C2G0F27802G), you state:

Kawaljeet Kaur has completed her medication competencies and has regularly completed medication administration. Kawaljeet Kaur also supervises and supports the Care Assistants as part of her role which she does very well. We therefore disagree that Kawaljeet Kaur does not train or supervise staff or administer medicine and can only think that she either did not understand the inspector's question or was so nervous that she did not properly explain her role.

19. In her interview, Ms Kaur stated that she 'does not lead, manage, or train any members of staff, does not order or store medication, and does not prepare care plans or carry out risk assessments'. You have not provided any evidence of her carrying out these duties, therefore you have not addressed the discrepancy or addressed the issue.

20. You have not provided any evidence of the above workers performing job duties at the level listed on their CoS. You have also not provided any evidence that any gaps in English language ability or duties training have been/are being addressed. We are therefore not satisfied that you have addressed the issues outlined above.

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

The role undertaken by a worker you have sponsored does not match one or both of the following:
• the occupation code stated on the CoS you assigned to them
• the job description on the CoS you assigned to them" .

General Sponsor Duties 3:

"You state in your representations:

Letters were sent to all those who were employed prior to 1 April 2022 regarding the introduction of a salary sacrifice scheme. A copy of this letter is enclosed (document 16A). Our employment contracts have been updated and letters were also sent to all migrants employed after 1 April 2022.

And

All of our workers, including Remya Varghese and Jobymol Sebastian, have been provided with full details to ensure that they are fully aware of the salary sacrifice scheme.

35. You have also provided a copy of the Pension Salary Exchange Letter dated 30 April 2022 (document 16A), a copy of the list of staff who opted out, and a sample of a payslip with the deductions.

36. In the Pension Salary Exchange Letter (document 16A), the date at the top of the document is 24 November 2022. Whereas the document date in the title of the document is 30 March 2022. You state that the letter was sent out to all employees, both those employed before and after the introduction of the scheme. However, you have not specified when these letters were sent out and the dates of the document you attached are inconsistent. Additionally, you have not provided any proof that the letters were dispatched to Remya Varghese (C2G2J47779T) and Jobymol Sebastian (C2G2G87779T) nor have you described the method of dispatch. Although you have attached a copy of the document, you have not provided copies of letters sent to sponsored workers.

37. Although you have provided a list of those who have since opted out of the Pension Salary Exchange, this in itself is not evidence that the letters were sent to Remya Varghese (C2G2J47779T) and Jobymol Sebastian (C2G2G87779T). You state that those unaware of the 'salary sacrifice' may simply have ignored your correspondence, yet you have failed to provide evidence that letters were dispatched to the individuals above.

38. Therefore, we are not satisfied that you properly informed the above migrant workers of the deductions and not satisfied that you are paying workers in line with their CoS. Although you have submitted representations and some evidence of action, you have not fully substantiated your claims and the fact remains that some workers are still unaware of the deductions and changes to their contract. You have therefore failed to resolve the issue outlined above.

39. This is in breach of Annex C1 aa) of the Worker & Temporary Worker Guidance for Sponsors (part three) as stated above."

General Sponsorship Duties 4:

"43. Regarding Remya George (C2G1M07774S), in your representations you state:
We have checked our payroll records and can confirm the following: Remya George: was paid £39.74 SSP as we received an isolation note. In total, Remya George missed five days of work as a result. Her three SSP waiting days meant a SSP payment of £39.74. The following dates are recorded on Coolcare as sickness:

5/09/2022 05/09/2022 11.0 1 Other
02/09/2022 04/09/2022 22.0 3 Other
11/07/2022 17/07/2022 44.0 7 Other
09/07/2022 09/07/2022 11.0 1 Other

44. You have provided details of the dates recorded as sickness absences for Remya George on Coolcare, your absence system. However, these dates are inconsistent with Remya George's interview, in which she stated that she took two separate week-long periods of sick leave. There is only one week-long period listed above. She also stated in her interview that she was told by a manager that there was no sick pay available for the second week. You have not addressed this in your representations. The dates outlined above, the SSP payment, and the periods of sickness noted in Miss George's interview are inconsistent. You have simply stated the dates you have recorded from your end and have not addressed the discrepancy.

45. Regarding Litty Puthenpurackal Joy (C2G2W57800E), in your representations you state:

Litty Puthenpurackal Joy: no sickness absence is recorded on Coolcare, the system that we use to record sickness absences. We have checked for gaps on Litty Puthenpurackal Joy's timesheets as well as checking with the Home Manager; the only time off recorded are suspension hours that are shown on Litty Puthenpurackal Joy's payslips as fully paid. No other time off is recorded and therefore no sick pay – or any other payment – is owed.

46. You have not addressed the issue. Our concern with Miss Joy was that she was told that she is not entitled to SSP, not that existing sickness absences went unpaid. It is possible that Miss Joy did not take any sickness absence due to her belief that she would not be compensated. This would reflect in a lack of sickness absence, which can be seen in your records. Therefore, simply reporting her absence record does not address the issue raised. Her claim that she was told that sick pay is unavailable is consistent with Miss George's account of a manager telling her the same thing. You have again failed to respond to these reports and have therefore failed to address the issue.

47. Regarding Ambily Jose (C2G4I97773R), in your representations you state: *Ambily Jose: no sickness absence is recorded on Coolcare. We have also checked Ambily Jose's timesheets and her contracted hours have been fulfilled every week. No other time off is recorded and therefore no sick pay – or any other payment – is owed.*

48. In our suspension letter, we stated:

Ambily Jose (C2G4I97773R) stated that she did not receive sick pay.

49. We note that is worded slightly incorrectly, and we apologise for the inaccuracy. Miss Jose declared in her interview that she "does not **get**" sick pay, not that she did not receive sick pay for any specific existing absence. This brings her statement more in line with those of Miss George and Miss Jose, who were told that sick pay is not paid or is unavailable.

50. Due to the minor miswording of our suspension letter, we accept that you have accurately paid Miss Jose.

51. However, despite this and whilst you have provided contracts which do state that workers are entitled to SSP, the issue remains that workers are incorrectly being told that they would not receive pay for sickness absences. You have not responded to the reports that workers are being informed that sickness leave is unpaid. Workers are unaware of their rights regarding SSP. Therefore, you have failed to resolve the issues we have raised on behalf of the above workers and are not complying with wider UK law regarding SSP.

52. Annex C2 a) of the Workers and Temporary Workers: Guidance for Sponsors (part three) states that we will normally revoke a licence if:

You fail to comply with any of your sponsor duties set out in section C1 of this document."

General Sponsor Duties 5:

"58. You have submitted a copy of an employee contract template for a senior care assistant/care assistant with amended costs dated 3 November 2022 (Document 39). In this document, section Annex 1 of the Employee Financial Agreement Section lists the costs which you may impose upon your workers and includes:

5. Visa Costs including:

5.1 Cost of assignment of Certificate of Sponsorship (CoS) £TBC.
5.2 United Kingdom Visa and Immigration (UKVI) at the cost of £ TBC.
5.3 Immigration Health Surcharge (IHS) at the cost of £ TBC.

59. In our suspension letter, we raised concerns about an undefined cost labelled only 'UKVI'. This charge still remains in the contract, and you have provided no evidence or explanation regarding the details of this vague cost.

60. The lack of explanation and the obfuscation of specific cost figures suggests a deliberate attempt to circumvent the rules in place that prevent you from recouping the cost (or part) of the Immigration Skills Charge by reducing transparency and omitting detail from us. Therefore, you have failed to address our concerns that you are recouping the (or part of the) ISC costs from your migrant workers.

61. Paragraph Annex C2 q) of the Workers and Temporary Workers: guidance for sponsors part 3 which states we will normally revoke your licence:
You are, or were, liable to pay the Immigration Skills Charge in respect of a worker whom you are, or were, sponsoring, and you have asked that worker to pay some or all of the charge, or you have recouped, or attempted to recoup, some or all of the charge from them."

General Sponsors Duties 6:

"71. Regarding Jesteena Devasia (C2G7I17781U), you have correctly identified that we referred to her applying for her own CoS but in fact we intended the refer to her applying for her own visa and we apologise for this minor error.

72. In your representations regarding the issues stated above, you state that you are unable to provide employees with a total costs figure in the pre-arrival contract. Whilst we accept that you included the bulk of the costs in the pre-arrival contract, it is unclear how you are able to provide estimates for other costs but not all of them, and therefore it is unclear why you are unable to provide an estimated total to your prospective employees in the pre-arrival contract. You state that this is due to the exchange rate fluctuations, but this would also affect airfare, which you have included a figure for. Additionally, airfare fluctuates frequently and significantly. Therefore, this explanation is not accepted.

73. You also confirm that migrant workers are issued a second contract upon arrival to the UK, which has the cost figure total included. We continue to find this problematic, as workers who have already arrived in the UK may find it difficult to say no to signing a new contract. Being in a foreign country and having already taken the flight may put extra pressure on them to accept terms which may have been unclear in the first contract. We therefore have continued concerns over the fact that you are excluding information until the second contract and/or changing any terms between the two contracts.

74. From your explanations, it is unclear whether the fee charged by BGM Consulting is the same as the £3000 agency recruitment fee that is included in the repayment clauses of the contracts you issue to employees. You seem to suggest that prospective employees are approached by a third party (BGM Consulting) and have the option to reject this advance. For example, you state that Jesteena Devasia (C2G7I17781U) continued to accept BGM Consulting's services and that she 'therefore incurred the charge' as a result of the third party services being provided. However, you simultaneously suggest that you include the £3000 charge as standard in many of your contracts, irrespective of whether third party agencies are used. These explanations are directly conflicting, and the charge remains unclear.

75. The inconsistencies regarding the agency cost persist further, as you have also failed to provide an explanation as to why Nisha Elsa Jacob (C2G5N37753I) had the £3000 agency recruitment fee included in a new contract, 3 years into her existing employment. You state that she signed a separate financial agreement at the time of her initial employment, which you have submitted. Upon review of this document, the £3000 agency charge is not specified. Additionally, you have failed to explain why Daljit Kaur (C2G2S87732A) had the £3000 agency charge included in her contract, despite the fact she used her own legal representations and carried out the visa process with an agent she hired herself.

76. You have not explained any details surrounding the £3000 agency costs included in the contracts outlined above. It remains unclear both to your migrant workers and to the Home Office how you arrive at the figure of £3000, the circumstances which incur this cost, or the justification for the cost. You have not explained what the cost pays for.

77. We are also concerned that the £3000 agency cost figure matches the £3000 ISC cost, which you are not permitted to recoup, as stated above.

78. Furthermore, we remain concerned that reports from your migrant workers suggest that many employees are unaware of the repayment costs and clauses. We accept that employees signed contracts which did include some or part of the repayment costs and clauses. However, specific figures are omitted from contracts and due to the vagueness of the charge and inconsistencies outlined above, we do not believe that these terms are made fully clear to prospective and existing employees.

79. You have failed to provide evidence that Prestwick Care are demonstrating practices and procedures in line with the encompassing values of the sponsorship regime. Based on what you have provided, we do not believe that the terms, costs, and clauses of your contracts are made clear to employees both before they arrive in the UK and while they remain here in your employment.
80. This is in breach of Annex C2 a) of the Worker & Temporary Worker Guidance for Sponsors (part three) as stated above."

Monitoring Immigration Status:

"84. You have not responded to our concerns regarding the eight workers above

who were not listed on your Coolcare system. You state that you have a system in place at your Head Office. However, you have not provided any details about this system or evidenced its existence.

85. You have provided an email which is an instruction to your care homes which states:

I have attached two letters that must be issued to any staff member on an overseas VISA. The letters should be issued 6 months and 3 months before their VISA expires, therefore you must diary the expiry dates as soon as they are employed with the Company and check their permission to work by using the Home Office Right to Work Checklist (attached).

86. This email suggests that the right to work is monitored by the individual care homes, not the Head Office. This is consistent with how you have previously described your monitoring process during our visit.

87. You have failed to explain why eight workers were omitted from your system and you have failed to evidence a working Immigration Status Monitoring system.
88. Paragraph Annex C2 b) of the Workers and Temporary Workers: guidance for sponsors part 3 which states we will normally revoke your licence:

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

Maintaining Worker Contact Details:

"89. As part of the review carried out of your Coolcare HR software system our officers assessed the contact details retained for your sponsored workers. They found a number of errors in the details recorded. Our officers noted that you had an Excel spreadsheet which included contact details and acted as a back up to your HR system records. However, review of this found the following instances where both versions recorded incorrect details… :"

The letter then set out the names and recorded address of 7 staff members as well as the different address given at interview.

"93. As noted above, both the Coolcare HR software and the Excel spreadsheet contained errors. You state that the Excel spreadsheet was a personal document and suggest it is not used as an official means of record keeping. It remains unclear from your explanation which of the two methods is the primary means of record keeping and which should be up to date. You have submitted no evidence that you have amended the addresses for any of the above workers or explained which system you are primarily using. Therefore, you have not demonstrated that you accurately keep up to date records of workers' contact details (UK residential addresses, personal email addresses, telephone numbers (mobile and/or landline).

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

Under the heading ‘Decision’ the letter states:

> “95. We always take into consideration the potential impact revocation may have on a sponsor and consideration is always given to re-rating a sponsor licence to allow a sponsor to demonstrate full compliance with their sponsor duties if appropriate.
> 96. We have considered the possibility of downgrading your licence and issuing you 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.
> 97. As already stated, you have acted in contravention Annex C1 s), aa), and Annex C2 a), b), q) of the Workers and Temporary Workers: guidance for sponsors part 3. Downgrading your licence is not appropriate due to the seriousness of your non-compliance with your sponsor duties.
> 98. We believe the issues described above constitute a failure to comply with your sponsor duties.
> 99. Paragraph C10.4 of the Workers and Temporary Workers: guidance for sponsors part 3 states:
> *Annex C1 of this document sets out the circumstances in which we will revoke your licence – these are known as ‘mandatory’ grounds of revocation. If any of these circumstances arise, we may revoke your licence immediately and without warning.*
> 100. As a result, your sponsor licence has been revoked. **There is no right of appeal against this decision.**

11. Following the issue of the Judicial Review proceedings, the claimant produced additional witness statements and an email to Mr Bunty Malhotra from Barry Norman, the Integrated Commissioning Lead at Gateshead Council, dated 7 February 2023, in which he says the claimant has two nursing homes in Gateshead with 125 vulnerable residents. There is a shortage of care staff. If 200 staff are lost as a result of revocation of the claimant’s licence this will result in the closure of units which will have a devastating impact on Gateshead as, with hospitals overflowing, it would have nowhere to transfer clients. Transfer itself is extremely detrimental to vulnerable clients and can lead to a loss of life.

12. An additional witness statement, from Anupama Kaura, dated 24 February 2023, stated that it had been discovered, as a result of the longer period to investigate General Sponsorship Duties 1 that the Senior Care Assistants’ job description, which included the 5 of whom it was said their CoS job descriptions did not match their actual work, were incorrect. Due to a genuine error the job descriptions for Nurses had been used when applying for their CoS. No advantage had been obtained as certificates could have been issued with the correct job description and the employees could have been brought in as care assistants as these posts were on the Shortage Occupation List under the scheme. Further information was provide concerning the provision of dealing with English language training. The statement also provided information about notification to staff concerning the pension salary sacrifice scheme, the complaint concerning sick pay, the recoupment of recruitment costs, the failure to note visa expiry dates and up to date residential addresses. The statement finishes by setting out the impact of revocation on the claimant, its staff and the provision of care locally and an assertion that steps

were taken to remedy certain of the alleged shortcomings immediately following the receipt of the suspension letter.

13. The statement of the decision maker, Mr Magee, dated 23 May 2023 states that there were multiple grounds for revocation but those where the guidance provided that revocation was mandatory were each sufficient reasons on their own to revoke the license. The mandatory grounds were the provision of incorrect job descriptions (Annex C1(s)) and paying a sponsored worker less than stated in the CoS (Annex C1(aa)). The other grounds for revocation provided that this sanction would normally follow.

The Claimant's Grounds

14. The claimant's pleading of the grounds is difficult to follow by the failure to comply with paragraph 7.3.4 of the Administrative Court Judicial Review Guide. The grounds are not identified as such, followed by the relevant provision or principle of law said to be breached and with sufficient detail of each to identify the essential issues. What I have been presented with is a document which starts by asserting that the challenge raises 4 identified issues, followed by the factual and legal background. It then sets out the claimant's submissions on the 4 issues identified. It looks much more like the claimant's skeleton argument, which large parts of the grounds resemble. It sets out detail which is said to be "without prejudice to the generality" of the particular submission. That is wholly contrary to the Guide as not only does it mix the Grounds and submissions in support but it also suggests that apart from the given particulars, more may be relied upon but which have not been particularised. That device is inadequate to enable the parties and the Court to identify the essential issues. In order to mitigate these shortcomings I shall treat the "issues raised" as the Grounds of challenge and take from the submissions made in connection with those issues, the failings to which these are alleged to relate.

    Ground 1: There was an unfair failure to invite representations regarding matters relied upon as the basis for the decision. This is said to arise because:

    a. The letter of 6 December 2022 did not state that every statement made in response needed to be supported by independent evidence. It had listed particular evidence that was required.

    b. The decision challenged appeared to rely upon matter which had not been identified in the request for representations. The decision letter states that the impact on the business was considered and that there would be a need to be scope for the rectifying shortcomings if rectification was to be avoided. The claimant was not asked to provide its representations about either.

    c. The charge concerning incorrect job descriptions was upheld on the basis that there was an absence of evidence to support the claimant's assertions as to the work undertaken and training being provided yet the claimant was not asked for evidence about these matters, it had supplied the evidence sought.

    d. The defendant was not satisfied that there was an answer to the allegation of breach by the claimant's evidence provided in relation to the salary sacrifice scheme but was not alerted to the need to provide further evidence.

e. In relation to the recoupment of recruitment charges, the claimant's explanation for the charge labelled UKVI was rejected on a basis not raised in the 6 December letter. There was a finding of dishonesty to which the claimant had not been given an opportunity to respond and an answer about currency fluctuation in relation to Visa costs was not engaged with. The suggestion that estimates of recoupable charges could have been provided is something the claimant had not been asked to address.

f. As regards contact details, the decision raised a fresh issue as to whether the claimant has corrected its records.

Ground 2: The defendant failed to approach the decision with an open mind in that:

g. She failed to invite further representations where new issues were relied upon in the decision and to give weight to the claimant's representations when there is no reason to doubt its credibility as it is a large business.

h. The evidence that the claimant pays sick pay was dismissed because the defendant considered there had been no response to the allegation that managers had said sick pay would not be paid whereas it would be unlikely they would make such statements as the claimant operated as sick pay system.

i. In concluding that the claimant's employment practices did not comply with guiding principles, no account was taken of the fact that the claimant had taken advice from lawyers and trade unions which suggests a desire to comply with the law.

Ground 3: The decision was based on an irrational conclusion that the claimant had been dishonest. The irrationality is evident from the facts that:

j. The decision letter made a finding of dishonesty in deliberately trying to circumvent the rules in circumstances where the claimant was saying it was complying with the rules.

k. No consideration was given as to why a large business such as the claimant which stated it had taken positive steps to comply with the law should behave dishonestly.

l. No account was taken of the failure to give an opportunity to respond to the allegation of dishonesty or to engage with the answer about currency fluctuations and the notification of recoupable amounts.

Ground 4: The decision failed to take into account relevant considerations, namely:

m. There was a failure to demonstrate, in the decision, that the impact on the business was taken into account, nor could it have been as the claimant was not asked for information on this matter.

n. The conclusion that the claimant adopted unacceptable employment practices failed to take account of the fact that it had sought legal and trade union advice, which suggested a desire to comply with the law. It is inconsistent with Paragraph C1.31 of the Sponsor Guidance, part 3, which puts compliance with UK law as key, to require the claimant to be judged by higher standards.

The Legal Framework

15. The Immigration Rules (HC 395) provide that foreign workers can gain entry clearance as Workers in shortage occupations if they have, amongst other things, sponsorship from an employer. The defendant is responsible for approving and registering sponsors, who may apply for a licence to operate as such. The sponsor system is set out in the Home Office Guidance "Workers and Temporary Workers: guidance for sponsors. The guide is in 3 parts. The guide sets out the Defendant's policy but it is not contained in a statute or statutory instrument. Part 1 deals with the applying for a licence, Part 2 gives guidance on how to sponsor a worker and Part 3 sets out how to meet the sponsorship duties and what action will take in the case of actual or suspected breach. The relevant version of these parts, for present purposes, is dated 22 August 2022. Part 4 provides guidance on how an employer can sponsor an employee on the Skilled Worker Route the relevant version at the time of the decision, though not the inspection, was dated 9 November 2022.

16. According to the guide, the Skilled Worker Route is the main immigration route for nationals who wish to work in the UK. SK13 of this Part records that Health Care visas are for eligible health workers who have been trained to a recognised standard and have good English language skills. The benefits of such a visa include fast-track visa processing for entry to the UK. To be eligible, the worker must be employed in one of the occupations listed in SK13.4 by occupation codes. Amongst these are 2231-Nurse, 6145-Care Workers and Home Carers and 6146-Senior Care Workers.

17. I have already quoted from parts of the guidance directly relevant to the breaches alleged. I have been referred to large parts of the guide, not all of which need to be repeated here.

18. In relation to the principles applying to compliance checks the guide states:

> "C7.1. The ability to sponsor workers to work in the UK is a privilege that must be earned. When a sponsor is granted a licence, significant trust is placed in them. With that trust comes a responsibility for sponsors to act in accordance with our immigration law, all parts of the Worker and Temporary Worker sponsor guidance, wider UK law (such as employment law) and the wider public good. UKVI has a duty to ensure all sponsors discharge these responsibilities, and that a sponsor's actions (or omissions) do not create a risk to immigration control or are not conducive to the public good.
> C7.2. The majority of those who employ overseas workers are honest and willing to comply with their duties. However, because sponsorship transfers a significant amount of responsibility and trust to sponsors, we have a duty to ensure that we deal appropriately with the minority who do not comply with their duties. We place great weight on the importance of trust in the operation of the sponsorship system and the need to ensure that sponsors take their duties seriously.

C7.3. We will continually monitor sponsors' compliance and take action against those who:
• pose, or may pose, a threat to immigration control
• breach their sponsorship duties, or otherwise fail to comply with the Immigration Rules or Worker and Temporary Worker sponsor guidance
• are convicted of criminal offences or issued with certain civil penalties (such as those for employing illegal workers)
• have engaged or are engaging in behaviour or actions that are not conducive to the public good…
C7.5. We have a range of measures to make sure that we enforce sponsors' duties and identify dishonest, incompetent, or otherwise inappropriate sponsors early on. Action we may take includes:
• reducing your certificate of sponsorship (CoS) allocation
• downgrading your licence to a B-rating
• suspending your licence
• revoking your licence
• cancelling the permission of your sponsored workers to remain in the UK"

The guide informs the sponsors that the defendant may check compliance by asking for documents and information and visiting on site (C7.6). The purpose of the checks includes making sure that the information the sponsor has given is accurate and that it is committed to and complying with all the duties of sponsorship (C7.8). If discrepancies are found, the defendant will investigate and, if appropriate, take action (C7.20). If the defendant finds that it cannot verify statements made or documents given to her by the sponsor she will assess the evidence and take appropriate action. She may also take account of information gained from interviews with employees. (C7.21). Downgrading of licences is only suitable for relatively minor breaches where the sponsor is willing to make corrections, but in the case of more serious cases the defendant will suspend or revoke the licence. (C7.25 and C8.2)

19. The process to be followed once the defendant is satisfied that there is enough evidence to suspend appears at C9.9 to C9.17 of the guide, which provides:

"C9.9 Where we are satisfied that we have enough evidence to suspend your licence without further investigation, we will write to you giving reasons for the suspension.
C9.10. Where we have evidence that justifies your licence being suspended pending a full investigation, we will write to you giving our initial reasons for suspension and telling you that an investigation will take place. It may not be possible to say how long the investigation will take, but we will update you on our progress at regular intervals. During this period, you can make any written statements to respond, including sending evidence. Any statement or evidence will be taken into account during the investigation.
C9.11. You have 20 working days from the date of the written notification to respond to our letter. <u>This is your opportunity to seek a review of our decision and to set out any mitigating arguments you believe exist. Your response to us must be in writing and set out, with any relevant supporting</u>

evidence, which grounds you believe to be incorrect and why (my emphasis). We may give you more time to respond if we are satisfied there are exceptional circumstances. We will not hold an oral hearing.
C9.12. If we identify any additional reasons for the suspension of your licence during that 20-day period, including any additional information gained during the course of discussions or interviews with workers to whom you have assigned a CoS, we will write to you again, giving you another 20 working days to respond in writing to the additional reasons.
C9.13. When we receive a response from you, we will consider this and may ask a compliance officer, other law enforcement agency, government department, agency, local authority, the police, foreign government or other body, for information.
C9.14. If we do not receive a response within the time allowed, we will go ahead with whatever action we believe is appropriate and tell you of our decision in writing.
C9.15. Appropriate action may include one or more the following – we may:
• re-instate your licence with an A-rating
• re-instate your licence with a B-rating (and issue you with an action plan)
• prevent you from assigning any new CoS
• prevent the use of any assigned, but unused, CoS
• revoke your licence
C9.16. We will tell you of our final decision within 20 working days of receiving your response, unless the consideration is exceptionally complex or we are waiting for information from a third party, such as another government department. In this case, we will inform you of the delay."

20. The legal principles concerning the enforcement of the guidance in sponsorship cases are to be found in ***R (on the application of St Andrew's College) v Secretary of State for the Home Department [2018] EWCA Civ 2496*** where Haddon -Cave LJ he said, at [29-30]:

"29. I summarised the legal principles applicable to Tier 2 and Tier 4 sponsorship cases in *R (Raj & Knoll) v SSHD [2015] EWHC 1329 (Admin)* and my summary was cited by Tomlinson LJ in *R (Raj & Knoll) v SSHD [2016] EWCA Civ 770* in the Court of Appeal at [23]:

"(1) The essence of the system is that the Secretary of State imposes "a high degree of trust" in sponsors granted ('Tier 2' or 'Tier 4') licences in implementing and policing immigration policy in respect of migrants to whom it grants Certificate of Sponsorship ("CoS") or Confirmation of Acceptance ("CAS") (per McGowan J in *London St Andrews College v Secretary of State for the Home Department (supra) (2014) EWHC 4328 (Admin)* at [12]) (and see Silber J in *R (Westech College) v Secretary of State for the Home Department (2011) EWHC 1484 (Admin)*).

(2) The authority to grant a certificate (CoS or CAS) is a privilege which carries great responsibility: the sponsor is expected to carry out its responsibilities "with all the rigour and vigilance of the

immigration control authorities" (per McGowan J in *London St Andrews College v Secretary of State for the Home Department* (supra) at [13]).

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

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

(5) The CAS in the 'Tier 4' scheme (the equivalent of the CoS in the 'Tier 2' scheme) is very significant: the possession by a migrant of a requisite CAS 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 (Global Vision per Beatson LJ at [12], citing Lord Sumption SCJ in *R (New London College Ltd) v Secretary of State for the Home Department [2013] UKSC 51* .

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

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

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

30. I would endorse the following further principles to be derived from the judgment of Silber J in *R (Westech College) v Secretary of State for the Home Department [2011] EWHC 1484 (Admin)* (*supra*):

(1) The SSHD has stringent powers to suspend or revoke a sponsor's licence if

the SSHD becomes concerned that a sponsor is not complying with its obligations and must be sensitive to any factors which might suggest the possibility of any breaches of immigration control having occurred or being about to occur because of lapses or omissions committed by a Sponsor (*per* Silber J in *Westech* , *supra* , at [17]).

(2) There is a clear need in some circumstances for the SSHD to invoke the SSHD's powers where there is a risk that the sponsor might not be complying with its duties provided of course that UKBA complies with its public law duties (*per* Silber J in *Westech* , *supra* , at [18]).

(3) The expertise and experience of the SSHD (and UK Border Authority ("UKBA")) in being able to detect the possibility that a sponsor might not be or be at risk of not complying with its duties is something that the courts must and does respect because, unlike the SSHD, courts do not have this critically important experience or expertise (*per* Silber J in *Westech* , *supra* , at [18]).

(4) An entity which holds a sponsor licence has substantial duties to ensure that the rules relating to immigration control are adhered to strictly and properly, such that if the SSHD were concerned that a sponsor is not complying with those duties, it would entitle, if not oblige, UKBA to prevent that sponsor from either granting more CAS or revoking its licence (*per* Silber J in *Westech* , *supra* , at [19])."

21. It is common ground that the common law duty of fairness must be observed by the defendant in the process of investigating and sanctioning the claimant and that the question as to whether a fair procedure has been followed is for the court to decide. It does not defer to the decision of the defendant on this issue. Where the parties differ is that Mr Southey argues that in a case such as this fairness requires that the defendant exercise a high standard of procedural fairness because (a) the implications of the decision to revoke are potentially grave to the claimant's business and the provision of residential care in the areas of its operation, (b) what is in issue is the removal of a benefit that has been enjoyed for a considerable period, (c) there is no appeal against the revocation of a sponsorship licence, with the result that there is no opportunity for a court to correct a factually incorrect decision and (d) it is the sponsor who has to satisfy the defendant that the scheme is and will be properly applied. In support of these contentions he referred me to ***R(Osborn) v Parole Board [2014] AC 1115***, which he says is of general application in the light of the decision in ***R(Mosely) v Haringey London Borough Council [2014] 1 WLR 3947*** at [24], ***Re A (a Child) (Withdrawal of Treatment: Legal Representations [2023] 1 FLR 713*** at [30], and ***McInnes v Onslow Fane [1978] 1 WLR 1520***.

22. In ***Osborn*** there was a successful challenge to a decision to refuse a prisoner an oral hearing when a Parole Board was considering whether he should be re-released, following his recall to prison following the revocation of his licence. In its judgment, the Supreme Court set out a number of circumstances where such oral hearing would be necessary. ***Mosley***, at [24] and ***Re A***, at [30] refer to ***Osborn*** as being of general application, but that is in relation to what was said as to the values underlying a fair

procedure, not the standard of rigour which fairness requires. It is implicit from the fact that ***Osborn*** sets out circumstances where an oral hearing will be necessary in a prisoner case, that there will be circumstances when it will not, such as in the case of ***R(Hassett) v Secretary of State for Justice [2017] 1 WLR 4750***, a case relied upon by Mr Manknell, where the Court of Appeal held that there was no requirement for an oral hearing where a prisoner's security categorisation was under review by the officials of the Secretary of State carrying out a management function and that the guidance in ***Osborn*** was fashioned in a manner specific to a Parole Board context; see per Sales LJ at [56].

23. ***McInnes*** concerned the refusal of the grant of a licence by the Boxing Board of Control. A challenge on the basis that the applicant was not made aware of what was said against him prior to the refusal and that he did not have an oral hearing was rejected. Whilst that case did draw a distinction between cases in which an existing licence is withdrawn, where the holder should be informed of the case against them and permitted to make representations, and the procedure which had been adopted on an application, the claimant here does not argue that it should have had an oral hearing and the defendant does not suggest that the claimant was not entitled to know the case against it and make representations.

24. I cannot see that the cases relied upon by Mr Southey support his assertion that a heightened standard of fairness was required in a case such as this. True, they set out the general values underlying the requirement of fairness, namely that an informed decision will be more likely to be correct, thus a better decision, and that a party whose rights are affected is less likely to have a sense of injustice, but as to what constitutes fairness, i.e. to serve those values, is highly context dependant, as is evident from ***Osborn, Hassett and McInnes*** and as appears from ***Operations Holdings Ltd (trading as Goldcare Homes) v The Secretary of State for the Home Department [2019] EWHC 3884***.

25. In ***Goldcare***, a decision of Miss Allison Foster QC, as she then was, siting as a Deputy Judge of the High Court, there had been a compliance visit to a care home at which two migrant employees were interviewed. As a result of the interviews, and information supplied by the employer during the visit, the SSHD came to the view that the one of them, a Mr Tiwari, was not fulfilling duties at the level claimed when providing the Certificate of Sponsorship. Goldcare was sent a suspension letter setting out allegation as to Mr Tiwari notifying the home of its opportunity to respond within 20 days. The response was on the lines that the Goldcare Group was large, well established and of good repute. Documents were enclosed to demonstrate that Mr Tiwari carried out the role for which he was sponsored. It was said that Mr Tiwari's interview was unfairly brief as a result of which he was unable to explain his role properly. Notwithstanding these representations, the Goldcare licence was revoked on the grounds, as stated in the letter, "*you have failed to provide evidence which demonstrates that Mr Tiwari has carried out the duties as stated in his COS…"* The decision was challenged on, amongst other, the grounds of unfair procedure, citing the brevity of the interview with Mr Tiwari. The claimant sought to argue that a heightened level of scrutiny applied, but it

was held that there was nothing in the procedural challenge, see para [79] and [74] where the judge said:

> "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."

26. The cases referred to in this passage, to which reference had been made were, apart from the reference to the principles set out by Haddon-Cave J in ***Raj & Knoll***, and repeated by him in the Court of Appeal at [29] in ***St Andrews College,***

(a) ***R (London Reading College) v SSHD [2010] EWHC 2561*** where it was said, at [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 light trigger in deciding when and with what level of firmness they should act." Per Neil Garnham QC, as he then was, siting as a Deputy High Court Judge.

(b) ***R (on the application of Raj & Knoll) v SSHD [2016] EWCA Civ 770*** were Tomlinson LJ said at [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).

(c) ***R (New London College) v SSHD*** were Lord Sumption JSC said, at [29]:

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

27. ***New London College*** and ***London Reading College*** are both Tier 4 scheme cases but, whereas the present is Tier 2, but the principles found in these cases apply to both; see ***Goldcare*** at [33] and ***St Andrew's College*** at [29]

28. In the light of these authorities, the four factors put forward by the claimant, summarised at paragraph 21 above, do not support a heightened standard of fairness. On the contrary, as was the case in ***Goldcare***, the enforcement procedure set out in the guidance is a fair one given the context. The commercial impact on the business was considered in the above extract from ***Raj & Knoll***; I shall deal with the claimant's reliance upon the impact on the provision of care separately. The fact that the revocation involves the removal of a benefit previously enjoyed is not relevant as the enforcement procedure involves no fundamental right of the sponsor but one contingent on adherence to the rules; also dealt with in the same extract. The absence of an appeal and the fact that the sponsor has to satisfy the defendant that the scheme is, and will be, properly applied does not assist the claimant's argument given the precarious nature of the licence as a privilege not a right, one which can be removed where there are reasonable grounds for suspecting a breach, i.e. at a fairly low threshold, where deference is given to the defendant's substantive decision and the enjoyment of which is based on a high level of trust placed in the sponsor. It would run contradictory to the reason as to why possession of the licence is precarious if the fact that it was imported more rigorous safeguards at the enforcement stage.

29. Mr Southey's reliance upon the impact of the provision upon local care as a reason for heightened scrutiny is also misplaced. He argued that the defendant must enquire about the impact upon such provision before taking a decision to revoke. He said this is required as a matter of democratic accountability. As he put it, if the Secretary of State wishes to prioritise compliance with immigration controls over the provision of health care for the elderly she must come out and say so in order to make the decision subject to democratic accountability. My first observation is that this is a political point and not one that goes to the lawfulness of the decision on revocation. The second is that Mr Magee's evidence is to the effect that there is a system in place for mitigations, such as pausing the cancellation of visas for a limited period to allow continuity of care so there is no need for the level of scrutiny suggested by Mr Southey in order to safeguard healthcare. The third is that I do not accept, particularly in the light of the available mitigations, that the balance suggested by Mr Southey, immigration control v health care, is one which the defendant is required to undertake. That being the case, there is no requirement on the defendant to make enquiries of such impact in relation to the

decision to revoke, albeit that she liaises with the relevant health authority to mitigate the impact.

30. Mr Southey argued in his skeleton, though he did not develop this in oral argument, that immigration powers cannot be used to frustrate statutory duties to provide health and social care. In support of that proposition he referred to ***R(One Search Holdings Ltd v York City Council [2010] PTSR 1481*** at [24] where, Hickinbottom J said, in dealing with a submission that a council policy of not allowing open access to certain of its records, framed under statutory powers, was unlawful as the statutory scheme for the provision of Home Information Packs contained an implied obligation to make such information freely available:

> "As a matter of principle, although it may be easier in practice to show that Parliament could not have intended the grant of a power in a statute to defeat the very purpose of that same Act, I do not see why a court might not conclude that Parliament could not have intended that a power in one statute be exercised in a way that would utterly defeat the purpose of another statute: although that would be very much dependent upon the circumstances of a particular case, including, most importantly, the wording and even (possibly) timing of the specific statutory provisions. The dearth of examples from the authorities shows just how rare such cases might be, and the caution with which the courts would infer such an intention. Mr Fordham was unable to provide any such examples; but, as a matter of law, such a construction is not impossible and, as statutory schemes and relationships become more complex, it may be that such a construction is more likely to find favour. However, intellectually, it requires the court to conduct the same exercise as that performed in Padfield's case, namely one of construing the intention of Parliament through the words they have used in the relevant statutory provisions."

31. In ***One Search***, the claim failed as the court held that the Information Pack legislative scheme did not place an obligation on local authorities to make the withheld information freely available. Thus, the question as to whether the council's exercise of its statutory power frustrated Parliament's intention in legislating for the provision of such packs did not arise. The passage at paragraph 24 is, therefore, obiter. Nevertheless, if I am to use it as a guide, I have not been referred to any of the relevant legislation which I would have to construe to find the intention upon which Mr Southey must rely, nor had it explained why the duty to provide health and social care, in the legislation to which I should have been referred, trumps the maintenance of immigration control. I am, therefore, unpersuaded that there is any authoritative support for his proposition that the defendant must balance the risk that there may be a lapse in the provision of health care when deciding to revoke a sponsorship licence.

32. Quite apart from the absence of supportive authority, the essence of the sponsorship system is that the defendant trusts the sponsor to carry out a function which would otherwise be carried out by her department, hence the high level of trust involved. If Mr Southey was correct in his argument, the defendant could be compelled, by the demand for care home places, to continue to trust the claimant to operate the system properly when that trust has gone. The defendant cannot be expected to do so; see ***Birds***

Hill Nursing Home & another v SOSHD [2015] EWHC 2241 (Admin) per Nicol J at 44 and ***St Andrews College*** per Haddon-Cave LJ at [35].

33. The defendant accepts that there can be good reasons to depart from the guidance but says that none has been shown here. Having rejected the claimant's arguments as to the reasons for a higher standard of fairness, there is nothing else, on the facts of this case, which would qualify as good reasons. The claimant argued the brevity of time to respond to the suspension letter was a factor which weighed in favour of a departure from the guidance. There is nothing in that point. The procedure makes provision for time for the sponsor to respond to be extended. The claimant did not seek an extension and, in any event provided its reply 8 days before the expiration of the 20 day deadline.

34. Mr Southey envisaged an additional step in the procedure whereby if the defendant was not satisfied by the sponsor's evidence concerning adherence to the guidance it should inform the sponsor of any shortcomings in the evidence and give it the opportunity to present more; he pointed to the fact that in response to some of the allegations in the claimant's letter in reply the offer was held out to provide further information if requested. He argues that the guidance on the enforcement procedure is highly prescriptive, from which it is to be expected that the sponsor's answers will be correspondingly limited. As special circumstances are of their nature, fact sensitive, this issue needs to be looked at when considering the individual reasons for revocation. In general, however, I accept Mr Manknell's point that there is no obligation to request further information. On the authorities, the defendant can accept what it is told by staff, such as Mr Tiwari in the ***Goldcare*** case; the Guidance, itself, makes clear that the defendant will assess the information taken at the inspection and may take into account information obtained from staff when deciding what action to take, that is at paragraph C7.21 of part 3. It is up to the defendant what it makes of the evidence. Further, it is impractical to expect the defendant to ask the claimant for more evidence where it concludes that which has been produced by the latter is unpersuasive as the defendant cannot know what other evidence the claimant possess.

35. It was suggested that fairness required that there ought to be a yet further step, which followed the decision on the issue of breach, at which point the sponsor should be asked to submit mitigation where, after the response to the suspension letter, the defendant was not satisfied that the guidance had been followed. This is part of the argument that the letter of suspension limited the scope of the information the sponsor can be expected to provide in response.

36. It is apparent from the terms of the guidance that there is no need for a second or third step as suggested by Mr Southey. A sponsor is supposed to be familiar with the "Guide for Sponsors"; the guide itself instructs them to read all parts so that they understand their duties and responsibilities. A sponsor who follows this instruction will know of the provision of C9.11 of the compliance provisions (set out at paragraph 19 above). It is clear from the guidance that, in response to a suspension letter, the sponsor can respond in writing, with all relevant supporting evidence, setting out which grounds are believed to be incorrect and why. It is also clear from this part of the guidance that the purpose of the response is to seek review of the defendant's decision and *"set out any mitigating arguments".* The fact that the suspension letter in this case indicates that it is an opportunity to explain the issues raised and asks for specific documents, but does not, for example, ask for witness statements, could not be expected to lead a sponsor, who has knowledge of C9.11, to believe that it need not put forward the whole case,

suitably supported by any supporting evidence it considers relevant to supporting a review of a decision, and in the context of both the guidance and letter referring to the possibility of revocation, preventing such an outcome.

37. There was no dispute as to what may be termed "the ordinary standards of fairness" entail. They are:

    a. The claimant must be informed of the case it has to meet;

    b. It must be given a reasonable opportunity to respond;

    c. If, after it has been informed of the defendant's case, new allegations come to light, it will be informed of them and given an opportunity to respond;

    d. The defendant must consider the claimant's representation with an open mind.

38. In relation to d, Mr Manknell made the point that the fact that the defendant accepted the claimant's explanation in relation to Nurse Tessa Joseph, Sponsorship Duty 2, demonstrates that she approached the evidence with an open mind. Mr Southey argues that this argument misses the point. It has never been necessary for the decision maker to reject everything a person says for it to be a legitimate complaint that they favour one party over another. He says what is key is whether the decision maker favours one source of evidence, and he referred me to ***R v Highgate Justices, ex parte Riley [1996] R.T.R. 150***, in support.

39. ***Riley*** was a case where a decision was successfully impugned on the grounds of apparent bias. In a driving case in which there was a direct conflict of evidence between the police officer witness and the defendant as to whether the latter was driving a car, and about which the officer was being questioned, the magistrate intervened when counsel confirmed that the question, he had just asked, was an accusation of lying. She said that it was not the practice in that court to call a police officer a liar. The defendant was duly convicted. On an application for judicial review, it was held that the chair's comment demonstrated a real possibility that there was not *"a wholly impartial adjudication of the central dispute arising in the case."*

40. The situation in ***Riley***, is wholly different from the present. Merely by preferring the evidence of one set of witnesses over another, such as the accounts given by staff over those given by the employer, the defendant is not preferring a source of the evidence so as to demonstrate a possibility of bias, but the evidence itself. I accept, however, that the fact that the defendant was receptive to the Nurse Joseph explanation does not rule out a finding that other representations were not considered with an open mind. The court's task is to look at the reasons given in relation to each breach both individually and collectively to see whether they betray the absence of an open mind.

41. One final submission as to the law which I have to consider was Mr Southey's argument that if I do not find for him in relation to grounds based on unfair procedure, I can nevertheless find that the decisions were irrational on the usual judicial review grounds. This argument followed my question as to what I was to do if I was against the claimant on unfair procedure but the decision was arguably irrational. He said that it would be wrong to place unfair procedure and irrationality as separate boxes as "they blend to produce justice." In support of this proposition, he made a passing reference to ***R v***

***SSHD ex parte Hindley* [1999] 2 WLR 1253**, for which no citation was provided nor any reference to the passage upon which reliance was placed. Having found the citation and read the case, I do not see that it is authority for the proposition advanced by Mr Southey. That case was concerned with a challenge to the procedural fairness under which the claimant's whole life tariff for murder was maintained.

42. The other case relied upon by Mr Southey was ***London Reading College*** where Neil Garnham QC (as he was at the time) said, at 37:

> "In my judgment, on the facts of this case, it does not much matter whether the procedures adopted by the defendants are seen as two separate procedures or a single complete whole. What matters is whether, before taking their decision, the claimants had been given fair notice of what was concerning the defendants so that the claimants could attempt to deal with the points. That was necessary both as a matter of fairness but also to ensure that the defendants were in a position to take a rational decision, a decision based on a proper appreciation of all the facts."

He says that this passage demonstrates that there is an overlap between procedural and substantive grounds.

43. The relevant "facts of the case," on which this passage relied arose from the revocation of a licence to sponsor foreign students to enter the country in order to study at the college. This was challenged on grounds, amongst others, that it had been procedurally unfair, as was the case, to revoke on the grounds of serious concerns regarding the levels of English of some of the sponsored students without giving the college notice of that criticism. The failure to give the claimant notice put the defendant in the position where the he knew that he was acting on incomplete information, hence the irrationality. Thus, a failure in a fair procedure can lead to an irrational decision. This does not support Mr Southey's point that having failed on the procedural challenge, he can maintain a, so far, un-pleaded rationality challenge on the grounds that it is all a matter of justice, however you get there. There is a good reason for distinguishing between procedural and irrationality challenges given the differing approach of the court to each, the court setting its own standard of fairness in the case of the former whilst deferring to the decision making in evaluating the merits of the decision.

44. When I pointed out the difficulty of Mr Southey's argument on this point he said he would seek to amend to allege, where he had not already done so, irrationality and he offered to produce a draft amended pleading in due course. This was opposed by Mr Manknell. I refused permission to amend and gave an ex tempore judgment explaining my reasons. The result is that I will confine my consideration of the challenge to the decision to the pleaded grounds. I have carried through my lettering of the sub-paragraphs for each Ground as set out in paragraph 14 should the need to cross refer arise. I shall also indicate in relation to each sub-paragraph dealing with particular Duties to which it relates to aid cross referencing to the defendant's decision letter.

<u>Ground 1-There was an unfair failure to invite representations regarding the matters relied upon as the basis for the decision.</u>

(a) The letter of 6 December 2022 did not state that every statement made in response needed to be supported by independent evidence. It had listed particular evidence that was required.

45. I have already dealt with, and rejected, the complaint that the defendant failed to request further information and that this was made necessary by the terms of the suspension letter of 6 December 2022; see paragraphs 34-36 above.

(b) The decision relied upon matters upon which representations had not been sought, namely the impact on the business of revocation and the need to rectify shortcomings.

46. Again, I have already dealt with the general point made by Mr Southey about the defendant being under an obligation to inform herself as to the implication of a decision to revoke on the claimant's business and the provision of care at paragraphs 21 to 33, above. Furthermore, it was not raised as an issue for consideration in the claimant's response to the letter of suspension. As C9.11 of the scheme guidance informs sponsors that the response is the opportunity to set out mitigating arguments, and impact on the public and the business both come within that category, these were matters for the claimant to raise if they want them considered.

47. This challenge is focused on paragraphs 95, where it is said …*"We always take into consideration the potential impact revocation may have on a sponsor*" and 96. Which states… *"We have considered the possibility of downgrading your licence and issuing you with an action plan. However, we will only downgrade a licence and issue an action plant where there is scope to rectify shortcomings or omissions in the systems or retained documents."* Mr Southey argues that, on the basis, that these matters formed part of the decision, the claimant was not given an opportunity to provide information about the impact on the business and what it could do to rectify the default.

48. In his statement, Mr Magee, sets out the inevitable practical impact of the revocation of the licence and this is set out general terms set out in the decision, i.e. the reference to impact on "a sponsor." That is all that can realistically be understood by this comment. The defendant was not purporting to take into account the commercial impact on the claimant's particular business. She had not been asked to do so in the claimant's response or pointed to what aspects of the impact she was being asked to take into account. Accordingly, there is no unfairness in not enquiring of the claimant's particular circumstances before taking into account the general impact of revocation.

49. Mr Southey sought to rely upon Mr Magee's statement in response to the claim. There, at paragraph 35, he refers to the 7th February 2023 email from Gateshead Council indicating the impact on its services if the claimant loses 200 care staff forcing its 2 homes in Gateshead to close. He said, *"The email confirms the impact of the revocation on Prestwick Care's Gateshead nursing homes of which we were already aware of and acknowledge."* Mr Southey says that this is evidence that the impact on the claimant's homes and care services was taken into account without the claimant being given a chance to comment. That is not what Mr Magee is saying. His statement is limited to recording that he was aware of the impact described in the Gateshead Council email

and is referred to in the context of the liaison between the Sponsorship Compliance Team and the Department for Health and Social Care to mitigate disruption to service users where a sponsorship licence is revoked. He did not raise it to explain what went into the decision making process.

50. Mr Southey's arguments as to paragraph 96 fails to take into account the reason given for not downgrading. In paragraph 97 of the decision letter, that reason is said to be the seriousness of non-compliance, not an inability to remedy the default. In any event, evidence as to what the claimant could and would do in this regard are matters of mitigation which the claimant should have raised if it expected its ability to rectify shortcomings to be taken in account. Thus, there is no unfairness in the defendant not asking what the claimant could manage by way of remedy.

    (c) The charge concerning the incorrect job description was upheld on the basis there was an absence of evidence to support the claimant's assertion as to work undertaken and training to be provided yet the claimant was not asked for evidence of these matters. General Sponsors Duties 1.

51. Before looking at this challenge, I shall deal with the fact that in Ms Kaura's second statement she gives a different reason for the appearance of incorrect job descriptions. She admits that the reason that the Senior Care Assistants were not undertaking roles more consistent with their Certificates of Sponsorship was because the claimant had, due to genuine error, used the job description for a nurse on the certificates. Mr Manknell said that the fact that the claimant's own evidence is that it was in breach of paragraph C1(s) of the guidance is a complete answer to the claim. Mr Southey argued that the admitted error does not mean that the staff were not also undertaking the more responsible roles in the job description. That argument is fatally undermined by the fact that Ms Kaura puts forward the error to explain why these staff were <u>not</u> undertaking roles more consistent with the CoS. His more substantial point is that the reason now put forward was not considered by the defendant who may feel able to forgive the error described by Ms Kaura. That is yet to be seen.

52. My view is that I have to leave out of account Ms Kaura's recent admission. It was not the subject of the decision currently under challenge. It would be wrong to rely upon the admission in applying s.31 (2A) of the Senior Court Act 1981 in a jurisdiction where it is recognised that the court should defer to the decision maker as the former is not equipped with similar expertise in deciding the merits of the decision. I cannot say whether it is highly likely that the same decision would have been reached on the incorrect job description breach if this was due to the clerical error suggested by Ms Kaura.

53. The claimant's complaint in relation to this breach is that the defendant took into account the absence of evidence as to skills and language training in circumstances in which the claimant was not asked to provide information about these matters. Mr Manknell argues that the onus for providing evidence necessary to address the defendant's concerns was on the claimant. It failed to do so. The defendant had the evidence of the 5 members of staff indicating that they did not fulfil certain of the roles

in the CoS, emails from the claimant to confirm that they did not perform their job duties and vague assertions about problems with English and gaps in training and the fact that they were being addressed. He pointed to the fact that under paragraph C1.21 of the Guidance workers are supposed to be fully qualified and experienced, i.e. capable of doing the job, by the time the employment commences. The emphasis is upon the employee working at the actual level of the job described, not being somewhere on the way to doing so.

54. I agree with Mr Manknell's stance. The refence in the letter to an absence of information about training in skills and English are just particulars which illustrate the lack of detail to support the claimant's explanations as to why the 5 members of staff were not undertaking some of the duties stated in the CoS. The burden was on the claimant to satisfy the defendant that the staff were being employed in accordance with their job descriptions. It simply failed to provide adequate detail of what was being done to see that they were so as to dispel the impression given by the staff that they were not employed to undertake the more responsible of the duties in the job description. The requirements of fairness did not require that the defendant ask for further information from the claimant to fill in the lack of detail. The claimant had adequate opportunity to do so in its response to the letter of suspension.

d. The defendant was not satisfied that there was an answer to the allegation of breach by the claimant's evidence provided in relation to the salary sacrifice scheme but was not alerted to the need to provide further evidence. General Sponsorship Duty 3.

55. This is one of the grounds which prompted me to ask what I was to do if concluded that the procedure was fair but the result irrational as it is arguable that the decision maker did not understand how a salary sacrifice/pension salary exchange scheme operates. It seems to have been treated as a device for underpaying staff by making deductions from the contractual salary declared in the CoS. In the event, the only challenge to the breach, as found, is a procedural one.

56. The allegation was that because Reyma Varghese and Jobymol Sebastien told the defendant's inspectors that they did not know to what the deductions for salary sacrifice related, the defendant was not satisfied that workers were paid in line with their CoS. The claimant's response did not provide evidence specific to these two staff members as to when and how they had been informed of the scheme. The response was that all staff had been sent a letter with details of the scheme, a pro forma version of which was produced, and that included Messrs Varghese and Sebastien, but if these two chose to ignore correspondence the claimant cannot be held responsible.

57. In its revocation decision, the basis of the decision that the defendant was not satisfied that migrant workers were properly informed of deductions and that they were being paid in line with the salary in the CoS was that the claimant had not produced evidence that the letters were dispatched to Varghese and Sebastien and that evidence others were aware of the scheme was not evidence that these two had been sent the letters. Mr Southey argues the claimant provided evidence about the salary sacrifice scheme and how it was communicated to the staff, and it was not alerted to the fact that the

defendant would be looking for evidence that these two workers, in particular, had been informed of what it was about.

58. It is difficult to understand how the claimant would not have realised that it should produce evidence specific to communications with Varghese and Sebastien given that they were the two employees, out of 29, who, it was said, claimed to know nothing about the scheme. Fairness did not require that the defendant was required to prompt them to produce such evidence. It was sufficient to tell the claimant, as was done in the suspension letter, that these two individuals said they did not know what the scheme was and to leave it to the claimant to provide evidence specific to them to show that they had been informed of it.

    (e) The claimant's explanation for the charge labelled UKVI was rejected on the basis not raised in the 6 December letter. There was a finding of dishonesty to which the claimant had not been given an opportunity to respond and an answer about currency fluctuations in relation to Visa costs was not engaged with. The suggestion that estimates of recoupable charge could have been provided is something the claimant had not been asked to address. Sponsor Duties 5.

59. The allegation that there was a finding of dishonesty is said to arise from paragraphs 59 and 60 of the decision letter, set out verbatim at paragraph 10, above, under General Sponsor Duties 5. It is said that the assertion that the *"lack of explanation and obfuscation of specific costs suggests a deliberate attempt to circumvent the rules"* concerning the recovery of the Immigration Skills Charge is a finding of dishonesty. As a matter of language, it is not such a finding as the defendant does not say this was a deliberate attempt. Quite apart from the language, however, this response has to be seen in the context of the way in which the claimant had dealt with the allegation regarding the charge.

60. In the suspension letter, at paragraph 27, the defendant pointed to the fact that the staff contacts shown to her officers included a schedule of recoverable charges which included £3,199 under the section Visa Costs. As the cost of the CoS was £199 and the claimant had previously assigned CoSs for a period of 3 years, the defendant believed that the £3,000 must be the Immigration Skills Charge as that is the amount of the charge which would cover the three years. In paragraph 28, the defendant commented on a 'Recoupment of Costs' letter template provided by the claimant post visit which listed the CoS for £199 and included an additional, undefined, cost labelled UKVI. She indicated that she remained concerned that this entry related to the Immigration Skills Charge. The claimant responded to the suspension letter by adding its comments in red after paragraphs containing the defendant's allegations. In this instance, it responded to paragraph 28 but not to what was alleged in the preceding paragraph. It kept silent as to what the specific figure of £3,000 related, hence the reference to the *"obfuscation of specific costs."* It did, however, admit that, due to oversight, it had been recouping the charge and, on discovery that it should not, had amended its contracts to correct this. It is to be remembered that the schedule containing the £3,000 charge was handed to the inspector during the October inspection suggesting that the charge was still being levied at that time.

61. Against that background, all that this part of the decision indicates as to the defendant's reasons is that she regarded the failure to identify to what the £3,000 in the schedule related in the letter of response as something which could be seen as an indication that the claimant was aware it was breaching the guidance when recouping the Immigration Skill Charge and it had, therefore, not satisfied the defendant that it was not recovering the charge from its workers. This reasoning was not based on a finding of dishonesty. Furthermore, this passage in the decision was a response to the claimant's reply. Fairness does not require that the defendant give the claimant an opportunity to comment on her analysis of the explanation it proffered for the alleged breach. For each of the above reasons, fairness did not require that the claimant be asked to respond to a finding of dishonesty.

    (f)The charge concerning a lack of engagement with the claimant's evidence that it did not state the Visa Cost due to currency fluctuations and the fact that the claimant was not asked to respond to a new issue, namely that estimates could have been given of recoupable costs can be considered together as they arise from the same criticism. General Sponsors Duties 6.

62. The allegation to which this is relevant is a breach of sponsors' duties by failing to *"demonstrate practices and procedures in line with the encompassing values of the sponsorship regime..."* (paragraph 69 of the revocation letter). This was said to arise from a provision in staff contracts which required that they repay certain of the claimant's expenditure of recruiting and bringing them to the UK if they left their employment within 5 years. The activities which it was said transgressed these values were, first, some staff were placed under a contractual obligation to repay certain fees which in their cases could not have been incurred. Secondly, others were not made fully aware of the repayment costs and clauses as they were not told the amount of the costs until they arrived in the UK and, third, in relation to the agency charge of £3,000, in particular, details as to how the figure was arrived at and thirdly, the circumstances in which it is incurred were unexplained in the light of evidence that two employees were required to pay the charge even though one was 3 years into her existing appointment when the charge was applied and the other had paid for and arranged a Visa using her own agent, paragraphs 75 to 78 of the revocation letter. This challenge relates to the second type of transgression.

63. The defendant's criticism of the claimant's conduct was, in essence, that employees were treated unfairly because they were not told how much they would have to repay if they left within five years until they were in the UK, at which point they may find it difficult not to sign the contract containing the charges, having been given one, without the charges stated, in their home country (paragraph 73 of the revocation letter.) Furthermore, there was evidence that the charges and terms were not made fully clear to prospective and existing employees (paragraph 78 of the same letter.) There is no challenge to the assertion that this behaviour could be contrary to the objectives of the sponsorship duties. Mr Manknell suggested it could come under the category of conduct detrimental to the wider public good, though it is not of a piece with the examples of qualifying conduct in paragraph 1.32 of the Guidance. It could come under the heading of conduct which is abusive of the sponsorship arrangement on the basis that the

sponsor is exploiting the imbalance in its power and that of the employee or simply conduct causing concern. Given the limited nature of the challenge, I do not need to resolve that issue. The only question I need to consider, aside from the 'tin ear' allegation which I shall deal with under Ground 2, is that related to the claimant's opportunity to deal with the complaint and whether what was said concerning the Visa costs was, to use Mr Southey's expression "engaged with," which is actually a rationality challenge as what is being alleged is that the defendant did not take the claimant's evidence on this subject sufficiently into account. Nevertheless, I shall deal with it here.

64. Mr Southey says that it is not clear from the suspension letter what amounted to unacceptable conduct so as to engage a comparison with the objectives of the scheme as these are ill defined. In those circumstances, the defendant should have made it clear to the claimant at the suspension stage of its concern about the lack of provision of estimated costs or given it an opportunity to deal with that point before she made her decision. He says that this was a fresh issue and the absence of the provision of estimates was *"the first matter relied upon to reject the claimant's explanation for its approach to recoupment."* The point the claimant made about the Visa, in common with other costs, is that the claimant could not provide precise figures due to currency fluctuations.

65. The complaint about lack of engagement as regards the Visa costs cannot succeed, as on the claimant's own case, the defendant did deal with it by indicating that estimates could have been provided. The challenge on the basis that the claimant was not given an opportunity to deal with why it was that estimates were not given is also unsustainable.

66. The allegation of breach was the unfair treatment of employees by putting them in a position where they would have no idea of their potential financial liabilities to the claimant until they had arrived in this country and were, effectively, committed to working for Prestwick Care. That much was perfectly clear from the letter of revocation. I do not accept, therefore, that it was not apparent from the letter what unacceptable conduct was in issue. It was up to the claimant to satisfy the defendant that it was not behaving in this manner. In order to do that it would need to demonstrate that it had done what it reasonably could to give the prospective employees some idea of the costs, and if they couldn't give precise figures, they would need to explain why they could not give estimates. This was not a new issue but follows naturally from the nature of the unfairness alleged. It is telling that in Ms Kaura's statement she does not suggest that had the claimant realised that it should address the question of the giving of estimates it would have said that this was not possible. Had I been in the position, therefore, where I considered that the reference to the giving of estimates was a new issue to which the claimant should have been alerted, I would nevertheless have concluded that it is highly likely that it would have made no difference and would have refused relief on this ground under section 31(2A) of the Senior Courts Act 1981.

(g) The decision on the failure to keep contact details raised a fresh issue as to whether the claimant has corrected its records. Maintaining Worker Contact Details.

67. This challenge relates to the finding that there were errors in the claimant's records of contact details for staff. The fact that the defendant referred to the fact that no evidence had been submitted to show that in the light of the finding on inspection the records had not been corrected raises no new issue.

68. The allegation was a failure to keep accurate records of workers contact details, not failing to update the contact lists after they had been found to be wanting. Under Part 1 d of Appendix D to the Guidance the sponsor is required to keep contract details for the staff and keep them up to date. Paragraph 49 of the suspension letter specifically brought this to the attention of the claimant in alleging a breach of the sponsor duty in relation to keeping an accurate contact list.

69. The suspension letter identified the 7 staff for whom accurate records had not been kept. It was for the claimant to explain why this was not a breach and, if it was, provide mitigation, such as what it had done to put matters right. The claimant's response to the allegation was that it had in place an effective system of record keeping and that at the inspection there were two documents kept by the claimant, an Excel spreadsheet and the Coolcare HR database and that spreadsheet was used at inspection to evidence errors on the Coolcare system. The claimant said that a document called "Prestwick Checks" was updated for the inspector and a copy was sent with the reply. Further, any errors were the responsibility of staff for not telling them of changes of address. The defendant's observation that *"You have no evidence that you have amended the addresses for any of the above workers or explained which system you are primarily using. Therefore, you have not demonstrated that you accurately keep up to date record of workers' contact details…"*, paragraph 93 of the revocation letter, merely highlights that the claimant has not produced evidence to satisfy the defendant that it kept up to date and accurate records. The fact that the records were not accurate or up to date was apparent at the inspection. That was sufficient to make out the breach; see principles 1 and 2 in ***St Andrews College*** per Haddon-Cave LJ at 29.

70. What the claimant did say about the breach was a matter of mitigation. It is apparent from the claimant's reply to the suspension letter that it realised it should explain what it was doing to put matters right as it referred to updating the "Prestwick Checks" document and that it had re-iterated to staff that they must inform their employer of a change in any of their details. Fairness did not require the defendant to ask if they had taken any other remedial steps such as correcting the errors in the records of staff contact details.

<u>Ground 2: The defendant failed to approach the decision with an open mind.</u>

(a) The defendant failed to invite further representations where new issues were relied upon in the decision and to give weight to the claimant's representations where there is no reason to doubt its credibility and it is a large business with a good reputation. General Sponsor Duties 1 and 5.

71. The premise of the first part of the challenge is not accepted. It is apparent from my consideration of Ground 1 that there were no new issues relied upon in the decision. The second part does not support a finding that the claimant failed to keep an open

mind. As regards breach of General Sponsor Duty 1, it is surprising that this allegation is made at all as the claimant knows that the reasons given for the staff not undertaking the duties shown in the job description were incorrect. Nevertheless, the fact is that the defendant had evidence from staff interviews which revealed that the 5 staff were not working in accordance with their job descriptions. The claimant provided an account of why this was and what was being done about it which was lacking in detail and objective evidential support. What was to be made of this conflict of evidence was a matter for the defendant.

72. The staff were not putting forward the reasons for the discrepancy between their work and the job description relied upon by the claimant. As regards Kawaljeet Kaur, those who interviewed her were in the best position to decide whether she did not understand the questions or was so nervous that she could not explain her role. The fact that the defendant prefers the evidence of the staff, or is not satisfied by the claimant's explanation due to the paucity of detail, is not evidence that it approached this issue with a closed mind. Neither can such an inference be drawn from the fact that the claimant is of a large size and good repute. There is no principle that it is entitled to favour for those reasons. The defendant's task is to weigh up the evidence dispassionately. It looked at the evidence provided by the staff, examined the account put forward by the claimant and explained why the latter was wanting.

73. It is to be remembered that that the defendant should take steps to suspend or revoke if she has reasonable suspicion of a breach of immigration control, is entitled to maintain a high index of suspicion and a "light trigger" in deciding when and with what level of firmness she should act; see ***St Andrew's College*** at [29 (6) and (7)]. In the light of these principles and the facts as set out above, I cannot conclude that the defendant did not approach the job description issue with an open mind.

74. The same may be said in relation to the defendant's handling of the claimant's response to the Immigration Skills Charge/Visa charge issue. I shan't repeat the analysis, set out in relation to Ground 1, of how this was dealt with by the defendant. It is evident from my conclusion there that the defendant's response took into account the claimant's representations on the point, albeit that part of the response was seen as yet a further reason for the defendant not to be satisfied that the claimant was not recouping the immigration skills charge. Indeed, what was said about the claimant's response did provide a reason for doubting the claimant's credibility, contrary to Mr Southey's submission that no reason was given; it is notable that this part of his submission is wholly at odds with the claim that the defendant made a finding of dishonesty against the claimant.

(b) The evidence that the claimant pays sick pay was dismissed because the defendant considered that there had been no response to the allegation that managers had said that sick pay would not be paid whereas it would be unlikely they would make such statements as the claimant operated a sick pay scheme. General Sponsorship Duties 4.

75. What seems to underly this submission is that the defendant's finding on sick pay was so irrational it can only have been motivated by a desire to ignore the claimant's evidence or make a finding contrary to its interests.

76. The claimant has a good point, if it were taken, as regards the lack of a fair opportunity to deal with the assertion that workers are being incorrectly told that they would not receive sick pay as amounting to a reason not to be satisfied that there had been compliance with the Guidance on sick pay. This decision could also be said to be irrational on the basis that the decision maker should have realised that the claimant had not had a fair chance to deal with what she regarded to be a reason for her conclusion and thus should have been aware that she was not in possession of all the necessary information as she had not had the claimant's side.

77. The allegation is that there has been a failure to comply with employment law by not providing statutory sick pay. This was based on the evidence of three members of staff who said they had been told by a manager, who was not named, and at some unspecified point in time, that sick absences would not be paid. The defendant provided information from its payroll records showing when one of the members of staff was off sick she had received statutory sick pay and that the other two had not been off sick, together with contracts to show that sick pay was payable.

78. The defendant's response in relation to the worker who did receive sick pay, Reya George, was that the defendant's records of absence did not match Ms George's account of being off for two separate week long periods and this discrepancy was not explained by the claimant. That reasoning related to the issue of non-payment and was open for the defendant to adopt. As the defendant observed, all the claimant had done was shown when their records indicated that she was sick and that she had received sick pay for the recorded period. What the claimant had not done was sought to demonstrate from its records that she had worked and been paid during her other periods of employment, so as to counter the suggestions that there was a further week period of sickness absence for which she had not been paid.

79. As regards the second member of staff, Ms Joy, the defendant did not challenge the claimant's assertion that she has not received sick pay because she has not been off sick. She says that the issue to be addressed is that she was told she would not be paid sick pay. She then hypothesises that Ms Joy may not have gone on the sick due to her belief that she would not be paid. That did not come from Ms Joy and was pure speculation on the part of the defendant. As regards the third employee, Ambily Jose, the allegation was withdrawn.

80. The reason for not being satisfied that the Guidance as to complying with UK employment law is to be found in paragraph 51 of the revocation letter. There it is said: *"…whilst you have provided contracts which do state that workers are entitled to SSP, the issue remains that workers are incorrectly being told that they would not receive pay for sickness absences. You have not responded to reports that workers are being informed that sickness leave is not paid. Workers are unaware of their rights regarding SSP. Therefore, you have failed to resolve the issues we have raised on behalf of the*

above workers and are not complying with wider UK law regarding SSP." This reasoning misses the point that the issue raised was a failure to follow the Guidance by complying with UK employment law on SSP. An allegation that staff are being misled as to their contractual entitlement as to SSP is a completely separate allegation and not one which falls under the duty to comply with UK employment law, paragraph 1.31 of part three of the Guidance. The claimant was required to satisfy the defendant that it did, which it could reasonably expect that it could accomplish by providing information showing that SSP was payable and had been paid, which, as regards the dates it had recorded as to Ms George's absence it had.

81. The claimant was not asked to confirm or deny what was said by the three workers as to what they had been told. Had that been the case, it could reasonably expect to have been given details as to when and between whom these conversations took place. Otherwise, it would not be in a position to produce a detailed rebuttal; it may be that the claimant could have sought such details from the staff, but to do so may bring with it the suggestion that they are pressuring staff to retract. The report of what staff had said was just the evidence underpinning the allegation. The suspension letter did not indicate that it was raising the issue as to what the staff had been told on behalf of the three employees or that was the issue which had to be addressed by the claimant. Accordingly, the claimant did not have a fair opportunity to answer to the point which was decisive in relation to Sponsor Duty 4.

82. The fact that the claimant was not given a fair opportunity to answer the allegation of what staff had been told does not necessarily lead to the conclusion that there was an unwillingness on the part of the defendant to consider the claimant's case with an open mind. It is equally likely that the decision maker failed to spot that there was a disconnect between the issue which the claimant had been asked to address and the issue she thought it should address because of the nature of the evidence she had relied upon as the basis for raising it. I am not satisfied that I should draw the inference from this error that the defendant approached the SSP issue with a closed mind.

    (c) In concluding that the claimant's employment practices did not comply with the guiding principles, no account was taken of the fact that the claimant had taken advice from lawyers and trade unions which suggests a desire to comply with the law. General Sponsors Duties 6.

83. Mr Southey argues that the taking of advice from lawyers and trade unions shows that the claimant desired to comply with the law. Mr Manknell says that this submission demonstrates a misunderstanding of the sponsorship scheme. Referring to the principles set out in ***St Andrew's College*** at [29] he points to the fact that the sponsor is expected to carry out its responsibilities with all *"the rigour and vigilance of the immigration control authorities,"* and the scheme is a system *"in which the emphasis is on certainty in place of discretion, on detail rather than broad guidance."*

84. I agree with Mr Manknell. The issue for the defendant is not whether the claimant is well intentioned but whether it has complied. Both counsel referred me to paragraph C1.31 of the Guidance which states "You have a duty to comply with the wider UK

law." That, and the principles set out at [29] in ***St Andrew's College*** demonstrate that that compliance is the key, not a mere willingness to do so.

85. In any event, on the facts of this case, the reliance on the taking of legal and trade union advice in relation to the failure to comply with the guiding principles of sponsorship as a challenge is wholly misguided. In its response to the suspension letter the claimant said, in relation to recoupable amounts "*…on the advice of our employment solicitors Ward Hadaway and the RCN, we were told that we should spell out specifically what was payable and the amounts, hence why we have now included this in the Financial Agreement with the employees."* It goes on to say that the RCN have said that other employers, such as the NHS, recoup costs if workers leave. The defendant's criticism was not that these costs were not shown in contracts issued after the employee had arrived in the UK but that they were not informed of the likely level of cost before they arrived. The claimant does not say that it sought advice on what should be in the pre-arrival contracts and was misled by what it was told. That could be relevant to an assertion that the claimant should be treated as trustworthy as it had acted on information from solicitors skilled in the area of immigration sponsorship, but that is not the case here.

86. The whole extent of the advice received was not revealed in the reply, nor the date; Ms Kaura has since said that it was provided happened in January 2022 but sticks by the assertion that the employees are not informed of the level of recoupable charges prior to receiving their post arrival contract due to currency fluctuations despite the reply to the suspension letter claiming they were advised to spell out the costs. The fact that the Schedule of Costs containing the £3,199 charge was given to the inspectors in October 2022, with the explanation as to advice set out in the claimant's reply, would suggest at the decision stage that either the claimant did not seek advice on what information as to which costs ought to be provided in the first, pre-arrival contract or, if the advice of the solicitors and the RCN was given in relation to these contracts as well, it clearly was not followed or, they did not seek such advice until it was pointed out in the letter of suspension that such costs were not recoupable, a fact of which it should have known if, as was required, it informed itself as to the contents of the guidance.

87. For both the reasons put forward by Mr Manknell and the facts identified in the preceding paragraph there is no basis upon which I can find that the defendant lacked an open mind when considering the claimant's response to its criticisms under General Sponsor Duty 6.

<u>Ground 3: The decision challenged is based on an irrational conclusion that the claimant had acted dishonestly. General Sponsor Duties 5.</u>

88. I dealt with the question as to whether there was a finding of dishonesty when considering Ground 1. As there was no such finding and the decision did not rely upon a dishonesty this ground cannot succeed.

Ground 4: The decision failed to take account of relevant considerations.

(a) There was a failure to demonstrate, in the decision, that the impact on the business was taken into account, nor could it have been as the claimant was not asked for information on the matter.

89. Mr Southey says that Mr Magee states that the impact was considered but it cannot have been as no information was sought from the claimant or the public authority and they supplied none. The defendant was under a duty of sufficient enquiry, that is to acquaint herself with the relevant information to decide what to do in the light her conclusions as to the claimant's adherence to the Guidance, following ***Secretary of State for Education and Science v Tameside MBC [1997] AC 1014 at 1065B*.**

90. Though Mr Southey suggests that Mr Magee said that the impact on the business was taken into account, he extends that to the impact on the provision of care home services in the area in which the claimant operates. As regards the impact on the business I have dealt with this argument, as well as any suggestion that Mr Magee said that the impact on local care was taken into account and that defendant was obliged to do so when dealing with Mr Southey's arguments as to the heightened standard of fairness at paragraphs 21-36, above. It will be apparent from what I said there that there was no requirement to take these factors into account either in reaching a decision as to whether the claimant had complied with the guidance and, if not satisfied that it had, what the defendant should do about it. Thus, the ***Tameside*** duty of enquiry does not arise.

91. As these matters were not taken into account and were not relevant considerations this challenge fails and I need say no more. In addition, however, to what I have said on the matter, there are good reasons why the defendant ought not be drawn into taking into account the commercial impact on the business and the effect on local care and health services.

92. As regards the commercial impact, there is the evidential difficulty which Nicol J identified in ***Birds Hill Nursing Home*** at [40] where he pointed out that "*it is remarkable how often dire predictions prove ill founded once put to the test,* and that the evidence about the impact on the business will not come from an independent source. Nor is it likely to reveal if another provider may come forward to take on the business. A more fundamental reason for not requiring the commercial impact to be considered by the defendant is that her expertise is in immigration control. It is unrealistic to expect her to evaluate the economic viability of the many and disparate businesses which rely upon the use of sponsored labour.

93. Similar observations apply to the issue of the impact on care and health. The defendant can never be confident that she has the whole picture. As was pointed out in ***Birds Hill*** there may be some other provider who would come forward to take over. They may not announce their interest until they know there has been a revocation so that they can take the benefit of what would, in effect, be a forced sale. It may be that the existing sponsor has, through control of other companies in possession of a licence, either by way of subsidiaries, other parts of the group or through a common controlling shareholder, the

ability to take over the running of the care homes. The defendant is highly unlikely to be aware of any of this until the revocation decision has been taken. Ultimately, neither the commercial viability or healthcare provision issues should need addressing because they are not relevant to the central question, namely, can I trust this sponsor to comply with the Guidance?

(b) The conclusion that the claimant adopted unacceptable employment practices failed to take account of the fact that it had sought legal and trade union advice, which suggests a desire to comply with the law. It is inconsistent with paragraph C1.31 of the Sponsor Guidance, part 3, which puts compliance with UK law as key, to require the claimant to be judged by a higher standard. General Sponsor Duties 6.

94. This challenge fails for the reasons given under Ground 2(c). In any event, this ground, as stated, makes no sense. Where compliance with the law is key, the question is a binary one, was there or was there not compliance. That is reflected in principle 6 at paragraph 29 of ***St Andrew's College*** (the emphasis is on certainty and on detail rather than discretion and broad guidance.) The fact, if it be the case, that the claimant has shown a willingness to comply with the guidance but failed, is irrelevant to deciding the question. Thus, the claimant was not being judged by a higher standard than that required by the guidance if the defendant restricts herself to binary questions and leaves out of account the claimant's motivation. As I pointed out earlier, receipt of expert, though incorrect, advice may be a relevant consideration as the defendant may take the view that the sponsor would have complied if correctly advised and will, accordingly do so now that the error has come to light. These are, however, not the fact of this case.

Section 31(2A) of the Senior Courts Act 1981

95. Mr Manknell asks that in the event that I find any of the claimant's grounds are made out I should, nevertheless refuse relief on the basis that it is highly likely that the defendant would have come to the same decision. This is a case in which there are multiple grounds for revocation, including two which are mandatory grounds, that related to the job description and underpaying workers. Mr Magee has said that the finding of a breach on either would have led to revocation whatever the position on the other breaches. Mr Manknell says that the court does not need to speculate what might have happened if the defendant had been persuaded by the claimant on a particular point.

96. Mr Southey argues that I must be careful in accepting Mr Magee's evidence as it may be influenced by post event justification. Furthermore, because the court must defer to the decision maker on the merits of the revocation decision as it does not have equivalent expertise in this area, I cannot safely conclude what would have been the result if the defendant had been persuaded by the claimant in relation to the breaches where there has been a successful challenge.

97. On one view there is no scope for the operation of the section as I have not found any of the pleaded challenges made out. For completeness, however, if the claimant had relied upon the failure to notify the claimant as to the issue it was expected to address in relation to SSP, I would have had no hesitation in reaching the conclusion that the

defendant was highly likely to have reached the same conclusion as to revocation. I do not accept that Mr Magee's evidence about the impact of an adverse decision on just one of the mandatory grounds is influenced by a desire to justify the decision in the light of these proceedings. It is entirely consistent with the Guidance which states that there are mandatory grounds for revocation and there are no exceptional circumstances in this case to depart from the guidance. Furthermore, all the other allegations of breach related to shortcomings for which revocation would normally follow; the claimant has not even sought to challenge the breach concerning the failure to monitor the immigration status of employees. They point to a lack of rigour in following the guidance and record keeping and cannot but have led to the conclusion that the claimant could not be trusted to comply with its duties as sponsor, and it is trust which is the watchword of the sponsorship system; see ***St Andrew's College*** at [35] per Hadden-Cave LJ.

Conclusion

98. Having examined each element of the pleaded challenge to the decision of the defendant to revoke the claimant's sponsorship licence, the claim fails in its entirety. Looking at the whole picture painted by the challenge leads to no different conclusion. In so far as the claimant is able to rely upon my conclusion concerning the SSP as an effective ground of challenge, the claim must nevertheless fail in view of my decision in relation to the application of section 31(2A) of the Senior Courts Act 1981. The interim order of Bryan J, suspending the operation of the revocation order lapsed on the granting of permission, though the parties have treated it as continuing until judgment on the substantive application. For the avoidance of doubt I will order that it be discharged on the handing down of judgment.