In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR/2246/2020

In the matter of an application for Judicial Review

The Queen on the application of
Mamun Sarkar
Naima Jesmin

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge McWilliam

HAVING considered all documents lodged and having heard Mr M Symes, of Counsel, instructed by Chancery Solicitors, for the Applicant and Mr R Harland of Counsel, instructed by GLD, for the Respondent at a hearing on 15 June 2021

IT IS ORDERED THAT:

(1) The application for judicial review is refused for the reasons in the attached judgment.

(2) I have considered the costs submissions made by the parties. The Applicant accepts that costs follow the event, but relies on para 10 (7) (b) of the 2008 Procedure Rules. Mr Symes submits that the UT should set a "reasonable" cap on costs because of the Applicant's financial circumstances. I have taken into consideration all that has been said on the Applicant's behalf; however, in this case I find no good reason to justify a departure from the general rule that the unsuccessful party should pay the costs of the successful party. The Applicant is to pay the Respondent's reasonable costs, to be determined by a costs judge if not agreed.

(3) Permission to appeal is refused for the reasons given for refusing this application.

Signed: *Joanna McWilliam*

Upper Tribunal Judge McWilliam

Dated: 27 July 2021

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 27/07/2021

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

IAC-AH-KRL-V2

Case No: JR/2246/2020 (v)

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR
27 July 2021

Before:

UPPER TRIBUNAL JUDGE McWILLIAM

- -

Between:

THE QUEEN
on the application of
MAMUN SARKAR
NAIMA JESMIN

Applicants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Mr M Symes
(instructed by Chancery Solicitors), for the applicant

Mr R Harland
(instructed by the Government Legal Department) for the respondent

Hearing date: 15 June 2021

- -

J U D G M E N T

- -

JUDGE McWILLIAM: In a decision of 22 January 2021 Upper Tribunal Judge Allen granted the Applicant, Mamun Sarkar, permission to judicially review the decisions of the Secretary of State on 28 August 2020 and 20 July 2020 to refuse his application of

22 February 2018 for leave to remain (LTR) in the United Kingdom as a Tier 2 (General) Migrant.

2. I shall refer to Mamun Sarkar as the Applicant. The second Applicant is his wife. She is dependent on his application.

3. The Applicant entered the UK as a student on 17 February 2010 with valid leave until 13 April 2013. He thereafter repeatedly applied for extensions of his student visa on 5 April 2013 (granted to 22 April 2014); on 20 April 2014 (granted to 29 February 2016) and on 17 November 2014 (granted to 20 September 2016). His partner entered the UK on 1 May 2016.

4. On 19 September 2016 (the day before his student leave expired) the Applicant applied for LTR under the ten-year family/private life route. He varied this to apply for indefinite leave to remain (ILR) on compassionate grounds. He again varied the application to one for leave outside of the Rules (LOTR) on 22 February 2017. On 22 September 2017 his application was refused and certified as clearly unfounded under s.94 NIAA 2002. The Applicant's leave under s.3C Immigration Act 1971 (s. 3C leave) expired fourteen days later, since when he has been an overstayer. (The Applicant unsuccessfully challenged the decision of 22 September 2017 by way of judicial review).

5. On 10 October 2017 the Applicant again applied for LTR under the family life route. He varied the application on 22 February 2017 to an application for LOTR. He varied it for a third time on 16 February 2018, to a Tier 2 (General) Migrant application under the PBS. It was this application which was refused on 21 July 2020. That refusal is the decision against which the Applicant now seeks judicial review.

6. The application was refused because although the Applicant relied on a certificate of sponsorship ("CoS") which purported

to come from a Sponsor called Enactor, that company made it clear that it had not sponsored the Applicant or given him employment. The SSHD gave the Applicant notice of this fact on 20 January 2020 and informed him that she was considering refusing the application on the basis of false representations. She invited him to respond as to why that should not happen.

7. In the event the Applicant responded within the set deadline by way of letter dated 31 January 2020. This document ("the 31 Jan letter") is important and I shall return to it in due course. The SSHD did not make a finding of deception, but she went on to refuse the application on 20 July 2020 on the basis that the Applicant cannot meet the requirements of the Immigration Rules (IRs).

8. The Respondent did not make any finding of deception, however refused the PBS application on 20 July 2020 under 245HD of the IRs because there was no valid CoS. Her reasons were enlarged upon by way of an administrative review ("AR") response dated 20 August 2020 (HB 42) and the PAP response (HB 73).

9. The grounds before Upper Tribunal Judge Allen are threefold. The second ground is that the Respondent failed to consider her own responsibility for the Applicant's failure, having had notice of the failures in Enactor's maintenance in May 2018. Upper Tribunal Judge Allen specifically refused permission on this ground, stating that

> "The fact that the Applicant is without a remedy against either the fraudster or the Sponsor is not a matter that arguably should be put at the Respondent's door. The fact that the Respondent continued to allow the Sponsor to continue in that capacity despite awareness of hacks in the Sponsor's system is not a matter that arguably gave rise to

> any duty on the part of the Respondent towards the Applicant".

10. Ground 3 argues that the Applicant failed to give timely notification of the flaw in the Applicant's application with reference to Pathan [2020] UKSC 41. Upper Tribunal Judge Allen refused permission on this ground, stating that

> "the guidance in Pathan [2020] UKSC 41 does not arguably encompass the circumstances of a case such as this. There was no arguably undue delay on the part of the Respondent".

11. Permission was granted by Upper Tribunal Judge Allen in respect of ground 1 only, on the basis that it is arguable that there has been a failure by the Secretary of State to consider discretion outside the Rules.

12. The Applicant's case, in a nutshell, is that the 31 Jan letter is an application to vary his application from one under the PBS to an application for LOTR for a period of 60 days described as a grace period, in order to find a new Sponsor. He sought the exercise of discretion in his favour. The SSHD did not properly consider whether to exercise discretion outside the Rules, with reference to her policy. The decision of the SSHD dated 20 July 2020 (and the AR decision 28 August 2020) discloses public law error because the SSHD was obliged, following the 31 Jan letter, to consider exercising discretion to grant LOTR and did not do so.

The 31 Jan letter

13. The majority of the contents of the letter refer to the allegation of dishonesty and the delay in investigating the allegation. However for the purposes of this decision the salient parts are as follows:-

"7. Accordingly, it is submitted that the SSHD has acted so unreasonably that no reasonable authority in her position could have acted in this manner. Therefore, it has amounted to a Wednesbury unreasonableness and to a procedural error on her part. It is further submitted that the SSHD's delay in communicating and investigating the matter earlier and making a decision is nothing but an abuse of power.

8. The SSHD is ought to withdraw the allegation or deter from making such allegation. We further submit the SSHD is ought to allow them a 60 day period to find an alternative Sponsor.

We would like to point out that the main Applicant is eligible for an indefinite leave to remain in the UK under long residence of the Immigration Rules. Since entering the UK on 17/02/2010, the main Applicant has been residing in the UK for a continuous period of ten years (eligible on the date 28 days prior to the date ten years' residence is completed). Hence, we submit the main Applicant is eligible to be granted an indefinite leave to remain, which in turn makes the dependant eligible to apply under family route. Further both the Applicant and dependant during their long period of residence in the UK have formed a private and family life under Article 8 of the ECHR. They have formed deep connection with the culture, society and most importantly their friends and family members present in the UK. Detailed submission in this regard, together with documents supporting their connection and integration will be provided as soon as possible. You would appreciate that they were not accumulating such documents as they were waiting for the SSHD's decision on their Tier 2 application.

> We further submit that the SSHD is required to make a consideration with due compassion of how his dealing and conduct of their Tier 2 application, as outlined above, have affected them and their circumstances. The unreasonable and overall lack of care in dealing with the matter have paralysed them to the point that they are now consumed with stress, anxiety and sleep deprivation, suicidal thoughts and many other symptoms, as we have been informed, which in our opinion refer to nothing but case of severe depression. Accordingly, we have advised them to seek urgent medical attention. We will forward your relevant medical documents, if any, as soon as they are available".

The Applicant's grounds

14. The Respondent failed to consider the request in the 31 Jan letter with reference to the terms of the LOTR policy. The state of affairs was arguably an "unexpected event" or a "crisis … that could not have been anticipated" and thus apt to call for consideration of a short grant of leave under the LOTR policy.

15. The delay prejudiced the Applicant's ability to pursue any claim against the Sponsor or the agent. Had the Applicant had notice of Enactor's lack of knowledge of his application he could have taken steps to protect his position which would have given him the opportunity to find an alternative Sponsor. The Respondent's lengthy inaction prevented him from doing so. From January 2020 until July 2020 the Applicant was unable to take steps to find a new Sponsor given that the Respondent had accused him of dishonesty. Therefore, any further application would not have been tenable whilst the Applicant's honesty was in issue.

16. The Applicant was not given adequate notice that there was a significant difficulty with his application. The making of a further application is not an alternative remedy to challenging the present refusal. The Applicant can no longer satisfy an employer that he has the right to work in the UK.

17. The present application on 10 October 2017 within fourteen days of his human rights application refusal on 27 September 2017 falls within the Rule 39E tolerance for overstaying. Any further new application that the Applicant seeks to make in the future would not fall within that proviso.

The Detailed Grounds of Defence

18. The application made by the Applicant was one under the PBS scheme, in particular Tier 2 (General) Migrant provisions. The application was bound to fail under the IRs because the Applicant did not have sufficient points (see paragraph 245HD of the Immigration Rules). The prescriptive nature of the PBS scheme has been set down in numerous authorities: (R (Muhammad Junied) and SSHD [2019] EWCA Civ 2293).

19. It is recognised that the Secretary of State has a residual discretion to grant leave outside of the Rules. This was defined by the Court of Appeal in MS (Ivory Coast) and SSHD [2007] EWCA Civ 133.

20. The Applicant asserts that the decision is unlawful because the Respondent did not take into account her own unreasonable delay and the Applicant's inability to take steps to protect himself. However, the two points are different formulations of grounds 2 and 3. However the arguments in grounds 2 and 3 cannot be pursued in this judicial review. They are not to be repackaged into ground 1.

21. In any event the Applicant's situation is far away from a Pathan type case where fairness would dictate a different

outcome. The Applicant in this case is an overstayer. The Pathan principle does not apply to him any more than it did to Mr Pathan's co-Appellant. The failure of the application was not caused by the actions of the SSHD but was the result of the behaviour of a third party. In Pathan Arden JSC, at paragraph 66, stated as follows "there is no need for the Secretary of State to give notice to the Applicant if the licence is terminated other than as a result of the Secretary of State's actions". In this case the Applicant did have notice of the allegations against him and the contention of the purported Sponsor that the CoS was not genuine, and they did not intend to sponsor him.

22. Pathan does not assist the Applicant. It establishes conclusively that there is no duty of substantive fairness in the circumstances, still less procedural fairness which would require the Secretary of State to grant a period of leave to the Applicants in order to allow them to make a further application. There is no need for any prior notification. That is to say any specific period between the notice of the problem and the refusal of the application. That is true when it is the Secretary of State's actions which have led to the failure of the application, whilst the Secretary of State's actions have not led to the failure of this application. I accept the argument on this point as advanced in the Defendant's grounds.

23. The Applicant is contending that where an application has failed due to the behaviour of a third party employed by the Applicant who has concocted a CoS for a job that does not exist, the Secretary of State should grant leave in any case so that the Applicant can apply again for leave. This goes against the ratio of Pathan and EK (Ivory Coast) [2014]. It would also be manifestly prone to abuse and it would run

entirely against the prescriptive nature of the PBS system as set out in Junied and Agyarko [2017] UKSC 11.

24. The Applicant's argument as to whether the Secretary of State should have exercised her discretion outside the Rules is bound to fail. In R (On the application of Kalsi) v SSHD [2021] EWCA Civ 184 the court said that the PBS system is prescriptive. There is no need for the Respondent to go on to consider a discretion because no such discretion exists. The Rules mandate the refusal of the application.

The Applicant's Skeleton Argument

25. The Applicant relies on Ullah [2016] EWCA Civ. The court found that "there is no doubt that there is a general discretion to grant leave to remain in the United Kingdom outside the Rules" however, no obligation to consider that discretion arose on the facts of the case.

26. It is submitted that the Applicant's case is made out and judicial review should be granted if

    (a) it was open to the Respondent to exercise her discretion to grant the Appellant leave to remain outside the Rules, but

    (b) the Respondent unlawfully failed to consider exercising that discretion.

27. The Respondent has a general power to grant leave to Applicants even where they do not meet the requirements of the Rules.

The SSHD's skeleton argument

28. It is the Respondent's case that the 31 Jan letter was not a valid application for LOTR either in form or substance. There was no need for the Respondent to go on to consider any further direct discretion. The Applicant's characterisation

of the 31 Jan letter does not reflect its true nature. It was not an application to supersede or replace the PBS application with an application for LOTR. The proper question for this Tribunal is whether the Secretary of State was entitled to consider that the PBS application remained extant, and she was plainly entitled to do so for two reasons.

29. The Applicant was required to make a proper application for LOTR (see R (on the application of Khajuria) v SSHD and Junied). If the Applicant was intending to replace his PBS application with an application entirely outside the IRs, then he was required to apply on form FLR(HRO) and pay the requisite fee (likely £1,033 compared to £610 for a PBS application for leave up to three years). This was not done.

30. In any event the 31 Jan letter makes no reference to LOTR. There is no suggestion that the PBS application is being superseded. Rather the application continued to push for a decision on the PBS application (see for example the correspondence from the Applicant's representatives on 5 February 2020 (HB 152), 16 March 2020 (HB 163); 29 May 2020 (HB 166) each of which is headed "Tier 2 – general leave to remain application – Mamun Sarkar".

31. The Applicant's representatives now contend that the words at paragraph 8 of the letter (HB 141) stating that "we further submit the SSHD is ought to allow them a 60 days' period to find an alternative Sponsor" amounted to an application for LOTR superseding the PBS application. This phrase cannot carry the weight the Applicant puts on it. In the context of the PBS case law a request for a further 60 days to find a new Sponsor does not amount to an application for LOTR. To the contrary, the practice in student cases following Patel (relocation of sponsor licence – fairness) [2011] UKUT 00211 was for the SSHD to delay deciding the application for 60 days

where a Sponsor's licence was revoked (as Briggs JSC described in Pathan). This is also a form of exercise of the residual discretion, but it prolongs s.3C leave and does not involve a further grant of substantive leave.

32. In order for the Secretary of State to void the PBS application and replace it with a new one there must be an unambiguous request; not least to protect those Applicants who intend to pursue their original application. A reference to a 60 days' period cannot be treated as a sufficiently clear application for further LOTR (rather than, as was the conventional process, a short delay in deciding the application), to allow the Tribunal fairly to conclude that the Secretary of State was acting irrationally by not treating it as such.

33. The words at paragraph 8 of the 31 Jan letter are immediately preceded by a sentence requiring that the SSHD withdraw her allegation of deception (consistent with the PBS application remaining live) and are followed by representations about ILR and family life. As the LOTR guidance sets out if there were to be any application for ILR it would have to be on a separate form. In any event any such application is hopeless, the Applicant being an open ended overstayer (using the terminology set out in Hoque and SSHD [2020] EWCA Civ 1357 at paragraph 9 (who fell approximately two years short of the ten-year threshold)). Likewise, any human rights application would need to be made on the appropriate form (as the administrative review letter subsequently pointed out in HB 44). To claim that the Secretary of State was required to treat the letter as an application for 60 days' LOTR rather than (say) an application for ILR reflects the difficulties with his key argument (viz that this letter could only rationally be construed as an application for LOTR outside the Rules). Indeed, the 31 Jan letter is not described as

applying for LOTR, but for ILR, in his own chronology (see for example, paragraph 12(e) of the original grounds (HB 12)).

34. Read as a whole the 31 Jan letter was not a clear, separate application for LOTR of the sort that was being required in Khajuria and Junied and which would trigger the formal variation of the application. The Applicant had previously successfully varied pending applications. He must be taken to be aware of the need for a formal variation of the application. Indeed, at no point in the AR did the Applicant contend that the Secretary of State had erred in treating the application as a PBS application, rather than one for LOTR (there was indeed no mention of 60 days whatsoever).

35. In the Appellant's subsequent challenge, he did not initially depict the 31 Jan letter as being an application for further leave. In the PAP letter, the Applicant referred to the 31 Jan letter, but made no reference to it being a further application for LOTR, or to 60 days – only referring to human rights representations. At paragraph 16 he described his application as being a PBS application. At paragraph 26 he raised an allegation of procedural unfairness (which he said should lead to discretionary leave or a reasonable remedy). This is manifestly a reference to the Patel type fairness case law and is bound to fail with reference to EK (Ivory Coast) and Pathan et al.

36. The SSHD was not obliged to treat the 31 Jan letter as a new application for leave outside the Rules which superseded the PBS application. She was not required to respond to it as a new application. It therefore fails for the same reason that the application did in Junied.

37. Even if it were not for the above the Applicant's arguments cannot succeed. The request that the Respondent exercise discretion to allow 60 days for an Applicant to obtain a new

Sponsor has plenty of precedent in the case law set out, in particular EK (Ivory Coast) and Pathan. It is bound to fail for the reasons set out in case law.

38. The SSHD does not have a policy of granting extra time in such circumstances. That approach has repeatedly been deemed lawful. Indeed, even in this judicial review, arguments that the Respondent acted unfairly in not taking into account her own responsibility for the failure of the application (so as to distinguish the case from EK (Ivory Coast) and bring it within the Patel line of authorities) and that the Respondent should have given prompter notification (so as to bring it within Pathan) have both been deemed unarguable.

39. The Applicant seeks to argue that the case law has no relevance. The Applicant cannot sensibly escape that case law which explicitly deals with how the Secretary of State should exercise her discretion to allow a short period of leave to obtain a new Sponsor – by claiming (after the event) that he seeks the exercise of the Secretary of State's discretion for the exact same short period, for exactly the same reasons, but in relation to LOTR (rather than generally).

40. The delays did not affect the outcome. Any delay and the fraud do not require the Respondent to grant him further leave and a further opportunity to seek a new Sponsor. That is the effect of the IRs and the SSHD's policy as expressed and upheld in EK (Ivory Coast).

41. The SSHD's consideration and rejection of the Applicant's representations in the AR and in the PAP letter was open to her.

42. Even if the Respondent's consideration of her discretion in the PBS context was incorrect (which is denied) there is no reason to consider that she would have reached a different

conclusion had she considered it in the context of a LOTR application. The Applicant contends (at paragraphs 31-32 of his skeleton argument) that the PBS case law has "no relevance" to the LOTR consideration. The two processes run alongside each other and the LOTR scheme cannot undermine the PBS scheme. The same policy considerations must underpin both. It is at very least highly likely and in fact inevitable that the outcome would not have been substantially different if the conduct complained of had not occurred.

The law

43. The case law to which I was referred concerned the SSHD's general discretion to allow an application outside of the Rules, the exercise of discretion within the IRs, specifically the PBS and issues of fairness applying to the PBS.

44. Section 3A of the Immigration Act 1971 gives the Secretary of State discretion to grant leave, which is generally exercised under the IRs, but it is well recognised that she has a residual discretion to grant LOTR. This was defined by the Court of Appeal in MS (Ivory Coast) as follows at paragraph 44; -

> "In situations falling outside the API there is a possibility of leave outside the Immigration Rules (LOTR). LOTR's legal basis arises from s3A of the 1971 Act and the Immigration (Leave to Enter) Order 2001 (SI 2590/2001). Broadly, this is a residuary power to deal with special or unusual situations that would not otherwise be covered".

45. In Alvi [2012] UKSC 33, the court considered the Respondent's discretion to grant leave where the requirements of the IRs were not met.

"31. In *R v Secretary of State for the Home Department, Ex p Ounejma* (1989) Imm A R 75, 80 per Glidewell LJ said that the residual prerogative powers remain, and in Macdonald, *Immigration Law and Practice in the United Kingdom* 8th ed (2010), para 2.35 it is asserted that the prerogative power is not impaired or superseded, merely put in abeyance. But these propositions understate the effect of the 1971 Act. It should be seen as a constitutional landmark which, for all practical purposes, gave statutory force to all the powers previously exercisable in the field of immigration control under the prerogative. It is still open to the Secretary of State in her discretion to grant leave to enter or remain to an alien whose application does not meet the requirements of the Immigration Rules. It is for her to determine the practice to be followed in the administration of the Act. But the statutory context in which those powers are being exercised must be respected. As their source is the 1971 Act itself, it would not be open to her to exercise them in a way that was not in accordance with the rules that she has laid before Parliament.

32. What then is one to make of Lord Brown's observation in *Odelola*, para 35 on which Mr Swift relies? Are the Immigration Rules to be seen, as Lord Brown said, as an indication of how it is proposed to exercise the prerogative power of immigration control? Lord Hoffmann's description of them in para 6 as detailed statements of how the Crown proposes to exercise its executive power to control immigration avoids attributing the source of that power to the prerogative, and it is unexceptionable. Although I said in para 1 of *Odelola* that I agreed with Lord Brown's opinion, I think that it must be recognised that his statement as to the source of the power was wrong. The entry to and stay in this country of Commonwealth

citizens was never subject to control under the prerogative. The powers of control that are vested in the Secretary of State in the case of all those who require leave to enter or to remain are now entirely the creature of statute. That includes the power to make rules of the kind referred to in the 1971 Act."

46. The issue was considered by Mostyn J in Thebo [2013] EWHC 146: -

> "13. … plainly the Secretary of State cannot when making her decisions adopt and apply a policy of restriction and control which is more confined and rigorous than the Rules stipulate. On the other hand the Secretary of State is surely perfectly entitled in an individual case to decide it more generously than the rules, literally read, allow. This is why Lord Hope refers in the passage in para 33 which I have cited to "powers **to restrict or control** immigration in ways that are not disclosed by the rules." Of course were such latitude to become commonplace then Parliamentarians may well start to wonder whether the rules were being paid more than lip service and in that event, as Mr Moules rightly says, the Secretary of State may well have to answer for her decisions on the floor of the House.
>
> .' … .
>
> 14. It is for these reasons that the phenomenon has arisen of 'applications made outside the Rules', and these are fairly regular. Decisions on them from time to time give rise to applications for judicial review. Mr Moules was not able to give me statistical data about the volume of such applications, but they are certainly made and

> decided, if infrequently. I therefore respectfully disagree … that the effect of the decision in Alvi is to abrogate entirely the residual discretion of the Secretary of State to make a decision in favour of an Applicant migrant which is more favourable than a literal reading of the Rules allows. Put another way, there remains vested in the Secretary of State a residual discretion by way of a safety net for those hard cases dealt with over harshly by the Rules as framed. It is worth noting that in this very case on 5 November 2007 the claimant made an application outside the Immigration Rules to remain here."

47. Mostyn J went on to emphasise at paragraph 30 that "the residual discretion here is not just false air and lives on in a meaningful and active way". This remark was cited with approval by the Court of Appeal in Sayaniya [2016] EWCA Civ 85.

48. The Respondent's discretion to grant leave to people who do not meet the requirements of the Rules was again affirmed in the Court of Appeal in Behary and SSHD [2016] EWCA Civ 702 (also known as Ullah) [2016] EWCA Civ 702 at paragraphs 32 to 39 in a judgment given by Burnett LJ. The case concerned a Tier 4 Student application which failed to meet a requirement under paragraph 14 of Appendix C of the IRs. The court found that "there is no doubt that there is a general discretion to grant leave to remain in the United Kingdom outside the Rules" however, no obligation to consider that discretion arose on the facts of the case. It was accepted by the Appellant in that case that "there is no legal obligation upon the Home Office to consider its discretion outside the Rules in every application for leave to remain", however it was argued that "whether it was required to do so as a matter of law depends

upon the facts of the case". The court found at paragraph 39 that

> "there was no obligation upon the Home Office to consider the grant of leave to remain outside the Rules in Mr Ullah's case. There is an obligation to consider a grant when expressly asked to do so and, if but briefly, deal with any material relied upon by an Applicant in support".

49. The residual discretion to grant LOTR as it applies to the PBS has been considered in a number of cases, including by Lord Reed JSC in Agyarko. At paragraph 4 he stated: -

> "The Secretary of State has a discretionary power under the 1971 Act to grant leave to enter or remain in the UK even where leave would not be given under the Rules: R (Munir) and Secretary of State for the Home Department [2012] UKSC 32; [2012] 1 Weekly Law Review 2192, para 44. The manner in which that discretion is exercised may be the subject of a policy, which may be expressed in guidance to the Secretary of State's officials. The discretion may also be converted into an obligation where the duty of the Secretary of State to act compatibility with Convention rights is applicable".

50. At paragraph 7 he commented on the priority given to certainty, rather than discretion:

> "… over time, increasing emphasis has been placed on certainty rather than discretion, on predictability rather than flexibility, on detail rather than broad guidance, and on ease and economy of administration. The increased numbers of applications, the increasing complexity of the system, and the increasing use of modern technology for its administration, have necessitated increasingly detailed Rules and instructions. In some areas, the apparent aim is

for the decision-making process to involve as little discretion or judgment as can be achieved consistently with the duty to respect Convention rights".

51. In Khajuria a claimant who could not succeed under the PBS argued that discretion should be exercised so that she should be granted LOTR. She argued that the covering letter to her application was sufficient to put the SSHD on notice that she was seeking the discretion to be exercised in her favour. Her argument failed because she had not made an application for LOTR for which there is a specified form with a specific fee.

52. The prescriptive nature of PBS scheme has been set down in numerous authorities. The Court of Appeal summarised the law in Junied at paragraphs 11-14, per Davis LJ;

> "11. Various aspects of the PBS contained within the Immigration Rules have been the subject of court decisions over the years. The prescriptive and inflexible nature of the PBS has been the subject of much judicial discussion and comment (indeed it has been the prescriptive and inflexible nature of the scheme in question in any given case which has usually given rise to the particular litigation in the first place).
>
> 12. As noted by Lord Hope in paragraph 42 of his judgment in R (on the application of Alvi) and Secretary of State for the Home Department [2012] UKSC 33, [2012] 1 Weekly Law Review 2228:
>
> > " … the introduction of the points-based system has created an entirely different means of immigration control. The emphasis now is on certainty in place of discretion, on detail rather than broad guidance. There is much in

> this change of approach that is to be commended ….
>
> If an Applicant wishes to invoke that wider discretion he must, as Mr Malik submitted, make a separate application for that purpose; as, indeed, the decision letter in this case so indicated."

53. In Kalsi Elizabeth Laing LJ (on behalf of the court) noted the arguments of the SSHD that: -

> "62. The court should not endorse the submission that the Secretary of State had some residual discretion to exercise in a case like this. Such a discretion would undermine the PBS and make it unworkable. The suggestion that it existed is contrary to authority. He cited ten decisions of this court to that effect in his skeleton argument, culminating in Junied and SSHD [2019] EWCA (Civ) 2293 at paragraph 13. Mehta was irrelevant. It is an old decision and concerns an express power to extend time. The authority which is in point is Al-Medhawi and Secretary of State for the Home Department [1990] 1 AC 876".

54. Laing LJ accepted the arguments on behalf of the Secretary of State. She stated as follows: -

> "70. The question whether the Secretary of State had a discretion to grant an application which the Rules required him to refuse is a distinct question. That question is answered decisively in the context of the PBS, and against A, by the decisions to which Mr Malik referred in his skeleton argument, which this court is bound to follow. The contrary is not arguable".

55. There is case law in which the courts have specifically considered whether fairness requires the SSHD to waive/vary the strict requirements of the PBS by allowing or granting an Applicant 60 days' leave to find a new Sponsor. In Patel, the UT considered that where the SSHD had revoked a Sponsor's licence, then "it was obviously unfair" for the SSHD not to inform the Applicant that the college is no longer on the approved list of Sponsors and that fairness required UKVI to defer the decision on the application for "a period of 60 days" to give the Applicant an opportunity to vary the application to "obtain the relevant qualification" (by obtaining a new CAS from a different college during the course). There was the same outcome in Thakur (PBS decision – common law fairness) [2011] UKUT 151.

56. The principle did not apply where it was not the Secretary of State who was substantially responsible for the failure of the application. In EK (Ivory Coast) the Applicant Sponsor had accidentally withdrawn the Applicant's certificate of sponsorship by way of an administrative error. Sales LJ distinguished Patel and Thakur and noted:

> "In the present case, by contrast the Secretary of State had no means of knowing why the Appellant's CAS letter had been withdrawn and was not responsible for its withdrawal, and the fair balance between the public interest in the due operation of the PBS regime and the individual interest of the Appellant was in favour of simple operation of the regime without further ado".

57. One factor which Sales LJ identified at paragraph 34 of EK (Ivory Coast) as affecting what fairness required in cases where the error lies at the Sponsor's door is that in such cases:

> "An Applicant deals directly with their college in relation to sorting out acceptance onto a course and the certification of that fact, and so has an opportunity to check the contract made with the college so far as concerns the risk of withdrawal of a CAS letter. If a college withdraws a CAS letter, the Applicant may have a contractual right of recourse against the college. The fact that there is scope for Applicants to seek protection against administrative errors by choosing a college with a good reputation and checking the contractual position before enrolling is of some relevance to the fair balance to be struck between the public interest in the due operation of the PBS regime and the interest of an individual who is detrimentally affected by it.
>
> In my view the circumstances in which the PBS applies are not such that it would be fair, as between the Secretary of State (representing, for these purposes, the general public interest) and the Applicant, to expect the Secretary of State to have to distort the ordinary operation of the PBS regime to protect an Applicant against the speculative possibility that a college has made an administrative error in withdrawing a CAS letter; rather than withdrawing it for reasons which do indeed indicate that no leave to enter or remain ought to be granted. The interests of Applicants such as the Appellant are not so pressing and of such weight that a duty of delay and inquiry as contended for by the Appellant can be spelled out of the obligation to act fairly".

58. In Pathan it was decided that even where it was the SSHD who had caused the application to fail, in that case by revoking the Sponsor's licence, there was no obligation to give a further period of leave to remain or to delay the decision of the application until the Applicant had had chance to find a

new Sponsor (Briggs JSC noted at paragraph 165 the Appellant's argument in that case that the SSHD could exercise her residual discretion by delaying the determination of a pending application), this being what had been done in Patel so as to provide a further 60 days in which to vary the application if necessary.

59. An Applicant can only have one application for leave extant at any one time pursuant to paragraph 34BB of the Immigration Rules. If an application is to be varied from one application to another it must be done by way of an application.

60. The Secretary of State's Guidance "Applications for Leave to Remain: Validation, Variation and Withdrawal (v2.0, dated 30 November 2018) "states that:-

> "If the Applicant wishes to vary the purpose of their application, they must complete the specified form and meet all the requirements of paragraph 34 of the Immigration Rules for the variation to be valid".

61. The Secretary of State's Guidance "Leave outside the Immigration Rules (version 1.0, published 27 February 2018) ("the LOTR policy")states that:-

> "LOTR on compelling compassionate grounds may be granted where the decision maker decides that the specific circumstance of the case includes exceptional circumstances. These circumstances will mean that a refusal would result in unjustifiably harsh consequences for the Applicant or their family, but which do not render refusal a breach of ECHR Article 8, Article 3, Refugee Convention or other obligations.
>
> Not all LOTR is granted for the same reason and discretion is applied in different ways depending on the circumstances of the case and the Applicant's circumstances.

… .

Important principles

A grant of LOTR should be rare. Discretion should be used sparingly where there are factors that warrant a grant of leave despite the requirements of the Immigration Rules or specific policies having not been met. Factors raised in their application must mean it would not be proportionate to expect the person to remain outside of the UK or to leave the UK.

The Immigration Rules have been written with clear objectives and Applicants are expected to make an application for leave to enter or remain in the UK on an appropriate route under the relevant Immigration Rules and meet the requirements of the category under which they are applying – including paying any fees due. Considerations of whether to grant LOTR should not undermine the objectives of the Rules or create a parallel regime for those who do not meet them.

… .

The period of LOTR granted should be of a duration that is suitable to accommodate or overcome the compassionate compelling grounds raised and no more than necessary based on the individual facts of a case. Most successful Applicants would require leave for a specific often short, one off period. Indefinite leave to enter or remain can be granted outside the Rules where the grounds are so exceptional that they warrant it. Such cases are likely to be extremely rare. The length of leave will depend on the circumstances of the case. Applicants who are granted LOTR are not considered to be on a route to settlement

(indefinite leave to remain) unless leave is granted in a specific concessionary route to settlement.

Reasons to go grant LOTR

Compelling compassionate factors are, broadly speaking, exceptional circumstances which mean that a refusal of entry clearance or leave to remain would result in unjustifiably harsh consequences for the Applicant or their family, but which do not render refusal a breach of ECHR Article 8, Refugee Convention or obligations. An example might be where an Applicant or relevant family member has experienced personal tragedy and there is a specific event to take place or action to be taken in the UK as a result, but which does not in itself render refusal an ECHR breach.

Where the Immigration Rules are not met, and where there are no exceptional circumstances that warrant a grant of leave under Article 8, Article 3 medical or discretionary leave policies, there may be other factors that when taken into account along with the compelling compassionate grounds raised in an individual case, warrant a grant of LOTR. Factors, in the UK or overseas, can be raised in a LOTR application. The decision maker must consider whether the application raises compelling compassionate factors which mean that the Home Office should grant LOTR. Such factors may include:

- emergency or unexpected events.
- a crisis, disaster or accident that could not have been anticipated.

LOTR will not be granted where it is considered reasonable to expect the Applicant to leave the UK despite such factors. Factors in the UK or overseas can be raised in a

> LOTR application. These factors can arise in any application type.
>
> … .
>
> Applying in the UK for LOTR
>
> Applicants in the UK must apply on the application form for the route which most closely matches their circumstances and pay the relevant fees and charges. Any compelling compassionate factors they wish to be considered, including any documentary evidence, must be raised within the application on their chosen route for it to be considered, if the requirement for leave on their chosen route are not met."

Oral Submissions

62. I heard oral submissions from both parties. Mr Symes' oral submissions followed his arguments in his skeleton argument. The Applicant is a victim of fraud. The issue arose not simply as a result of a mistake. The Respondent has taken a very long time to investigate the matter and to inform the Applicant of the fraud. The Applicant's life has been on hold for two years and this has caused real distress to his wife. The application properly considered cries out for consideration under leave outside the Rules. The 31 Jan letter is clear enough. The SSHD's position is predicated strongly on discretion within the Rules however there is a wide discretion outside the Rules which does not apply without a proper application. He referred me to Kalsi at paragraph 58 and Junied, paragraph 43. What the Applicant was seeking was a short period of leave for 60 days. The Applicant recognised that the application under the PBS system was "dead in the water".

63. While the fairness cases suggest that there is no duty on the SSHD where there has been a third-party failure, there is a general public law duty of fairness. Here the issue is different because there has been a distinct application for LOTR on the basis of a series of issues, including delay, fraud and where the Applicant has been left in a lengthy period of limbo.

64. The SSHD has not done a good job. The decision shows no sign of understanding that there is any discretion, and the author of the letter seems to be blind to the existence of discretion.

65. Mr Harland addressed me initially specifically on the letter from the Home Office to the Applicant of 20 January 2020 (page 128) where the following is stated

> "The purpose of this letter is not to consider all the issues raised in your current application. We will make a decision on the application once we have received any response to this letter or you run out of time to reply.
>
> However, if there are other grounds which you think are relevant to whether you should be allowed to stay in the UK, even if we find false representations were made, you should include them in your response. This requirement is being imposed under Section 120 of the Nationality, Immigration and Asylum Act 2002. If you do not tell us as soon as reasonably practicable and you tell us later without good reason for the delay, you may lose any right of appeal you may have had. Your application is refused".

66. He submitted that the s.120 notice did not trigger a particular route. There was an expectation of a formal application. The suggestion that is put forward that there

has been an application or grounds for further leave is not accepted.

2. He specifically referred to paragraph 8 of the 31 Jan letter. Mr Symes says that this is an application for LOTR; however, it is important to remember the 60 days' context in PBS cases flowing from Patel. What the Applicant is asking for is a deferral of a decision, however in this respect he had already received a six-month deferral having been notified of the fraud in January. He says that he wanted leave in order to change his status, however what he sought was not to be put into the position that he was in before he made his application because when he made his application, he did not have leave. He was an overstayer. Patel would not apply to him in any event.

3. The reference to s.120 in the does not indicate that the Applicant does not have to make an application should he wish for LOTR. In any event the letter of 31 Jan cannot reasonably be construed as an application for LOTR (or as a variation).

Conclusions

4. Mr Symes in his skeleton argument indicates that the Applicant's case is made out if it was open to the Respondent to exercise her discretion to grant the Applicant leave, but that she failed to consider exercising that discretion. However, it is always open to the SSHD to exercise discretion to grant LOTR. The issue is whether it was rational for her, in this case, not to consider exercising discretion outside of the Rules.

5. The parties were in no disagreement as regards the law, which I summarise as follows. The SSHD has a discretion to consider LOTR. However, she has no discretion to waive strict compliance with the IRs in a PBS application. There is an

obligation to consider a grant of LOTR when expressly asked to do so. An applicant can only have one application for leave extant at any given time, pursuant to paragraph 34BB of the IRs. If the applicant is deemed to have made a new application (a variation) the SSHD will void the original application. There is no obligation to consider the grant of LOTR unless expressly asked to do so, unless there are specific facts that are so striking that it would be irrational not to do so.

6. An application for LOTR could succeed where a PBS application fails. Following Patel and Thakur, the practice of the Respondent in student cases has been to defer a decision for 60 days to give the applicant the opportunity to vary the application on the basis that fairness demands this where the Respondent had been substantially responsible for the failure of the application; however, in Pathan it was decided that there is no obligation on the SSHD in these circumstances to grant residual leave and delay the determination of the application.

7. A summary of the LOTR policy follows. A grant of LOTR should be rare and should not undermine the objective of the IRs or create a parallel regime. Reasons for granting LOTR can be compelling compassionate grounds which are broadly speaking exceptional circumstances which mean that a refusal of entry clearance or leave to remain would result in unjustifiably harsh consequences for the applicant or their family, but which do not render refusal a breach of Article 8, the Refugee Convention of other obligations.

8. Having considered the letter of 31 Jan, I am in no doubt that this Applicant did not make an application for LOTR and it was clearly not the intention of his solicitors to make such an application.

9. There is no reference to LOTR in the letter of 31 Jan which is a response to the allegation of deception. The letter asks the SSSHD to "withdraw" the allegation of deception, which would suggest that the PBS application was very much alive. It is an acceptance that at that time, the PBS rules cannot be met because of the problem with the CoS, and a request (albeit misconceived) for 60 days is made to enable the Applicant to find another Sponsor. There is an assertion that the decision breaches the Applicant's rights under art 8 and a misconceived attempt to make an application for ILR on the basis of 10 years residence; however, these matters are not pursued in these proceedings. The Applicant did not make an application on either basis. However, the fact that the Applicant raised these matters is further evidence that had he intended to ask for LOTR, he would have done so. It further undermines Mr Symes' argument that the 31 January letter "cries out" for consideration of LOTR.

10. There is no indication that the Applicant intends to vary the PBS application to an application for LOTR. The Appellant has twice varied the application and is aware of the procedure.

11. The Appellant is legally represented. The 31 Jan letter was prepared by his solicitors. It can reasonably be inferred that had it been the Applicant's intention to apply for 60 days LOTR, they would be able to express this with a degree of clarity properly seeking a variation of the application.

12. The reference to 60 days is unarguably a clear reference to the Patel/Thakur case law. Moreover, had it been the intention of the Applicant to vary the application /apply for LOTR, I would reasonably have expected his solicitors to have raised this in the application for AR and correspondence after the decision.

13. The fact that the Applicant made an application for AR is further support that he had not intended to vary the application. Moreover, the application for AR makes a number of assertions; however, it does not mention an application for LOTR or a failure by the SSHD to exercise discretion. It is asserted in the AR that actions of the SSHD are "grossly unreasonable so much that it amounts to a Wednesbury unreasonableness and rendered her decision unlawful" and that the SSHD "acts or omission to act are nothing but an abuse of process". It claims that there was a "serious injustice" to the Applicant because the SSHD "unreasonably failed to make a decision on their application for almost two and a half years". It is asserted that the SSHD "failed to take action or inform the Applicant despite becoming aware of the allegation as early as May 2018" and "as a result of this the Applicant and his partner have suffered from stress and anxiety and "the remedy or actions the Applicant could have taken against the Sponsor and Applicant job prospects are diminished". It is asserted that the Appellant's partner "is in serious health risk (suffering from severe mental health) and her pregnancy is in danger" and that the Secretary of State failed to consider the length of residence here in the UK "and surrounding human rights issues raised specifically on 31 January 2020". There is an assertion that the decision is "grossly unreasonable and unlawful" and that there "has been a failure to apply evidential flexibility Rules". The claims are consistent with a PBS application being pursued and the application of Thakur/Patel.

14. The SSHD in the AR stated as follows: -

> "… whilst we empathise the delay on your application has caused stressed to you and your spouse we maintain that the original caseworker has followed the appropriate procedures in relation to the service standard and has informed you

when a request was made that your application was still being considered. Issues regarding human rights or Article 8 grounds are not factors which are considered within a point-based system application and unfortunately, Article 8 issues are not eligible decisions for administrative review as defined under Appendix AR of the Immigration Rules – specifically AR2.6. If you wish for such matters to be considered it is open for you to submit an appropriate human rights focused application. We maintain that the decision to refuse your application is not unreasonable or unlawful because it was your Sponsor themselves that had confirmed that they did not intend to employ you and therefore we consider it to be reasonable to refuse your application under paragraph 245HD(f) of the Immigration Rules. We therefore do not consider that there has been a case working error and the decision to refuse your application has been maintained."

15. The PAP letter does not claim that the SSHD has not considered an application for DL for a period of 60 days LOTR. There is no complaint that the Applicant varied his application (for a second time) or that the letter of 31 Jan should be deemed to be a variation of the application under the PBS to an application for LOTR. The focus of the PAP letter is on delay in reaching a decision. Much is made of the discovery by the SSHD of the fraudulent CoS on 17 May 2018, the same date the Respondent inquired with the Applicant whether he still relied on a variation of his application to one under the PBS. It is asserted that the Respondent's "failures and conducts since May 2018 are grossly unreasonable by any standards". It is asserted that the Secretary of State's conduct is "seriously questionable." It is suggested that the Sponsor note on the SMS system was made in May 2018, yet it was not until 14 November 2019 that the Respondent contacted Enactor Limited by

e-mail. Enactor responded on 15 November 2019. Even once that was received there was a delay in contacting the Applicant. It is asserted that the Respondent has failed in her duty to reasonably regulate the Sponsor licence of the company. Allegations are made by the Applicant regarding the actions of Enactor Limited. It is asserted that the Applicants have wasted two and a half years of their lives and that they cannot return to Bangladesh. Assertions are made that there has been a procedural irregularity in regard to the delay and that the delay is unreasonable and excessive. Article 8 is raised.

16. In the PAP the solicitors state that "the appropriate course of action would be to grant a (sic) discretionary leave or reasonable remedy" (p63). It is advanced that "it would be rational and appropriate to reconsider the decision as an alternative to judicial intervention" on the basis of procedural unfairness. It is asserted that the "respondent was under an obligation to act in a manner which afforded the applicant a fair opportunity to either challenge a decision or other (sic) necessary steps, i.e., a decision in a reasonable period of time (wherein the sponsor would have provided the necessary employment or could have been challenged reasonably and LTR would have been granted) or a reasonable remedy or a discretionary leave giving consideration to the circumstances existing". The reference to procedural fairness supports the view that the Applicant was seeking a Thakur /Patel type remedy.

17. In the response to the PAP the Respondent engaged with the claim made by the Applicant that he is entitled to DL (see para 6 (vii) of the PAP (P.77). It is stated that the Applicant "has not provided evidence of why this should be a consideration…"

18. The reference to LOTR (and the policy) is raised, for the first time, in the grounds prepared by Counsel. It is asserted therein that the SSHD should have considered whether the fraud perpetrated on the Applicant constituted an exceptional circumstance. This is a clear reference to the LOTR policy, hitherto not referred to in correspondence from the Applicant to the SSHD.

19. The SSHD rationally concluded that the application was an application under the PBS. It is clear that the Applicant understood that he could not meet the requirements of the IRs. The SSHD was not required to respond to the letter of 30 Jan as though it were a new application. The assertion that the letter of 30 Jan was an application for 60 days LOTR with reference to the SSHD's policy is an afterthought and it is a response to the case law and the Applicant's untenable position should he rely on the Thakur/Patel line of authority. The assertion does not accurately reflect the application or indeed any communication from the Applicant's solicitors relating to the application. The Applicant has sought to recharacterize the application in the hope of enhancing his position.

20. The Respondent was not obliged to consider LOTR with reference to the policy. She was not expressly asked to do so by the Applicant. There was no identification of "compelling compassionate grounds" or "exceptional circumstances" with reference to the policy. What the Applicant was seeking in the letter of 30 Jan (apart from leave under art 8 and ILR which are not pursued) was for the Respondent to grant him 60 days to find a new Sponsor in response to his application under the PBS relying on the Thakur/Patel case law. He has not pursued this because the argument is hopeless. The Applicant would not be entitled to a 60-day extension of leave under s.3(c) of the 1971 Act in any event because he did not have

leave when he made the application. He was an overstayer. (While the Applicant states that the application was made within 14 days of the refusal of the human rights claim on 27 September 2017, this does not accord with the SSHD's case that date of the refusal is 22 September. Mr Symes did not address me on the point). Furthermore, any unfairness caused to the Applicant was not as a result of the actions of the SSHD. Albeit there was a delay in communicating, investigating and communication of the decision, the Respondent is not responsible for the invalid CoS. In respect of the issue of delay, the Applicant was notified of the invalid CoS in January, six months before the decision. In the light of Pathan, these issues including the date of the September decision are not material. The fact that permission has not been granted to argue these matters as discrete issues, undermines the Applicant's case that they are matters that could and should bring him under the LOTR policy.

21. Albeit misconceived the reference to 60 days in the 31 Jan letter was unarguably meant in the context of an extension of s.3C leave (or deferral of the consideration of the application under the PBS). This can only rationally be characterised as a request to exercise discretion under the PBS supported by the Applicant's continual assertions of unfairness which is an argument which is bound to fail, for the reasons explained above. The request for 60 days has been reframed by the Applicant as an application for LOTR. I disagree with Mr Symes' that a distinct application has been made for LOTR. The submission that the SSHD has not done a good job, is unsupported. The 31 Jan letter lacks clarity and focus. However, what is clearly not contained therein is a distinct application for LOTR or anything that could rationally be deemed as such. In these circumstances it was

not incumbent on the SSHD to consider exercising discretion outside of the IRs.

22. In reality this application is an argument that the SSHD should mitigate the hard consequences of the PBS by way of her residual discretion. This is an argument that has been rejected by the Court of Appeal many times because to do so would undermine the purpose of the PBS. The same argument is being made but the Applicant is seeking to re-characterise it an application for LOTR, with reference to the LOTR policy in order to achieve the same ends. Of course, the SSHD has a discretion to allow any application when the IR cannot be met, as in this case, if an application has been made (or deemed to have been made) for LOTR where there are properly identified exceptional circumstances and when a grant of leave does not subvert the requirements of the IR.

23. The Applicant cannot meet the IRs. Granting him LOTR would unarguably create a parallel regime for those who cannot meet the IRs. The Applicant seeks time to find another Sponsor; however, he did not have leave in the first place. It would be very odd for him to be granted a period of leave when he cannot meet the IRs when he did not have leave in the first place. To characterise any delay and the fraudulent CoS as "a crisis, disaster or accident that could not be anticipated" is fanciful and is a misconceived attempt to avoid the application of case law which does not assist him. This is a very clear case of an attempt to subvert the requirements of the IRs. The delay and/or fraud are not capable of amounting to 'exceptional circumstances'. Bearing in mind that the Applicant did not have leave when he made the application, it is difficult to identify "unjustifiably harsh consequences".

24. There was no obligation on the SSHD to consider this application as an application for LOTR and had she done so,

properly applying the LOTR policy, in the absence of properly identifiable exceptional circumstances, the application would have no prospect of success.

25. To summarise my findings, in the absence of an application to vary or a deemed variation, the Applicant's application was one made under the PBS and not an application for LOTR. The SSHD rationally considered the application under the IRs (PBS)and in the absence of an application for LOTR, there was no discretion to allow the application.

26. In any event, had the Respondent considered discretion in the absence of properly identified "exceptional circumstances" and "compelling compassionate grounds", the application could only be refused. I am satisfied that the application is an attempt to subvert the IR and it has no prospect of success. The LOTR scheme cannot undermine the PBS scheme. It is inevitable that the outcome would have been the same if the SSHD had considered whether to exercise discretion. This application for judicial review is refused.

UTJ McWilliam

27 July 2021