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

JR/214/2020

In the matter of an application for Judicial Review

The Queen on the application of
Riju Kannothukudy Raju

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Blundell

HAVING considered all documents lodged and having heard Rajiv Sharma of counsel, instructed by Direct Access, for the applicant and Zane Malik of counsel, instructed by GLD, for the respondent at a hearing on 5 January 2021

IT IS ORDERED THAT:

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

(2) The respondent's decisions of 17 October 2019 and 22 November 2019 are quashed.

(3) The respondent shall reconsider the applicant's application for leave to remain, together with any additional submissions made within 28 days of the date of this order, within three months of the date of this order.

(4) The Respondent shall pay two thirds of the applicant's reasonable costs from 2 September 2020, to be assessed on the standard basis if not agreed.

(5) Permission to appeal is refused because it was not sought and there is, in any event, no arguable legal error in the judgment.

Signed: *M.J.Blundell*

Upper Tribunal Judge Blundell

Dated: **24 January 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):

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).

Case No: JR/214/2020

IN THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

Field House, Breams Buildings London, EC4A 1WR

25 January 2021

Before:

UPPER TRIBUNAL JUDGE BLUNDELL

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Between: THE QUEEN
on the application of
RIJU KANNOTHUKUDY RAJU

- and -

Applicant

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr Rajiv Sharma
(instructed by Direct Access), for the applicant

Mr Zane Malik
(instructed by the Government Legal Department) for the respondent Hearing

date: 5 January 2020

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J U D G M E N T

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This judgment was handed down remotely by circulation to the parties' representatives by email and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10am on 25 January 2021

Judge Blundell:

1. The applicant is an Indian national who was born on 3 March 1987. He seeks judicial review of decisions made by the respondent on 17 October 2019 and 22 November 2019. By the first of those decisions, the respondent refused his application for leave to remain as a Tier 2 (General) Migrant. By the second of those decisions, she upheld her earlier decision following an Administrative Review. The sole ground of refusal under the Immigration Rules was that the applicant had worked in breach of the terms of immigration bail by working at a care home. The respondent concluded that this justified refusal under paragraph 322(5) of the Immigration Rules, on the basis that his conduct rendered it undesirable to permit him to remain in the United Kingdom.

Background

2. For reasons which will shortly become apparent, it is necessary to set out two chronologies in some detail. The first is the applicant's immigration history. The second is the history of the dealings between the applicant's employer and the respondent, as regards the latter's sponsorship licence.

3. The applicant entered the United Kingdom as a Tier 4 student in 2011. He held leave in that capacity until April 2013. Before the expiry of his leave, he made an application for further leave outside the Immigration Rules. That application was refused on 17 June 2013 but an appeal against the decision was allowed by a judge of the First-tier Tribunal. As a result of that decision, the applicant was granted 60 days' leave to remain, valid from 17 July 2014 to 15 September 2014.

4. It was at this point that the applicant sought to 'switch' into Tier 2 of the Points Based System ("PBS"). On 11 September 2014, he applied for leave to remain under that tier to enable him to work at a residential care home named Sunrise. The application was refused on 29 October 2014 but an appeal was allowed in February 2015 and, on 17 July 2015, he was granted leave to remain under Tier 2 until 20 July 2020.

5. On 22 November 2016, however, the respondent decided to curtail the applicant's leave to remain with effect from 27 January 2017 because Sunrise Residential Home had lost its sponsorship licence. On the day before the expiry of his curtailed leave, the applicant applied for leave to remain so that he could work for a different employer: Cedars Residential Care Home.

6. That application was refused on 2 February 2018. The respondent was not satisfied that the applicant had provided a valid Certificate of Sponsorship. Amongst the "hostile environment" rubric at the end of that letter, there appeared the following warning:

> You will not be allowed to work in the UK. Immigration Enforcement Officers visit workplaces and any employer found to be employing an illegal immigrant may be liable for a civil penalty of up to £20,000 per illegal worker.

7. The applicant sought Administrative Review ("AR") of that decision, however, and on 19 March 2018 the respondent upheld the decision but found that one or more of the original reasons for it were incorrect. She therefore amended the decision. The only substantive change concerned a part of the chronology which had been entered wrongly in the original decision. The remainder of the AR responded to the applicant's complaint that he had submitted a valid CoS with his application and had not been told that Cedars Residential Care Home had lost its licence. The respondent noted that the applicant had not, in fact, submitted any CoS with his application. The CoS had been issued after the application had been made but the sponsor's licence had expired before the application was considered by the respondent. The respondent considered that to be an issue between the applicant and his sponsor, and not to undermine the validity of the conclusions she had reached on the application itself.

8. Attached to the AR decision was an Enforcement Notice, also dated 19 March 2018. This stated that the applicant was liable to removal and that he had been granted immigration bail subject to conditions. The conditions (imposed under paragraph 2(1)(b) of schedule 10 to the Immigration Act 2016) were that he was not allowed to work or study. Under the sub-heading 'Consequences of Illegally Staying in the UK', the applicant was given a number of warnings, one of which repeated what had been said at the end of the 2 February 2018 refusal letter in respect of illegal working and the consequences thereof.

9. It is not in dispute between the parties that the statutory extension to the applicant's leave under section 3C of the Immigration Act 1971 came to an end with the refusal of his AR application.

10. The applicant then made two further applications. On 29 March 2018, he applied for leave on compassionate grounds. On 30 April 2018, he made another application for leave to remain under Tier 2. That application was made in reliance on sponsorship from a third care home: Broadway Care Centre. The respondent treated the making of that application as having voided the application on compassionate grounds. The applicant submits that the second application was a variation of the first. Nothing turns on the point for present purposes but Mr Sharma's submissions in this respect align with what was said in JH (Zimbabwe) [2009] EWCA Civ 78; [2009] Imm AR 499.

11. On 23 January 2019, the respondent refused the Tier 2 application because she did not consider the work undertaken by the applicant at Broadway Care Centre to meet the level stated in the relevant SOC code (Administrative Care Co-ordinator / Team Leader). The respondent did not accept that the applicant had the necessary experience from his previous roles to operate at the level required by the SOC Code: National Qualifications Framework Level 6.

12. The applicant made an application for AR of this decision on 7 February 2019. There was a delay in considering the AR application but it was finally decided on 2 May 2019. On that date, the respondent wrote to the applicant, accepting that her decision was in error and withdrawing it in full. She indicated that the applicant's application would be reconsidered but that the AR Team was unable to do so

because further evidence was required. This letter was sent to the applicant under cover of a letter which contained, amongst other things, the following notification:

> Your existing leave and conditions of leave are extended under section 3C of the 1971 Immigration Act while your application is under consideration.

13. The respondent then undertook investigations into the sponsorship licence of Broadway Care Centre. I will describe those events below. For present purposes, it suffices to state that the applicant was found to be working there. That fact was confirmed by the care home itself in an email dated 13 September 2019, which stated that the applicant was indeed working there, for 20 hours per week, "whilst waiting for a decision on his application to become a full-time employee as per the COS conditions."

14. This confirmation caused the respondent, on 3 October 2019, to issue a notice called a Bail 204. This notice bears the applicant's details and his photograph and states that it had come to the attention of the respondent that the applicant had failed to comply with the terms of his immigration bail. Specifically, it was said that he had failed to abide by the restriction on employment by working for Broadway Care Centre from January 2019 onwards. The respondent stated that the applicant had been informed by letters dated 23 January 2018 and 19 March 2018 that he was not allowed to undertake any employment. This notice then spelt out several 'Consequences of Non-Compliance', which included a warning that "Any unresolved application which you may have made for leave to enter may be refused". The notice sought a response from the applicant. The invitation to respond was in the following terms:

> If there is [sic] reasonable excuse for this failure to comply with your immigration bail condition(s) then you must inform this office using the attached notice. We must receive your completed notice within 10 working days of this letter being served (deemed to be two days from date on postmark, if posted) – we may not consider your response if we receive it after this date.

15. The applicant duly completed the response notice and returned it to the respondent so that it was received on 17 October 2019. His response is central to my decision in this application. I make no apologies, in those circumstances, for reproducing it in full (and verbatim):

> I wish to submit respectfully that I was not able to comply with my immigration bail conditions primarily due to my unawareness of the Immigration Bail Condition imposed on 19/03/2018 and to some extent my personal stupidity and circumstances.
>
> I have entered to United Kingdom as student on 3rd February 2011 until 30/11/2012. Further leave as student until 30/4/2013. Leave to remain in UK on outside rules by first tribunal until 15/04/2014 and further

> leave was granted under Tier 2 (General) Migrant until 209/07/2020 and this was curtailed to expire on 27/01/2017.
>
> Since January 2017 to January 2019 my personal circumstances were incomprehensible, I have not worked on salary anywhere in UK. I was surviving with support of Friends and relatives. I have a dependant young family (consists of spouse and young child) and found it very difficult to maintain them financially without any source of income or job. Due to unexpected delays in my application being processed by the Home Office I was not able to have normal life. A combination of stress and depression may have clouded my judgement and I ended up in this predicament. In these 3 years I have received 3 refusals of application for different reason on (02/02/18, 19/03/2018, 23/01/2019 and one successful Administrative Review on 2/5/2019 for my tier 2 General application which I have applied on 30th April 2018. After the investigation from Home Office to the employer on November 2018 and December 2018, Employer was confident about the success of application. After issuing the COS and waiting almost 11 months, the post was still vacant and employer offered me for shadowing the post.
>
> The genuinity of the vacancy, learning opportunity, also my poor financial situation forced me to start the job as on part time basis, without entering to the main job roles, I was shadowing the manager. ON OTHER HAND I WAS COMPLETELY UNAWARE THAT I AM NOT ALLOWED TO WORK. AFTER 2 YEARS OF WAITING AS A JOBLESS PERSON IN UNITED KINGDOM. MY FINANCIAL SITUATION WAS VERY PATHETIC THE SUPPORT I HAVE RECEIVED FROM FRIENDS AND FAMILY HAD STOPPED AT ONE STAGE AND I WAS STRUGGLING FOR FOOD AND SHELTER.
>
> AFTER STAYING 8 YEARS IN UNITED INGDOM, IT'S HARD FOR ME TO BELIEVE THAT I HAVE BROKEN THE IMMIGRATION BAIL WHEN I HAVE NO INTENSION TO DO THAT. I AM SINCERELY APOLOGISE FOR INCONVENIENCE. I AM PLEADING TO THE CASE WORKER/HOME SECRATORY TO CONSIDER MY PERSONAL CIRCUMSTANCES AS AN EXCUSE FOR THE CONCERNS AND ISSUES RAISED AND I WOULD BE HIGHLY OBLIGED IF YOU COULD CONSIDER MY CASE AS GENUINE.

16. On the same day (17 October 2019), the respondent reconsidered the application for leave to remain as a Tier 2 Migrant which the applicant had made on 30 April 2018. She refused the application for reasons entirely different from those given on 23 January 2019. She was satisfied that the applicant should be awarded all the points claimed under the PBS. The single ground of refusal was that the applicant had breached the terms of immigration bail by taking employment at Broadway Care Centre, as a result of which the respondent considered that his ongoing presence in the United Kingdom was undesirable. Having set out the relevant background, including the Bail 204 notice and the applicant's response to it, the respondent concluded as follows:

> You stated you were unaware of the bail conditions imposed upon you. While it is accepted that the refusal letter we served you with on 2 February 2018 does not specifically mention the word "Bail", the letter does inform you that you were no longer permitted to work in the United Kingdom as a result of the decision to refuse your application for Leave to Remain.
>
> In response to our Bail 204 letter, you also raised issues with your financial situation through being unable to work. While we understand your current financial situation may bring you hardship, the decision to refuse your application does not permit employment until your immigration status in the United Kingdom is resolved and you have been informed you are permitted to work.
>
> Therefore you are working illegally in the United Kingdom because you do not have permission to undertake employment and the Secretary of State is satisfied it would be undesirable to permit you to remain in the United Kingdom in the light of your conduct.
>
> In light of this the Secretary of State has deemed the refusal is appropriate under paragraph 322(5) and is not prepared to accept exercise discretion in your favour.
>
> Alternatively, you may consider applying to extend leave under human rights and the family and private life categories.

17. The applicant applied for AR of that decision. On 22 November 2019, the respondent refused the application for AR. The respondent was not persuaded by anything said in the application for AR and the original decision stood unamended.

18. The relevant chronology in respect of the applicant's sponsor is as follows. Broadway Care Centre held a sponsorship licence when it was visited by the Sponsor Compliance Unit on 9 May 2019. It was suspended from the register of sponsors as a result of information gathered during that visit. The decision was communicated by letter dated 14 June 2019. The letter noted that the care home had assigned a CoS to the applicant on 25 April 2018, for the role of Team Leader/Health Care Coordinator, under SOC Code 2219. During interviews conducted at the premises, however, the Compliance Officers had been told that the applicant occupied a role which was junior to the Home Manager and it did not appear that he was carrying out all of the duties listed in the CoS or in his job description. The letter also noted that the applicant's CoS stated that he would be working for 39 hours per week, whereas the contract and the wage slips suggested that he was working only twenty hours per week. The officers had been told that this was all that the applicant was allowed to work. The fact that he was working for only twenty hours per week suggested that the full-time role detailed on the CoS was not required. The respondent had concluded, in the circumstances, that the role on the CoS had been exaggerated. The respondent had also concluded that the role stated on the CoS was at a lower skill level than RQF Level 6 and that the

applicant was paid at a lower rate than had been specified in the CoS. The respondent felt that the care home had failed to comply with its sponsorship duties in several respects, therefore, and that it was appropriate to suspend its licence accordingly.

19. Representations against the suspension were made by Ideal Solicitors on 12 July 2019. The gravamen of their complaint was that the applicant was not a sponsored migrant worker whilst his application for leave to remain was under consideration. Further submissions were made in response to each of the other concerns expressed in the suspension letter, including an assertion that the respondent had overlooked aspects of the applicant's role in concluding that it was not at the required level.

20. On 30 August 2019, the respondent's Sponsor Compliance Team reinstated Broadway Care Centre to the register of sponsors with immediate effect. In respect of the main submission made by Ideal Solicitors, the respondent held as follows:

> [27] Whilst Mr Raju has been assigned a CoS for the role of Team Leader / Health Care Coordinator under the SoC code 2219, we accept that Mr Raju's leave to remain application has not yet received a final outcome. Therefore, on this occasion, we will take no further action on this matter.

21. The remaining submissions were held to fall away because the respondent accepted that the applicant had not received a final outcome on his application for leave to remain. The respondent reinstated the licence accordingly but, at [52], she gave the following emboldened warning:

> I would stress that the UK Visas & Immigration compliance officers continually monitor the compliance of licensed sponsors. If your client fails to comply with their sponsor duties and/or rules about assigning certificates of sponsorship (CoS), UK Visas & Immigration may revoke the licence, downgrade the licence to a B-rating or, issue a civil penalty or, where criminal activity is found, refer the case for prosecution.

The Application for Judicial Review

22. This application for judicial review was issued on 20 January 2020. The grounds were settled by solicitors who were at that stage acting for the applicant. An Acknowledgement of Service was filed on 11 February 2020. Permission was refused by Upper Tribunal Judge Hanson, who considered the respondent's decision to have been open to her.

23. The applicant renewed the application to an oral hearing. In the meantime, he decided to dispense with the services of his solicitors and to instruct counsel directly. The oral permission hearing which was listed on 18 June 2020 was vacated by consent and Mr Sharma was duly instructed.

24. In amended grounds for judicial review, Mr Sharma makes three concise submissions. By the first, it is submitted that the respondent erred in adopting an

unfair procedure, in that she failed to issue a 'minded to refuse' letter before refusing the application on the ground that the applicant's presence in the UK was undesirable. By the second, the applicant submits that the respondent failed lawfully or rationally to conduct the balancing exercise required by paragraph 322(5). By the third, it is submitted that Article 8 ECHR requires the Upper Tribunal to consider for itself whether the allegation made by the respondent is made out, rather than whether it was reached rationally.

25. Permission to amend the grounds was given by Upper Tribunal Judge Owens at an oral permission hearing on 2 September 2020. UTJ Owens considered all three grounds to be arguable and she gave permission to proceed.

Submissions

26. In his skeleton argument and oral submissions, Mr Sharma develops his grounds as follows. In relation to the first, he relies on what was said by the Court of Appeal in R (Balajigari & Ors) v SSHD [2019] EWCA Civ 673; [2019] 1 WLR 4647 about the respondent's procedural obligations in cases of this nature. He submits that the applicant was not given a proper opportunity to respond to the allegation against him. Nothing said or done by the respondent in the course of the events I have summarised above sufficed, he submits, to negate the need to give the applicant notice that the respondent was minded to refuse his application under paragraph 322(5) because he had breached his immigration bail conditions. In particular, Mr Sharma submits that the Bail 204 notice procedure did not comply with the requirement described at [55] of Balajigari, of giving the applicant "an opportunity to respond, both as regards the conduct itself and as regards any other reasons relied on as regards "undesirability" and the exercise of the second-stage assessment".

27. As to his second ground, Mr Sharma submits that the respondent's 'balancing exercise' is flawed for a number of reasons. He refers in this connection to what was said by Underhill LJ, giving the judgment of the Court of Appeal, at [38]-[39] and [130]-[132] of Balajigari and also to what was said by Irwin LJ (with whom Simler LJ and Sir Jack Beatson agreed) in Yaseen v SSHD [2020] EWCA Civ 157; [2020] 1 WLR 1359. What did not suffice on the unusual facts of this case, he submits, was for the respondent merely to state that she had considered her discretion and decided not to exercise it.

28. As to his third ground, Mr Sharma submits that this was a case in which the remaining requirements of the PBS were satisfied and that the Tribunal is obliged to reach its own conclusion on whether the interference with the applicant's Article 8 ECHR rights is justified: Balajigari, at [92]. Although the respondent had been asked to consider that question in the application for AR, she had chosen to shut her eyes to it.

29. In his written and oral submissions for the respondent, Mr Malik avers as follows. As to the first ground, he submits that the duty of procedural fairness is context- specific and that the respondent was not obliged to give notice above and beyond the Bail 204 notice. The position in the applicant's case is, he submits, similar to

that which obtained in the case of one of the cases considered with Balajigari, that of the appellant Mr Albert. In that case, the appellant had been alerted to the respondent's concerns by an earlier decision and there was no need to issue a further 'minded to refuse' letter. This was not a case in which there was any dispute about the basic facts, which had been accepted in terms by the applicant. In any event, Mr Malik submits that Balajigari – which concerned individuals being refused ILR – is distinguishable from the applicant's case, given that he had no leave to remain beyond the refusal of his AR application in March 2018. The refusal of his application would not expose him to the 'hostile environment', as he was already without leave.

30. Mr Malik submits that the second ground is not made out because the respondent was clearly aware of her discretion and took it into account in what he describes in his skeleton argument as a 'classic example of lawful decision making'. On proper analysis, it cannot be said that the respondent omitted relevant matters from her analysis. The respondent's exercise of discretion may only be challenged on traditional public law grounds and her conclusion cannot properly be categorised as irrational. Mr Malik reminds me that it has been held in decisions of the highest authority that the balancing and weighing of relevant considerations is a matter for the primary decision maker and that it is not necessary for the respondent to refer to every material consideration.

31. As to the third ground, Mr Malik submits that the applicant made an Article 8 ECHR claim after his PBS application had been refused and that it is improper to attempt to raise that claim in this application for judicial review. The claim had been refused and certified and it amounts to an abuse of process to raise arguments against it in this forum. Balajigari concerned a distinguishable situation, he submits, in which there had been no separate Article 8 ECHR application or decision.

32. In any event, Mr Malik submits that this is a case in which it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Relief should therefore be refused even if any of the grounds are made out.

Analysis

33. It is not necessary to refer to any provisions of the Immigration Rules other than paragraph 322(5). This ground of refusal falls into the "non-mandatory" section of paragraph 322, in respect of which leave to remain (etc) should normally be refused in certain circumstances. The circumstances described in sub-paragraph (5) read, at all material times, as follows:

> the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C)), character or associations or the fact that he represents a threat to national security.

34. The leading authority on this provision is undoubtedly Balajigari, to which both advocates made extensive reference in their skeleton arguments. Mr Malik submits that Balajigari was concerned with procedural fairness in a specific set of circumstances and that it is either of no application or limited application to the circumstances before me. He notes, in particular, that the Court of Appeal was concerned in those cases with individuals who had extent leave and who faced the refusal of ILR, with all the consequences which that entails: [50]-[55] refers. The applicant, on the other hand, is an individual with no leave, since it is accepted that the statutory extension of his leave came to an end in March 2018, and he does not face the refusal of ILR but only the denial of limited leave to remain under the PBS.

35. Similar submissions were made by leading counsel for the respondent in R (Karagul) v SSHD [2019] EWHC 3208. The applicants in those linked cases were Turkish nationals whose applications for leave under the standstill provisions in the Turkish Association Agreement had been refused because their businesses were not thought by the respondent to be genuine. It was submitted by the respondent that Balajigari was of limited effect and was relevant only in the context of the specific facts of the several cases before the court: [98].

36. Having reviewed the jurisprudence, including R (Citizens UK) v SSHD [2018] EWCA Civ 1812; [2018] 4 WLR 123, Balajigari and Shahbaz Khan [2018] UKUT 384 (IAC), Saini J rejected that submission, holding that Balajigari was an application of well-established general principles and was not to be limited in the manner contended by the Secretary of State: [102]. At [103], Saini J summarised what he considered to be the general principles:

> (1) Where a public authority exercising an administrative power to grant or refuse an application proposes to make a decision that the applicant for some right, benefit or status may have been dishonest in their application or has otherwise acted in bad faith (or disreputably) in relation to the application, common law fairness will generally require at least the following safeguards to be observed. Either the applicant is given a chance in a form of interview to address the claimed wrongdoing, or a form of written "minded to" process, should be followed which allows representations on the specific matter to be made prior to a final decision.
>
> (2) Further, a process of internal administrative review of an original negative decision which bars the applicant from submitting new evidence to rebut the finding of wrongdoing is highly likely to be unfair.
>
> (3) The need for these common law protections is particularly acute where there has been a decision by the legislature to remove an appeal on the merits to an independent and impartial tribunal.

37. Despite Mr Malik's submissions to the contrary, I reach similar conclusions in this case. I consider that the respondent was under a duty to act fairly to the applicant and that she was obliged to give him notice of her concern and an opportunity to

respond to it. I reject Mr Malik's submission that such a duty only arises when all of the circumstances set out by Underhill LJ at [50]-[54] of Balajigari are present. Whilst it is correct that he set out four features of those cases at [50]-[54] and then began his assessment at [55] by stating '[f]or all of those reasons', Mr Sharma is undoubtedly correct to submit that the duty does not only apply when all of those features are present. Insofar as Mr Malik submitted that the decision in Balajigari was driven by the court's concern that a fair procedure should be afforded to those who will be exposed to the hostile environment as a result of their applications being refused, I disagree. To my mind, the real driver behind the decision was the potentially long-lasting consequences of being refused leave to remain on grounds of character, conduct or associations. A refusal on that basis is likely to cause serious difficulties in any future applications and it is imperative, given those consequences and the absence of a right of appeal, that an individual such as the applicant is given notice of the respondent's concern and an opportunity to respond to it.

38. It is quite plain, to my mind, that the respondent owed the applicant a duty of procedural fairness in this case. Given the consequences of a decision under paragraph 322(5) (even for a person who has no leave), an applicant who is to be refused on that basis should be given notice of the respondent's concern and an opportunity to comment upon it. The real issue, in this case, is not whether there was such a duty. It is the content of that duty and whether it was discharged by the respondent by her Bail 204 notice.

39. In that respect, Mr Malik notes (as did Saini J in Karagul) that these general principles are not to be applied by rote identically in every situation and that what fairness demands is dependent on the context of the decision: R v SSHD ex parte Doody [1994] 1 AC 531, per Lord Mustill at 560E-F. He submits that the relevant context, in this particular case, is supplied by the events immediately preceding the decision of 17 October 2019. He notes that the applicant had, just a fortnight earlier, been sent the Bail 204 notice in which he had been given notice of the allegation that he had been working in breach. He had been told, in terms, that any unresolved application for leave to remain might be refused and he had been given an opportunity to respond. He did respond, and the respondent demonstrably took account of what he said in his response of 17 October 2019 before she reached her conclusion.

40. Despite Mr Sharma's attempts to meet these submissions, I find them to be well made. I do not consider there to have been any need for a further 'minded to refuse' letter, over and above the Bail 204 notice which was issued to the applicant. I recognise, of course, that the bail notice was addressed to the specific question of bail but it sought expressly to elicit from the applicant his response to the allegation and it stated, in terms, that any outstanding application for leave to remain might be affected by the events described. The applicant confirmed that he had been working at the home, he gave his explanation for his conduct, and he made reference to additional circumstances such as the length of time that he had been awaiting a decision from the respondent and his need to provide food and shelter for his wife and child.

41. Mr Malik draws a parallel with the facts of the fourth appellant's case in Balajigari. That appellant – Mr Albert – had previously been refused under paragraph 322(5) but his solicitors had made further representations against that conclusion. At [210], the court noted that Mr Albert's case was 'unlike the others' in light of this history, and that a claim based on procedural fairness could not have succeeded in circumstances such as this. The factual similarity is limited but the essential point which Mr Malik seeks to make in reliance upon it holds good; the applicant had been given notice of the charge that he had breached his bail conditions and he had been given an opportunity, which he took, to answer that charge.

42. Viewed objectively, I do not consider that procedural fairness – which ordinarily requires a 'minded to refuse' letter in such a case – required such a letter to be issued on the facts of this case. This was, in short, a case in which further notice of the respondent's concern would have been superfluous because the case against the applicant was already obvious, as was the potential impact of it (Citizens UK refers, at [73], citing what was said in R v SSHD ex parte Fayed [1998] 1 WLR 763). Properly understood, Balajigari did not require the respondent to particularise her concerns or her inclination towards refusal in any greater detail. Nor did it require her to provide anything more than an opportunity to respond to those concerns, and she was not required to attempt to elicit specific submissions from the applicant on the balancing exercise which she might perform under paragraph 322(5). She was required to identify the conduct in question, to provide an indication of the possible consequences, and to give a reasonable opportunity to make submissions on both points. The Bail 204 notice and the opportunity to make submissions upon it discharged that obligation and the respondent complied, therefore, with her obligation to act fairly towards the applicant.

43. I have not found it necessary to refer to any of the other authorities cited by Mr Sharma in support of this ground. Ashfaq [2020] UKUT 226 (IAC), R (Mansoor) v SSHD [2020] UKUT 126 (IAC), Pathan [2020] UKSC 41 and R (Topadar) v SSHD [2020] EWCA Civ 1525 concerned different circumstances altogether and do not bear, in my judgment, on the extent of the respondent's duty to act fairly on the facts of this specific case. I reject the first ground accordingly.

44. Mr Sharma is on much more fertile ground when it comes to his second ground. The complaint here is that the respondent failed to undertake any balancing exercise or that the balancing exercise which she did undertake was legally insufficient. It is necessary to recall what was said in Balajigari and in Yaseen about the scope of respondent's obligation in this respect.

45. At [38] of the Balajigari, the court emphasised the need – in a 322(5) case such as the present – to conduct a "balancing exercise informed by weighing all relevant factors". It would be necessary, Underhill LJ stated, to weigh matters such as 'any substantial positive contribution to the UK made by the applicant' and also to consider the circumstances relating to the misconduct in question. The court did not accept that it would 'always be an error of law for a decision maker to fail to conduct the balancing exercise explicitly' but suggested that it would be good practice for the respondent to incorporate it in the formal decision-making process. The failure of the respondent to conduct any sort of balancing exercise in the case of

Mr Balajigari was one of the reasons that the court found his application for judicial review to be arguable, contrary to the conclusion reached by the Upper Tribunal:

[130] refers.

46. Yaseen was also an earnings discrepancy case. Having concluded that the applicant had used deception in relation to his previous earnings, the respondent had noted that refusal under paragraph 322(5) was not a 'mandatory decision'. She considered that his actions meant that 'refusal under paragraph 322(5) is appropriate': [9] refers. On appeal, the First-tier Tribunal had found that the appellant had 'failed to act with integrity in his tax affairs' and that he fell to be refused under the Immigration Rules accordingly. It was submitted by the applicant in that case (represented, as it happens, by Mr Malik) that a number of factors had been left out of account, such that there was in truth no lawful balancing exercise conducted by the respondent or by the FtT.

47. Irwin LJ gave the only full judgment in Yaseen. He noted, at [41], that the Ministerial Statement made about earnings discrepancy cases confirmed that 'the scale of the misstatement is relevant [and] that all information will be taken into account, each case being considered on its own merits'. There was a world of difference, Irwin LJ stated, between deliberately false information to avoid paying significant amounts of income tax and minor tax errors. He went on, on [42], to note what had been said at [34] of Balajigari: that a balancing exercise 'was proper practice'. At [46], he concluded materially as follows:

> In my judgment this appeal should succeed on a simple but important ground. In all but the most extreme cases, where the conduct complained of is such that on any view the balance must fall against an applicant, even where a sufficient character or conduct issue is proved, a balancing exercise is required. In this instance there was at least some positive material. I would remit the matter for a re-hearing to permit such an exercise.

48. Mr Malik submits that the decision letter in the instant case discharged that obligation; that the reasoning in respect of the balancing exercise might have been brief but it was legally adequate; and that the conclusion reached was ultimately open to the respondent in public law terms.

49. I have reproduced the relevant part of the decision letter above. In my judgment, it is insufficient to support Mr Malik's submissions, or to withstand the criticisms levelled by Mr Sharma. Echoing the submissions made by Mr Malik in Yaseen, Mr Sharma submits that the respondent left a number of material matters out of account in the balancing exercise she purported to conduct. His strongest points, it seems to me, are as follows.

50. Firstly, the respondent took no account of the complexity of the situation in which the applicant found himself. He had been undoubtedly been told, when his application was refused in January 2018 and when his AR application was refused in March 2018, that he did not have leave to remain; that he was not entitled to work; and that it was a condition of his immigration bail that he was not permitted

to work or study. When he responded to the Bail 204 notice, however, he stated that he had found his situation 'incomprehensible' thereafter and that he was 'completely unaware' that he was not allowed to work. When other aspects of the chronology are taken into consideration, the basis of that submission becomes quite clear.

51. As Mr Sharma notes at [19] of his skeleton argument, the applicant was told, when the respondent withdrew her earlier decision in response to one of his AR applications, that his 'existing leave and conditions of leave are extended under section 3C of the 1971 Immigration Act' (my [12] above refers). Mr Sharma accepts, as he must, that this indication was legally wrong. The applicant's leave under section 3C had come to an end some time before this letter and there was no leave – whether under section 3C or otherwise – for the withdrawal of the decision to reinstate. Mr Malik submits that the applicant's position was 'tolerably clear'. To a judge or a lawyer versed in this field, it was. But what was said in that letter must be considered through the eyes of the applicant and Mr Sharma is entitled to submit – as he does at [19](vi) of his skeleton – that this would have given the applicant 'the distinct impression that his leave had been re-established'.

52. It is interesting to note, in that connection, the terms of the sponsor licensing correspondence which I have described at [18] above. The applicant's employer – which is now accepted to have conducted itself perfectly lawfully – proceeded on the basis that it was able to employ the applicant for 20 hours per week because that was what was permitted. The officers who visited the site had been told this by the staff, who appear to have assumed that the applicant continued to enjoy leave on the same terms as before.

53. There is another aspect of the sponsor licensing correspondence which it is necessary to consider. The licence was suspended in June 2019. As I have explained above, that suspension was motivated entirely by concerns that the applicant was not undertaking work which fulfilled the job description given in the Certificate of Sponsorship. Representations were made against the suspension, the gravamen of which was that the applicant was not working under a CoS and that he was simply awaiting the decision on his Tier 2 application. Until he received the decision on that application, it was submitted that the employer was not bound by the terms of the CoS. Shortly after these submissions were made, in August 2019, the sponsorship licence was reinstated, with the respondent accepting that there had been no breach of the sponsor licencing requirements.

54. On proper analysis, it seems to me that the situation was really rather more serious than the respondent had at first thought. Whilst Ideal Solicitors might have been correct in their assertion that there had been no breach of the sponsor licencing provisions, the reality was that Broadway Care Centre had actually been employing a person who was not entitled to work at all. The care home was potentially liable, therefore, to a Civil Penalty under section 15(1) of the Immigration, Asylum and Nationality Act 2006 or possibly to prosecution under section 35 of that Act (offence of knowingly employing illegal worker). The respondent took no action under either provision, however, and simply reinstated the sponsorship licence, without the imposition of sanction or condition.

55. The applicant was clearly aware of the respondent's investigations into his employer as he made reference to those investigations in his response to the Bail 204 notice. What, therefore, would he have been told about his employer's dealings with the respondent in the summer of 2019? He must, it seems to me, have been told that the licence had been suspended because his job title had been exaggerated and he must also have been told that it had been reinstated because they had told the respondent that he was not employed under the CoS but only for 20 hours per week.

56. On the one hand, therefore, the applicant had been told unequivocally that he was not entitled to work in early 2018. On the other hand, he had subsequently been told (wrongly) that his leave under section 3C had been extended and no action had been taken against his employer, who had told the respondent that he was working there for 20 hours per week. The applicant was perfectly entitled, in light of these mixed messages, to state that his situation was 'incomprehensible' to him. In considering whether his conduct was sufficiently reprehensible to justify refusal under paragraph 322(5), this sequence of events and the resulting confusion was a point which the respondent was required to consider, and failed to do so. It bore on the applicant's culpability for breaching his immigration bail conditions and on the critical question of where this case lay on the spectrum envisaged by Irwin LJ at
[41] of Yaseen.

57. Whether or not I am correct to consider that the applicant and his employer had been faced with 'mixed messages' about his status over the course of 2018 and 2019, the respondent failed in any event to give any adequate consideration to whether his conduct was sufficiently reprehensible to justify refusal on the ground that his presence in the United Kingdom was undesirable. There was no prior history of deception or other adverse conduct. The applicant satisfied the remaining requirements for leave to remain. There was (ongoing) breach of a single bail condition, which the applicant attributed to his inability to provide for his wife and young child without working. Of course, in Balajigari itself, the court had no difficulty in agreeing with the conclusion reached in the Upper Tribunal, that an earnings discrepancy will often be a serious matter which will prima facie justify refusal on conduct grounds. But the conduct in this case was arguably of a lesser order altogether, and I have been shown no authority or guidance which suggests that a breach of immigration bail will, without more, begin to justify refusal under paragraph 322(5).

58. There was, in truth, no balancing exercise conducted by the respondent. She did not demonstrably assess the seriousness of the applicant's conduct in light of the factors above. And she did not weigh that particular conduct against the aspects of the applicant's case which militated against a conclusion that his presence in the United Kingdom was undesirable. The applicant need not establish – as Mr Malik sought to submit – that the conclusion of the balancing exercise was irrational. Mr Sharma did not advance the applicant's case on that basis. His submission, which must in my judgment succeed, was instead that the respondent failed to turn her mind to material matters and failed to conduct a lawful balancing exercise accordingly. The applicant's second ground is therefore made out.

59. Mr Sharma quite properly accepted that the third ground added nothing to the first two. The result of the conclusion I have reached immediately above is that the decision must be quashed in any event, and the respondent will have to reconsider the application holistically. It would not be appropriate, in these circumstances, to embark upon consideration of the competing submissions about the impact of the certified human rights decision which post-dated the decision under challenge.

60. I firmly reject the submission made at [40] of Mr Malik's skeleton argument, in reliance on s31(3C) of the Senior Courts Act 1981, that it is highly likely that the outcome for the applicant would not have been substantially different if the respondent had not erred as alleged in the second ground. This is clearly not a case in which relief should be refused on that basis because there is every possibility that the respondent would conclude, when considering the breach of bail in its proper context, that the applicant's conduct does not render his presence in the UK undesirable.

61. This judgment will be handed down by email. I invite written submissions from counsel on the terms of the appropriate order and other consequential matters

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Supplementary Judgment

62. This judgment was sent to the parties in draft in the usual way. I am grateful to Mr Sharma for the typographical amendments suggested, and to both counsel for their submissions on the form of the order, on which there was a good measure of agreement. Two matters were not agreed, which I resolve as follows.

63. Mr Sharma contended that the respondent should be ordered to reconsider the application within 28 days. Mr Malik submitted that this timescale was too tight, in light of the potential need for further evidence and the difficulties caused by the pandemic. I accept the submissions made by Mr Malik in this respect but I do not accept his further submission that there should be no timescale specified at all. The applicant is in a difficult position and should be entitled to a decision within three months.

64. Mr Sharma sought summary assessment of the applicant's costs in the sum of £18,274. Mr Malik raised three objections: (i) that the applicant should not be entitled to his costs for anything preceding the amended grounds; (ii) that the applicant had only met with success on one of three grounds; and (ii) that Mr Sharma's hourly rate of £450 was 'obviously excessive and disproportionate'. I take those points in turn:

    (i) Mr Sharma notes that the applicant has not claimed the costs of any work which preceded his advice to amend the grounds. I accept that but the respondent should not, to my mind, be put to the costs of anything preceding Judge Owens' decision to give permission to amend the grounds. The points taken in the amended grounds had not been properly identified in pre-action
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correspondence and the respondent's first real opportunity to take a view on their merits was at the point that the grounds were formally amended on 2 September 2020.

(ii) The applicant has been largely successful in his claim but he has not established that he was entitled to a further 'minded to refuse' letter, as maintained in ground one. And I accept Mr Malik's submission that the respondent has herself incurred unnecessary costs in meeting grounds one and three. The first and second grounds were not interconnected, as Mr Sharma submits, and the applicant clearly failed on the first and clearly succeeded on the second. The third ground, as noted in my judgment, was not even pursued. It is therefore appropriate for me to exercise my discretion to reduce the hours claimed. I do not accept Mr Malik's submission that a reduction of two thirds is appropriate. On balance, I consider a fair order to be that the respondent should pay two thirds of the applicant's costs.

(iii) As for the rate claimed, Mr Malik's submission is plainly correct. £450 per hour for junior counsel of 12 years' call is obviously excessive and disproportionate for a short judicial review hearing in the Upper Tribunal. Whilst counsel for an applicant can properly command a higher rate than Treasury counsel, the rate is nearly four times that of Treasury counsel on the A panel (ie those of 10 years' call or more). The fact that the current guideline rate for Queen's Counsel conducting a two day hearing in the Supreme Court only slightly exceeds the total sum claimed[1] equally sheds a good deal of light on the situation. At Mr Malik's invitation, however, I decline to fix upon a suitable rate by way of summary assessment; that can be achieved by way of agreement, failing which there will have to be detailed assessment.

[1] Paragraph 15.9 of the Supreme Court's Practice Direction 13 refers