IN THE UPPER TRIBUNAL

R (on the application of Islam and Pathan) v Secretary of State for the Home Department (Tier 2 licence-revocation-consequences) [2017] UKUT 00369 (IAC)

Field House
London

Heard on: 16 May 2017

Between

THE QUEEN (on the application of)
SHIFUL ISLAM

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and Between

IMRANKHAN MAHMDIQBAL PATHAN

Applicant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Before

UPPER TRIBUNAL JUDGE ALLEN

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For Mr Islam: Mr B Malik, instructed by Londonium Solicitors on behalf of the Applicant.
For the Respondent: Mr A Payne, instructed by the Government Legal Department

For Mr Pathan: Mr A Jafar instructed via Direct Access on behalf of the Applicant
For the Respondent: Mr A Payne, instructed by the Government Legal Department

Unlike the situation for Tier 4 applicants, a person whose sponsor's Tier 2 licence was revoked for non-compliance with the Immigration Rules is not entitled to challenge a decision not to provide him/her with a period of 60 days in which to secure an alternative sponsor. Patel [2011] UKUT 211 (IAC) distinguished.

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APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

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1. These two linked cases raise a common issue which makes it appropriate for there to be one decision relating to that issue which is applicable equally to each applicant. Insofar as there are specific points relating to either applicant they will be dealt with separately at the close of the determination under headings applicable to each of them.

2. The central issue in this case is whether an immigration applicant who has applied to the Secretary of State for leave to remain under the Tier 2 (General) Migrant category of the Immigration Rules and has submitted a certificate of sponsorship from their sponsoring employer which is valid at the time the application is made is entitled to challenge the respondent's decision not to provide them with a period of 60 days in which to secure an alternative sponsor, in circumstances where the sponsor's Tier 2 licence was revoked for non-compliance with the Immigration Rules.

3. Mr Islam was granted leave to enter the United Kingdom as a Tier 4 (General) Student on 25 September 2009, and that leave was extended from the initial period elapsing on 30 June 2011 to 4 August 2012. On 25 August 2012 he was granted leave to remain as a Tier 1 (Post-Study Work) Migrant until 25 August 2014. On 23 August 2014 he submitted a Tier 1 (Entrepreneur) application which was refused on 8 December 2014 and a subsequent appeal was dismissed.

4. On 1 February 2016 he applied for the role of "Business Development Manager" in an Indian restaurant and relied on a certificate of sponsorship issued by Tamarind (South West) Limited trading as Viceroy. The respondent had concerns as to whether the role of the applicant was genuine and as a consequence of enquiries being made the sponsor licence of Viceroy was revoked on 21 April 2016. The refusal decision in the applicant's case was 7 June 2016 on the basis that he did not satisfy

the requirements of paragraph 245HD(f) of the Immigration Rules since the certificate of sponsorship had been cancelled due to the sponsor having had its Tier 2 licence revoked.

5. Subsequently on 16 June 2016 the applicant submitted a request for administrative review and as a consequence of this the decision was maintained on 6 July 2016. Proceedings were issued following a PAP letter and response, on 13 September 2016.

6. Mr Pathan was granted leave to enter the United Kingdom as a Tier 4 dependent partner on 7 September 2009, with leave to remain until 31 December 2012. That leave was extended subsequently until 30 April 2014. On 30 January 2013 he submitted an application as a Tier 2 (General) Migrant, relying on a certificate of sponsorship issued by Submania Limited and was granted leave to remain until 15 October 2015. On 2 September 2015 he submitted a further Tier 2 application again relying on a certificate of sponsorship issued by Submania. The respondent had concerns as to whether the post on offer was a genuine vacancy, the application was put on hold awaiting the outcome of a sponsor visit and subsequently on 4 February 2016 Submania was informed that its sponsor licence had been suspended and it was invited to submit representations within twenty working days. No representations were made and the licence was revoked on 7 March 2016. On 7 June 2016 the applicant's application was refused because the CoS had been cancelled on account of Submania having had its Tier 2 licence revoked. An administrative review was sought on 14 June 2016 and refused on 7 July 2016. Thereafter the proceedings were issued.

7. There was some discussion at the outset about the further decisions in each case which had been issued by the respondent. It was agreed that I would address what may conveniently in shorthand be called the 60 days' issue and hear submissions on that alone since if the appellants were unsuccessful in their challenge to the main decisions then that would render any challenge to the subsequent decisions academic.

8. The essence of the argument put forward on behalf of both applicants is that it is irrational for the Secretary of State not to provide Tier 2 applicants with a 60 day period in which to find an alternative sponsor. Their applications for leave to remain were refused on account of the sponsor losing its Tier 2 licence whilst their applications were under consideration. In particular the argument is based on the decision of the Upper Tribunal in Patel [2011] UKUT 211. In this case a Tier 4 applicant had been refused further leave to remain as his sponsor had been removed from the list of approved sponsors and he therefore had no sponsorship letter capable of earning him points under the points-based system. It was held that what was required to give effect to the principle of fairness was for a direction to be given that the fresh decision was not to be made for a period of 60 days from the date of the reasons decision being transmitted to the parties to enable the appellant to obtain a fresh sponsorship letter that was current and enable his existing application to be varied to include study at the institution set out in the new sponsorship letter.

9. In summary the argument on behalf of the applicants is that an immigration applicant is entitled under the common law to have the Immigration Rules applied to him in a way that adheres to principles of fairness. Reliance is placed on what was said by the Court of Appeal in Q [2003] EWCA Civ 364, that decision relying also on what had been said by Lord Mustill in Doody [1994] 1 AC 531 at 560. It is argued that whether the principle of fairness had to be applied identically or differently depends on the context of the legal and administrative system in question and that the Immigration Rules fall within the definition of the legal and administrative system for the purposes of Doody.

10. As regards what was said in Patel, emphasis was placed on paragraph 22 where it was said that where the applicant is both innocent of any practice that led to loss of the sponsorship status and ignorant of the fact of such loss of status, it seemed to the Tribunal that common law fairness and the principle of treating applicants equally meant that each should have an equal opportunity to vary their application by affording them a reasonable time with which to find a substitute college on which to base their application for an extension of stay to obtain the relevant qualification. It

was noted that in curtailment of leave cases the express Home Office policy was to afford a period of 60 days for such an application to be made, and that period was thought to be equally appropriate to the case of refusal of leave. This was based on the principle of fairness. It was clear that the Home Office knew that it had suspended the college in question in January 2010 but no one else knew this. The applicant could not have known subsequently that the college's status as an approved sponsor was revoked before his application for an extension of stay was decided. It was said to be obviously unfair for the Secretary of State to revoke the college's status after the application had been made when it was an approved sponsor and not to inform the applicant of such revocation nor to afford him an opportunity to vary the application. This would not apply where the applicant had not been a *bona fide* student at the college or where he had participated in the practices that might have led the college to lose its sponsorship status or where he had had actual knowledge of the termination of the college's status as a sponsor.

11. It was argued that on the one hand fairness dictated that students who had been refused following revocation of their education provider's education sponsor licence should be treated the same as students whose leave had been curtailed and also that it was, with particular reference to the instant case, obviously unfair of the Secretary of State to revoke the college's status after the application had been made when it was an approved sponsor and not to inform the applicant of such revocation and not afford him an opportunity to vary the application. It was argued by Mr Malik and Mr Jafar that this second strand in the Patel ratio was supported in EK (Ivory Coast) [2014] EWCA Civ 1517, where it was held that the principle of fairness did not extend to requiring the Secretary of State to afford an applicant who had applied for leave to remain under Tier 4 an opportunity to correct an administrative error made by her education provider whereby it cancelled her Confirmation of Acceptance of Studies letter owing to an administrative error. The principle of fairness was said to apply only to decisions within the Secretary of State's control. It was argued that this reasoning applied equally across to the situation of Tier 4 applicants. This was on the basis that revocation by the Secretary of State of a sponsorship licence in

circumstances where the applicant is unaware of that revocation without affording a 60 day period of grace is unfair. In addition it was argued that there are no material differences between the two categories as defined and therefore it was unlawful not to apply the Patel principle to Tier 2 cases. Both categories were set out in part 6A of the Immigration Rules, the PBS section, both categories made reference to Appendix A of the Immigration Rules and under paragraph 245HD of the Immigration Rules some applicants already in the United Kingdom under Tier 4 were part of the limited category of applicants entitled to "switch" to Tier 2 without having to leave the United Kingdom to seek entry clearance. Also it was argued to be clear from the respondent's own description of the certificate of sponsorship that it was analogous to an education sponsor licence.

12. On behalf of the respondent it is argued that the Patel principle has been considered only in the context of Tier 4 applicants, in cases such as EK (Ivory Coast), and in Kaur [2015] EWCA Civ 13 where it was confirmed that there was no general obligation on the Secretary of State to give notice to an applicant for leave to remain or to the Tier 4 sponsor that she considers there to be a deficiency in the Confirmation of Acceptance for Studies before making an adverse decision on that basis. It was noted that it had been said in Kaur that the points-based system was designed to achieve predictability, administrative simplicity and certainty and did so at the expense of discretion, that is to say it was prescriptive. The consequence was that failure to comply with all its detailed requirements would usually lead to a failure to earn the points in question and thus refusal.

13. Also reference was made to Raza [2016] EWCA Civ 36 where it was held that fairness did not require a 60 day grace period to be granted to a Tier 4 applicant whose application had been made out of time. In addition Mr Payne on behalf of the Secretary of State argued that it was relevant to bear in mind when considering Patel that there was no system of administrative review in 2010. He also argued that it was wrong in Patel to say that no fresh application made after a refusal could be considered, as it was the case then and until recently that a person would have 28 days in which to make an application. The period since late last year was fourteen

days. It was also wrong to say at the end of paragraph 22 that in curtailment cases express Home Office policy was to afford 60 days had such an application to be made. In fact it was a maximum of 60 days so if a person had 60 days' outstanding leave they would have that period in which to make a further application but if they only had one day left on their leave then they would only have one day in which to make an application. It was not a matter of an equal opportunity as referred to at paragraph 23 in Patel but in fact a person who was given 60 days under Patel would be better off than a person whose leave had been curtailed where they had less than 60 days' leave remaining. Also if a person's leave was curtailed they did not have a right to administrative review. Mr Payne argued that the same mistake was made in paragraph 16 in Raza, in that a person's status would not be transformed from lawful resident to unlawful overstayer, but they would have the previously 28 days and now fourteen days' opportunity to make an application.

14. Part of the respondent's argument was to make comparisons between the objectives underlying Tier 4 and Tier 2, and this was supplemented by witness statements attached to the detailed grounds, from a Mr Jackson, a Senior Executive Officer in the Migration Policy Unit which is part of the Immigration and Border Policy Directorate, and Ms Buzzeo who is an Assistant Director and the Head of the Employment Route Casework and Premium Customer Service Team responsible for the Work Study Sponsorship Routes within UK Visas and Immigration. It is argued by the respondent, based at least in part on these witness statements, that the objective of Tier 4 is to provide those who wish to study in the United Kingdom access to appropriate educational institutions and to regulate demand from prospective students, stating that students are service consumers who wish to attend educational courses for which they pay for the course provided, and the Tier 4 sponsor is the service provider and provides the courses and at times the accommodation in return for a fee. Tier 4 is based on a high volume, over 200,000 prospective students applying for courses each year with around 1,200 sponsors, and the decision to permit a high volume of Tier 4 student applicants reflects the wider social benefits to resident students and to the UK economy. It is noted that Tier 4

students as service consumers will spend funds purchasing a service and are likely to invest significant time and money to study the relevant course, and in the circumstances a student who is refused further leave to remain before having completed his or her course or series of courses risks losing the full benefit of the time and money invested. This will be equally true whether the leave is curtailed mid course or refused in relation to an application made to complete further courses. It is said that this potential prejudice falls to be considered in the wider context of the objectives of Tier 4, namely to facilitate large numbers of genuine students to study at educational institutions in the United Kingdom. It is seen as a risk that Tier 4 applications might be discouraged if there is a pattern of genuine students being prevent from completing courses, and that this is contrary to the Tier 4 objectives of promoting access to educational establishments for genuine students. Reference is made to the ease with which students are able to find alternative sponsors as courses offered by different colleges are often similar when students are often to switch college with relative ease and without losing the benefit of the studies they have undertaken, especially when they are able to transfer any course credits they have already built up.

15. It is said that in contrast the Tier 2 route is led by demand from prospective employers in areas of skills shortage and it is the sponsor who is the service consumer who needs an applicant to fill a particular skilled vacancy where no resident worker can be found. The applicant therefore is the service supplier providing the labour in return for a salary. It is said that the objective of Tier 2 is to provide entry into the United Kingdom which is strictly limited to persons who are genuinely needed to do a particular job which cannot be filled by a resident worker and for this reason the Tier 2 system is designed to operate in a way that promotes the use of resident workers and prevents migrant workers from displacing resident workers from job opportunities. It is said that the criteria in Tier 2 are designed to match a specific worker with a specific vacancy and a specific company, there is an annual cap on the number of Tier 2 applicants, Tier 1 applicants can no longer be granted leave to remain for the purpose of looking for work and the criteria for

securing Tier 2 entry and leave to remain are regularly being modified to encourage further employers to use resident workers, thereby reducing the number of Tier 2 applicants.

16. In comparing the two tiers therefore, it is argued on behalf of the respondent that in contrast to Tier 4, the presence of Tier 2 workers does not further the wider social and political objectives of promoting the employment of resident workers, and since Tier 2 applicants are service users whereas Tier 4 applicants are service providers, the consequences of refusal of leave are very different in that whereas a Tier 4 applicant risks being denied the service he has acquired the Tier 2 applicant loses the possibility of providing further services. While the impact of refusal of leave on a Tier 2 applicant may on occasions be harsh, the fact remains that they do not lose the earnings for the work they have already carried out and have obtained the primary benefit they could expect to receive by reason of the grant of leave to remain to fill a specific role of a specific employer. There is no reason to consider that another labour market gap exists which cannot be filled by a resident worker and for which the Tier 2 applicant would be suitable, in contrast to the relative ease with which Tier 4 students can find alternative sponsors. It is said to be desirable in terms of the wider objectives for Tier 4 students to be able to complete their education, that the objective of encouraging UK businesses to employ resident workers is not advanced by permitting Tier 2 applicants to remain in the UK looking for other jobs and indeed allowing migrants to stay in the UK to look for jobs is contrary to the Secretary of State's deliberate decision to remove this route of entry into the United Kingdom.

17. It is also said that a further significant difference between the two types of applicant is that students sign up to general courses whereas the job offer made to a Tier 2 applicant is based around a specific match or a specific job between employer and applicant and hence it is reasonable to consider that the relationship between employer and employee is closer than that between college and student and therefore reasonable to expect employees to have a greater awareness of activities by the sponsor which are likely to lead to a loss of sponsorship status, particularly when they relate to the role being offered to the applicant.

18. On behalf of the applicants it is argued that none of the respondent's points in relation to the differences between Tier 4 and Tier 2 have any substance. It is argued that even if the underlying assertions are accepted as correct they do not disturb the strong similarity between the position of Tier 4 and Tier 2 applicants for the purposes of fairness. Matters such as the suggestion that students are consumer PBS applicants as opposed to merely ordinary PBS applicants did not form part of the reasoning behind the elaboration of the principle of fairness in Patel nor that they were present in large numbers or able to switch sponsors easily which in any event was argued to be contentious, but it was simply a matter that they had been treated unfairly because their sponsors' licences had, unbeknown to them, been revoked by the Secretary of State. In particular it was argued that the fact that Tier 4 students are consumers with respect to their education providers is completely incidental to the relationship with the Secretary of State as is the case with Tier 2 applicants. Also it is argued that the number of applicants in fact assists the applicant given the greater number of Tier 4 applicants in relation to whom potentially 60 day grace period letters would have to be written. Also it is argued that the contention there is a significant operational impact of a 60 day grace period is squarely at odds with the dictum of what was said by the Upper Tribunal in Patel to the effect that the potential cost of imposing a duty having to inform an applicant that a college was no longer sponsored did not diminish the duty to act fairly or the way in which the duty was discharged in that case.

19. It is also argued on behalf of the applicants that there is no primary evidence to support the contention that there is a higher personal cost for Tier 4 applicants, bearing in mind that Tier 2 applicants also incur significant personal and financial costs in making applications and that they are likely to be older and with dependent spouses and children. Also with regard to the implication of the argument that there is an inconsistency between a large number of Tier 2 employees and the objective of trying to ensure that local businesses employ resident workers that offering Tier 2 applicants a 60 day grace period would lead to a proliferation of the number of Tier 2

migrants ignored the fact that there was an annual limit of 20,700 on the number of Tier 2 visas.

20. A further point concerned the so-called Patel cycle, in respect of which the respondent argued that there was some evidence of a number of cases where people took advantage of the 60 day Patel period to apply to college after college and when the college lost its certificate had the 60 day period in which to make a further application and again and again. It was argued on behalf of the applicants that this was in effect inviting the Tribunal to conclude that Patel and therefore EK were wrongly decided and that in any event the argument was not based on evidence.

21. The witness statement of Mr Jackson sets out the purposes behind Tier 2. He notes that Tier 2 is designed around the principle of sponsorship and the purpose of filling specific labour market needs under the route being designed to be demand led by employers. The government's policy is noted as being one of reducing net migration, as a consequence of which Tier 1 (General) and Tier 1 (Post-Study Work) categories were closed and around the same time the limit of 20,700 was imposed on Tier 2 which increased the skills threshold and English language requirement to improve selectivity.

22. Mr Jackson in his statement notes the 60 day provision with regard to curtailment which enables a migrant whose leave is curtailed if they cease working for their sponsor or the sponsor loses its licence to enable him in a 60 day period starting from the date of decision to curtail leave to sort out his affairs and make arrangements to leave the United Kingdom or submit an application for leave to remain either in Tier 2 with another sponsor or in another immigration category. It is said that however seeking another Tier 2 sponsor is not the specific reason for the existence of the 60 day provision.

23. Mr Jackson also notes the decision in Patel and the fact that the Tier 4 policy guidance gives effect to the decision in Patel, but there is no corresponding provision in the published Tier 2 policy guidance. The point is made that in contrast to a person whose leave has been curtailed, an applicant who is making an application

for further leave is considered to be in a fundamentally different position. It is said that they have no expectation that their stay will continue and, as such, can reasonably be expected to have taken steps to ensure that their affairs are in order should their application be refused. In contrast to those with existing leave, the possibility that their application will not be granted cannot be said to be unexpected. It is noted that in such a case if the person still has extant leave that leave will continue until its expiry date. If the leave expired while the application was under consideration, the applicant's status is protected under section 3C of the Immigration Act 1971 until such time as the applicant exhausts their rights to immigration review. The Immigration Rules also allow for a further application to be made up to fourteen days after these rights are exhausted. It is said that given this a further 60 day provision is considered unnecessary. This, it is said, contrasts with the negative actions involved in curtailment involving the taking away of existing leave until there are only 60 days left which is said to be wholly different from giving an applicant an extra 60 days which they would otherwise not have had.

24. With regard to the Patel cycle to which I referred above, it is said in Mr Jackson's statement that it is not merely a theoretical possibility that a pattern of applicants in precisely that situation has been identified. The respondent has considered extending the application of the Patel principles to Tier 2 but does not consider this to be either necessary or appropriate given the fundamentally different relationship between applicant and sponsor and the purpose of granting leave as between Tier 4 and Tier 2. The Tier 4 route is led by demand from prospective students, the applicant being the service consumer and by contrast under Tier 2 the route is led by demand from prospective employers. These are points which I have set out above earlier in the context of the submissions that were made. It is relevant in this regard also to note what is said in Ms Buzzeo's statement about the operational impact of implementing a 60 day grace period for Tier 2 applicants which she says would be significant. She set out her reasons why this would be so including writing to each affected applicant setting out why the CoS is no longer valid and specifying a timeframe and associated requirements for securing further leave on the basis of a

new CoS from a different sponsor. New processes would need to be established to ensure that these cases were handled correctly and promptly on the expiry of the 60 day grace period. This was a point also emphasised by Mr Payne in his submissions that there would be an extra burden on the system in terms of having to set out new procedures and new systems and that it was not a point that was answered simply by Mr Malik's argument that because the numbers would be less than in relation to Tier 4, the impact would be less. In my view it is necessary to take seriously what is said by Ms Buzzeo that the potential administrative burden of operating a 60 day grace period is substantial. Having said that I bear in mind what was said in Patel about the importance of fairness in relation to and in contrast to operational difficulties.

25. It is right in my view as was set out in Mr Payne's skeleton argument, to begin by recalling the legal framework behind the decision. I do not propose to set out the relevant provisions of the Immigration Rules but rather to concentrate on the legal framework. It is important at the outset to recall that this is an application for judicial review based on contended irrationality in the respondent's decision in these cases. Mr Payne placed weight on such matters as the emphasis in the leading case of Associated Provincial Picture Houses Ltd in Wednesbury Corporation [1948] 1 KB 223 that if a public authority is to be found to have acted unreasonably the court can only investigate its actions with a view to seeing if it has taken into account matters that ought not to be considered or disregarded matters that ought to be taken into account. Unreasonableness was not made out merely because particular judges might think that a decision went further than was prudent or necessary or convenient or because it was not accompanied by a qualification or an exception some judges might think ought to be there. Of the relevant powers given to a Minister responsible to Parliament the court was even less willing to intervene *a fortiori* where the Rules and questions before Parliament were subject to a process akin to a negative resolution. It is clear from MM (Lebanon) [2017] UKSC 10 noting what had been said by the House of Lords in Huang [2007] UKHL 11 that there is in general administrative desirability of applying known Rules, so that a system of

immigration control is to be workable, predictable, consistent and fair as between one applicant and another. The particular context of this is Article 8 but it does in my view have some relevance to the proper approach to my consideration of the issues in this case. Undue deference is clearly inappropriate, but regard must be had to the views of the decision maker in an area of policy such as this.

26. I must bring these matters together. In my view, for both policy and operational reasons, the respondent's decision not to extend the 60 day grace period on Tier 4 cases to Tier 2 cases is a rational one. I accept that there are material distinctions which the respondent is justified in drawing between Tier 4 and Tier 2. In particular the relationship between the applicant and the sponsor and the purposes of granting leave are significantly different in each case. I do not read Patel as requiring in effect that its ratio in the context of Tier 4 is directly applicable to Tier 2 cases. It is clear from that and other decisions that fairness is essentially context driven, and I am persuaded that the different context identified by the respondent for Tier 2 cases is such as to justify not extending the 60 day policy to those cases. There are clearly different policy objectives. The Tier 4 objective is to provide persons who wish to study in the United Kingdom access to appropriate education at institutions and to regulate demand from prospective students, whereas the purpose behind Tier 2 is to meet demand from prospective employers in areas of skills shortage with applicants who can fill particular skilled vacancies where no resident worker can be found. There is materiality in the distinction drawn by the respondent between the applicant in a Tier 4 case who is a service consumer and the applicant in a Tier 2 case who is the service supplier. A Tier 4 applicant may or may not have completed a level of study when a further application is made. In some instances therefore I accept they may be in the same position as a Tier 2 applicant who has been able to do the job for which they obtained the visa. There may in some cases therefore be an equivalence of inability to do a new course or take on a new job but that in my mind is not a material distinction such as to indicate irrationality in the respondent's decision. Inevitably there are going to be points of coincidence between the two systems, but equally I consider there are proper and clear matters of material difference between

the two which I have set out above. I think there is also some merit to the point made by Mr Payne that it may be relatively easy for a Tier 4 student to find an alternative sponsor, whereas it is difficult to see how, even in a 60 day period a Tier 2 applicant would be able to find another labour market gap existing which could not be filled by a resident worker. I also attach some weight to what is said about the logistical problems, identified at paragraph 17 of Ms Buzzeo's statement, that would arise if a 60 day grace period were to be implemented for Tier 2 applicants. Clearly there would be significant operational difficulties, including the need to establish new processes involving significant storage, management and review elements. A reasonable expectation of the Tier 2 applicant when granted leave is limited to working in a specific role for a specific employer whereas a student may, although as I have said above I accept not necessarily, wish to do further studies and their investment in the time they have been studying may well be adversely affected if they are unable to take advantage of a 60 day period in which to find another college.

27. I conclude therefore that the respondent's decision in these cases is a rational one, and that it was not unlawful for her not to afford a 60 days period to the applicants in order to seek to obtain further Tier 2 employment.

28. In relation to the other decisions that were made, in each case a supplemental decision concerning each applicant dated 5 April 2017, as noted at the start of this decision, I reach no conclusions on those matters since it was common ground that the judicial review applications are disposed of by my decision on the 60 day point.
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