IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Case No: CO/4118/2019
Neutral Citation Number: [2021] EWHC 2071 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22nd July 2021

Before:

Neil Cameron QC
sitting as a Deputy High Court Judge

Between:

THE QUEEN ON THE APPLICATION OF SHAHNILA KANWAL	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Michael Biggs (instructed by **Gaffrey Brown Solicitors LLP**) for the **Claimant**
Jack Anderson (instructed by the Government Legal Department) for the **Defendant**

Hearing date: 13th July 2021
- -

RULING on PRELIMINARY ISSUE

The Deputy High Court Judge (Neil Cameron QC):

Introduction

1. In this case Ms Shahnila Kanwal, the Claimant, makes an application for judicial review of the decisions made by the Defendant, the Secretary of State for the Home Department on 10 October 2019, to:

   i) Curtail the Claimant's leave to remain in the United Kingdom;

   ii) Remove the Claimant from the United Kingdom; and

   iii) Detain the Claimant.

2. At an oral permission hearing held on 27 March 2020, James Strachan QC, sitting as a Deputy High Court Judge, granted permission to proceed with the claim for judicial review on grounds 1-3 of the claim as pleaded.

3. The three grounds are as follows:

   i) By failing to interview the Claimant and/ or giving her an opportunity to respond to the allegation that she was acting in breach of her leave as a Tier 1 (Entrepreneur), the Defendant has acted in a procedurally unfair manner;

   ii) The Defendant's decision to curtail the Claimant's leave was irrational and is unevidenced; and

   iii) The C's detention from 10 October 2019 onwards has been unlawful.

4. By a consent order made on 19 May 2021 the Court ordered that the hearing listed for 26 May 2021 be vacated and ordered that:

> "*the parties are to consider cross examination and any application to call witnesses by 4pm on 21st June 2021.*"

5. By an application notice dated 21 June 2021 the Claimant seeks an order that both parties be permitted to call oral evidence, and that the witnesses to be called by the parties should attend for cross-examination.

6. In a document dated 23 June 2021, the Defendant responded to the Claimant's application made on 21 June 2021. The Defendant submitted that the best approach would be for the Court to determine, as a preliminary issue, whether there is a question of precedent fact or not. The Defendant anticipated that, if it is held that there is no question of precedent fact, the Claimant may want to reconsider her application to call and/or cross-examine witnesses.

7. By an order dated 12 July 2021 Foster J ordered that the issue as to whether the Defendant's decision to remove the Claimant from the United Kingdom (or any other decision under challenge), involves an issue of precedent fact to be determined by the trial judge at the hearing as a preliminary issue.

8. On 13 July 2021 I heard argument on the preliminary issue.

Background Facts

9. The claimant is a national of Pakistan.

i) She was born on 7 April 1986.

ii) On 24 March 2010 she was given entry clearance as a tier 4 (general) student valid to 18 May 2011.

iii) On 29 April 2010 she entered the UK pursuant to that entry clearance.

iv) On 12 May 2011 she applied for leave to remain as a tier 4 (general) student. On 19 October 2011 the application was granted and the claimant was given leave to remain valid until 27 March 2012.

v) On 27 March 2012 she applied for further leave to remain as a tier 1 (post study work) migrant.

vi) The application was granted on 13 August 2012 and the claimant was granted leave to remain valid until 13 August 2014.

vii) On 12 August 2014 the Claimant applied for further leave to remain as a tier 1 (entrepreneur) migrant. The application was refused on 7 October 2014, subject to a right of in-country appeal. The claimant brought an appeal in-time. The appeal was allowed by a determination dated 21 September 2015.

viii) On 20 October 2015 the Claimant was granted leave to remain valid to 20 October 2018.

ix) On 15 October 2018 the Claimant applied for further leave to remain as a tier 1 (entrepreneur) migrant. The application was granted on 3 July 2019, and the claimant was given leave to remain valid to 10 July 2021.

x) The grant of leave to remain included the condition that:

> "*…You are not permitted to undertake employment other than working for the business(es) you are establishing, joining, or taking over.*"

10. On 10 October 2019 Immigration Enforcement Officers attended at the City Inn Express Hotel, 144 Mare Street, London E8.

11. In her witness statement dated 20 October 2019 the Claimant states that, on 10 October 2019, she was at the City Inn Express Hotel for the purposes of providing consultancy and training services to staff at the hotel under the terms of a contract made between ASH Recruitment Consultants Limited ("ARC") and City Inn Express Hotel. The Claimant is the sole director and shareholder of ARC.

12. The Claimant states that she was present when the City Inn Express Hotel was visited by immigration officers. She said that she explained to the immigration officers her role with ARC and the services that ARC provided to other businesses.

13. The Claimant states that she was detained and served with a RED.0001 Notice of Removal, and a Notice of Detention. The Notice of Removal states:

> "*You are specifically considered a person who has failed observe a condition of leave to remain because on 10th October 2019 you were observed working at City Inn Express as a receptionist. It is not considered that the circumstances in your case are such that discretion should be exercised. The SSHD therefore curtails*

your leave to remain in the UK under paragraph 323(i) with reference to 322(3) of the Immigration Rules so as to expire with immediate effect.

"*You are therefore working in breach of your visa conditions under Sec 10(1)(a) of the Immigration and Asylum Act.1999, which is an offence under Sec 24(1) (b)(ii) of the Immigration Act 1971 as amended.*"

14. Ms Hassana Rhazouani, an immigration officer made a witness statement dated 2 June 2020. She states:

i) On 10 October 2019, she attended a North London enforcement visit to the City Inn Express Hotel with a team of Immigration Enforcement officers.

ii) She was informed by another officer, that when officers entered the hotel, the Claimant was sitting on a sofa in the hotel lounge. The Claimant told officers that she was not working.

iii) She says that she saw the Claimant leaving the lounge to go upstairs. Ms Rhazouani asked the Claimant to return to the lounge.

iv) Ms Rhazouani says that she asked the Claimant where she lived, and that the Claimant evaded the question.

v) Ms Rhazouani carried out a check on the Claimant and established that she had been granted a Tier 1 Highly Skilled Entrepreneur visa. Following that check the Claimant went upstairs.

vi) Ms Rhazouani says that other immigration officers interviewed the duty receptionist Motashim Ali Mohammed. Ms Rhazouani states that it was reported to her that Mr Mohammed stated that the Claimant worked at the hotel as a receptionist, or as a cleaner.

vii) The Immigration officers then undertook a search of the premises. They say that they found some of the C's possessions in room 301.

viii) Ms Rhazouani says that she undertook an 'illegal working interview' with the Claimant. Ms Rhazouani says that the Claimant said that she had trained Mr Mohammed.

ix) Ms Rhazouani says that the Claimant denied that she was an employee of the hotel.

x) Ms Rhazouani says that she and Immigration Officer Cotterell were not satisfied with the Claimant's answers to questions, and that she arrested the Claimant.

15. The Claimant was detained at Yarl's Wood Immigration Removal Centre.

16. On 16 October 2019 removal directions were set and removal was scheduled for 24 October 2019.

17. On 24 October 2019 the Claimant was released from immigration detention.

Legal Framework

18. Section 3 of the Immigration Act 1971 ("the 1971 Act") provides:

"*3. General provisions for regulation and control.*

"*(1) Except as otherwise provided by or under this Act, where a person is not* [a British citizen]

"*(a) he shall not enter the United Kingdom unless given leave to do so in accordance with [the provisions of, or made under] this Act;*

"*(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;*

"*(c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely-*

"*(i) a condition restricting his [work] or occupation in the United Kingdom;*

...

"*(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in*

different circumstances; and section 1(4) above shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality). If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid)."

19. Section 4(1) of the 1971 Act provides:

"*(1) The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(a) (whether as regards duration or conditions) [or to cancel any leave under section 3C(3A)], shall be exercised by the Secretary of State; and, unless otherwise [allowed by or under] this Act, those powers shall be*

exercised by notice in writing given to the person affected, except that the powers under section 3(3)(a) may be exercised generally in respect of any class of persons by order made by statutory instrument."

20. Paragraph 322 of the Immigration Rules provides:

"*322. In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave except that only paragraphs (1A), (1B), (5), (5A), (9) and (10) shall apply in the case of an application made under paragraph 159I of these Rules.*

…

"*(3) Failure to comply with any conditions attached to the current or a previous grant of leave to enter or remain, unless leave has been granted in the knowledge of a previous breach.*"

21. Paragraph 323 of the Immigration Rules provides:

"*323. A person's leave to enter or remain may be curtailed:*

"*(i) on any of the grounds set out in paragraph 322(2)-(5A) above (except where this paragraph applies in respect of a person granted leave under Appendix Armed Forces, where "paragraph 322(2)-(5A) above" is to read as if it said "paragraph 322(2) and*

(3) above and paragraph 8(e) and (g) of Appendix Armed Forces"; and except where this paragraph applies in respect of a person granted leave to enter or remain under Appendix EU or granted leave to enter by virtue of having arrived in the UK with an entry clearance that was granted under Appendix EU (Family Permit), where "paragraph 322(2)-(5A) above" is to read as if it said "paragraph 322(2)-(2A)."""

22. Section 10(1) of the Immigration and Asylum Act 1999 ("the 1999 Act") provides:

"*(1) A person may be removed from the United Kingdom under the authority of the Secretary of State or an immigration officer if the person requires leave to enter or remain in the United Kingdom but does not have it.*"

The Claimant's Arguments

23. Mr Biggs submits that the court should decide for itself whether the condition set out at section 10(1) of the 1999 Act is satisfied. He submits that whether the condition is satisfied is a question of law and involves no discretion vested in the Defendant.

24. Mr Biggs makes two main submissions in support of that contention:

i) He submits that, in this case it is artificial to separate the Defendant's decision to curtail leave to remain from reliance on section 10(1) of the 1999 Act, as the decisions were taken together. He submits that the

substance of the Defendant's decision making depends upon the correctness of her allegation that the Claimant was working in breach of her visa conditions. He places emphasis on the fact that the decisions to curtail leave, remove, and detain were 'bundled together'.

ii) Applying the principle of legality, at least when a composite decision (relating to curtailment and removal) is taken, section 10(1) of the 1999 Act should be interpreted to confer power to remove, and thus justifying detention, only if the factual basis for curtailment decision is correct.

25. In oral argument Mr Biggs expanded on his written skeleton argument in submitting that the Defendant's power to curtail leave in exercise of powers conferred on her by the 1971 Act must also be limited by the principle of legality.

26. Mr Biggs drew attention to the following statement of the principle of legality made by Lord Hoffman in ***R v. Secretary of State for the Home Department ex parte Simms*** [2000] 2 AC 115 at page 131:

> "*Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.*"

27. Mr Biggs submits that the principle of legality is engaged as the decision to curtail leave, remove and detain deprived the Claimant of her liberty, and engaged the Claimant's rights under Article 8 of the European Convention on Human Rights ("ECHR").

28. Mr Biggs also relies upon the statement made by Toulson LJ at paragraph 62 in ***R (A) v. Secretary of State for the Home Department*** [2007] EWCA Civ 804 that ultimately it is for the court to decide what is the scope of the power of detention and whether it was lawfully exercised. He also relies on the statement made by Robin Purchas QC sitting as a Deputy High Court Judge at paragraph 59 in ***R (Azaroal) v. Secretary of State for the Home Department*** [2013] EWHC 1248 (Admin):

> "*I remind myself that the question of lawfulness of the exercise of the power is one for the court to determine for itself and not by way of review. In that respect the onus is on the Defendant throughout to justify that the detention is lawful.*"

29. Mr Biggs seeks to distinguish ***R (Giri) v. Secretary of State for the Home Department*** [2015] EWCA Civ 784. At paragraphs 19, 29 and 30 in ***Giri*** Richards LJ stated:

> "*19. In my judgment, Mr Malik's reliance on the decision in **Ex p Khawaja** [1984]AC 74 was misplaced. The passages I have quoted from **Ex p Khawaja** and **Ex p Bugdaycay** [1987] AC 514 are fatal to his case on this issue. The decision here under challenge is a decision made in the exercise of the power conferred on the Secretary of State by section 3 of the 1971 Act*

to grant leave to remain in the United Kingdom. The Rules contain detailed provisions as to how the power is to be exercised (though there is a residual power to grant leave even where it falls to be refused under the Rules). Paragraph 322(1A) is one of those provisions. Its application involves findings of fact, but that is true of a multiplicity of provisions in the Rules. If the conditions in it are found to be satisfied, leave must be refused under the Rules, but that, too, is true of many other provisions under the Rules. A finding that the conditions are satisfied has potentially serious consequences (see, in particular, the effect of paragraph 320(7B) as summarised above), but paragraph 322(1A) is again far from unique in that respect. The key point is that the statute confers the power on the Secretary of State, or the immigration officers acting on her behalf, to make the decision whether to grant or refuse leave to remain. It is for the Secretary of State or her officials, in the exercise of that power and in reaching their decision, to determine which provisions of the Rules apply and whether relevant conditions are satisfied, including the determination of relevant questions of fact. On the reasoning in ***Ex p Khawaja*** *and* ***Ex p Bugdaycay****, their findings on such matters are open to challenge in judicial review proceedings only on Wednesbury principles; it is not a situation in which their powers depend on some precedent fact the existence of which falls for determination by the court itself.*

…

> "*29 In my judgment, however, that reasoning is based on a mistaken understanding of the reasoning in* ***Ex p Khawaja*** *[1984] AC 74. I have explained that the question whether someone was an illegal entrant was treated in* ***Ex p Khawaja*** *as one of precedent fact because in that case the existence of the power to remove and detain depended on it. It does not follow that wherever the expression illegal entrant appears in the Rules, it raises a question of precedent fact for determination by the court. On the contrary, the reasoning in* ***Ex p Khawaja****, underlined by* ***Ex p Bugdaycay*** *[1987] AC 514, shows that decisions on the grant or refusal of entry clearance or leave to enter or remain, including the determination of relevant questions of fact arising in the application of the Rules, are subject to review on Wednesbury principles.*
>
> "*30 Accordingly, I am satisfied that the judge's inclination to treat the question as one of precedent fact was wrong and that he ought to have applied Wednesbury principles to determine the lawfulness of the decision under challenge. By proceeding to ask himself whether, on the evidence before the court, the Secretary of State had proved that deception had been used, he was addressing the wrong question.*"

30. Mr Biggs argues that ***Giri*** can be distinguished on the ground that liberty was not at issue. He submits that the current case is different based upon context and the effect of the decision making under challenge. He argues that the

application of the principle of legality leads to limitations on the exercise of a general discretion.

31. Mr Biggs argues that the concession made on behalf of the Claimant in ***R (Riaz) v. Secretary of State for the Home Department*** [2019] EWHC 721 (Admin) was wrongly made as it did not recognise the principle of legality. ***Riaz*** concerned the issue of whether the Claimant was working in breach of condition of his visa; the point that arises in this case. David Edwards QC sitting as a Deputy High Court Judge set out the approach to be taken at paragraphs 26 to 29:

> "*26. Mr Malik, who appears for the Secretary of State, says that the issue of whether Mr Riaz was working in breach of the conditions of his visa is not an issue of precedent fact, to be determined by the court itself, but an issue to be determined by the Secretary of State through his immigration officers, susceptible to challenge only on conventional public law principles.*
>
> "*27. Mr Malik referred me to two authorities in this regard:*
>
> "*i) the decision of the Court of Appeal in* ***R v Secretary of State for the Home Department ex p Giri*** *[2015] EWCA Civ 784 at [19] per Richards LJ; and*
>
> "*ii) the decision of the Upper Tribunal (Immigration and Asylum Chamber) in* ***R v Secretary of State for the Home Department ex p Miah*** *[2016] UKUT 23 (IAC) at [33] where Mr Justice Blake,*

albeit obiter, accepted a submission that, under the new statutory regime created by the 2014 Act (i.e., the changes to section 10 of the 1999 Act effected by the 2014 Act), a decision to curtail leave on the basis of a breach of conditions was:

"*an immigration decision taken under the rules … [which] can only be challenged on conventional public law principles rather than by way of precedent fact.*

"*As the authors of Macdonald's Immigration Law and Practice (9th ed.) observe at 17.3, the substituted power created by the 2014 Act is very differently conceived and, in sharp contrast to the prior version:*

"*… no consideration is necessary as to how the person came to be in the situation of requiring leave but not having it.*"

So, Mr Malik submitted in paragraph 14 of his skeleton argument:

"*The issue before the Court is whether it was open to the Secretary of State, on the information that was then available, to conclude that the Claimant was working in breach of his immigration conditions" (my emphasis).*

"*28. Although the Grounds for judicial review and the renewal grounds appeared to suggest the contrary, I understood from paragraph 2 of his skeleton argument that Mr Badar, who appears for Mr Riaz, accepted the issue of whether or not Mr Riaz was working was not an issue of precedent fact. In response to my*

questions, Mr Badar confirmed that this was his position near the start of his oral submissions."

32. Mr Biggs submits that any relevant propositions set out in ***Miah v. Secretary of State for the Home Department*** [2016] UKUT 00023 (IAC) at paragraph 33 and in the Scottish case of ***JO v. Secretary of State for the Home Department*** [2016] CSOH 179 at paragraph 37 are obiter.

The Defendant's Arguments

33. Mr Anderson for the Defendant submits (at paragraph 46 of his skeleton argument):

"*The decision to curtail leave itself does not rest on any matter of precedent fact, and any challenge to the decision to curtail must be on ordinary public law grounds. That has been authoritatively established by the Court of Appeal: see* ***R (Giri) v SSHD*** *[2015] EWCA Civ 784; [2016] 1 WLR 4418 at paragraph 19 as applied in* ***R (Riaz) v SSHD*** *at paragraphs 26 - 29 (and the same reasoning, obiter, in* ***R v SSHD ex p Miah*** *[2017] UKUT 23; and the Court of Session in* ***JO v SSHD*** *at paragraphs 36 – 38).*"

34. In oral argument Mr Anderson submitted that the power to detain is discretionary. In making that submission he relied upon paragraph 29(iii) in the judgment of Richards LJ in ***R (LE (Jamaica)) v. Secretary of State for the Home Department*** [2012] EWCA Civ 597 at paragraph 29(iii):

> "*iii) Subject to the limits imposed by the Hardial Singh principles, the power to detain is discretionary and the decision whether to detain a person in the particular circumstances of the case involves a true exercise of discretion. That discretion is vested by the 1971 Act in the Secretary of State, not in the court. The role of the court is supervisory, not that of a primary decisionmaker: the court is required to review the decision in accordance with the ordinary principles of public law, including Wednesbury principles, in order to determine whether the decision-maker has acted within the limits of the discretionary power conferred on him by the statute.*"

35. Mr Anderson submits that the control on the legality of decisions to detain made under sections 3 and 4 of the 1971 Act is the application of ordinary public law principles. He submits that the mere fact that the consequence of the decision is the deprivation of liberty does not change the basis on which the review is conducted.

Discussion

36. In this case the Secretary of State acted under the discretionary powers conferred on her by the 1971 Act in accordance with the practice to be followed in the administration of the Act as set out in the Immigration Rules.

37. The consequence of the Defendant's determination that the Claimant was working in breach of the conditions of her visa was that leave to remain was curtailed. As a result the Claimant being a person who required leave to remain

in the United Kingdom did not have that leave, and therefore pursuant to section 10(1) of the 1999 Act, the Claimant was a person who may be removed from the United Kingdom.

38. The Defendant's decision to curtail leave to remain was made under the 1971 Act.

39. The 1971 Act confers on the Secretary of State a discretionary power to curtail leave to remain. I agree with Mr Anderson that it was authoritatively determined by the Court of Appeal in ***Giri*** that the discretionary power conferred by the 1971 Act is reviewable on conventional public law or *Wednesbury* principles.

40. Paragraph 322(1) of the Immigration Rules provides that a person's leave to remain may be curtailed on the ground set out at paragraph 322(3), namely failure to comply with a condition attached to the current leave to remain.

41. Application of those paragraphs in the Immigration Rules involves making findings of fact, but as observed by Richards LJ in ***Giri*** that is true of a multiplicity of provisions in the rules. The statute confers power on the Defendant to make the decision on whether to curtail leave, including the determination of relevant questions of fact. The findings on those issues are susceptible to review on *Wednesbury* or conventional public law principles. It is not for the court to conduct a full merits review of each finding of fact made by the Defendant in the exercise of a discretionary powers in the application of the Immigration Rules.

42. Mr Biggs seeks to rely on the principle of legality. That principle, as explained by Lord Hoffman in the passage from ***Simms*** on which Mr Biggs relies is a principle of statutory interpretation. Mr Biggs points to no general or ambiguous words in a statute to which he seeks to apply the principle.

43. The fact that a finding of fact in the application of the Immigration Rules has serious consequences including deprivation of liberty does not, of itself, make it a finding which is susceptible to a merits review by the courts.

44. In my judgment this claim does not raise issues of precedent fact for the court to determine. The appropriate approach is that set out ***Giri***, namely, to apply conventional public law or *Wednesbury* principles.

45. For those reasons, on the preliminary issue I find in favour of the Defendant.

46. I make the following directions:

i) Within seven days of the date of this ruling, the Claimant is to indicate whether she wishes to pursue her application that witnesses for both parties attend at court to give oral evidence.

ii) If the Claimant wishes to pursue her application to call oral evidence, that application be listed to be heard with a time estimate of ½ day.

iii) If the Claimant does not wish to pursue her application to call oral evidence, the substantive hearing be listed to be heard with a time estimate of one day.