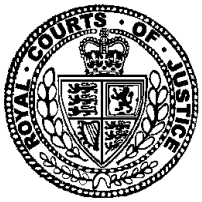

Neutral Citation Number: [2022] EWHC 110 (Admin)

Case No: CO/4118/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2022

Before :

MR JUSTICE FREEDMAN

- -

Between :

THE QUEEN ON THE APPLICATION OF MS SHANILA KANWAL

Claimant

- and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -
- -

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

Hearing date: 26 October 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 20 January 2022 at 10.30am.

.....

MR JUSTICE FREEDMAN:

I Introduction

1. The Claimant is a national of Pakistan. She was born on 7 April 1986. She seeks judicial review of the Defendant's simultaneous decisions taken on 10 October 2019: (a) to curtail her leave to remain with immediate effect; (b) to remove the Claimant from the UK pursuant to section 10 of the Immigration and Asylum Act 1999 ("the IAA") (for both decisions, see the RED0001); and (c) to detain the Claimant (a decision that was renewed until the Claimant was released from immigration detention on 24 October 2019), see the IS.91R form and the detention reviews of 11 October 2019, 17 October 2019 and 24 October 2019.

2. On 24 March 2010, the Claimant was given entry clearance as a tier 4 (general) student valid to 18 May 2011. She entered the UK pursuant to this entry clearance on 29 April 2010, whereupon her entry clearance was converted to leave to enter valid to 18 May 2011 as per articles 2-5 of the Immigration (Leave to Enter and Remain) Order 2000 as amended. 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. On 27 March 2012 she applied for further leave to remain as a tier 1 (post study work) migrant. The application was granted on 13 August 2012 and the Claimant was granted leave valid to 13 August 2014.

3. On 12 August 2014, the Claimant applied for leave to remain as a Tier 1 (Entrepreneur) Migrant. That application was refused on 7 October 2014, subject to a right of in-country appeal. The Claimant appealed in-time, and her appeal was allowed on 21 September 2015. On 20 October 2015, she was granted leave to remain as a Tier 1 (Entrepreneur) Migrant, which, following an application made on 18 October 2019, was extended on 3 July 2019 until 10 July 2021. The notice of decision extending her leave noted:

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

4. In respect of both tier 1 (entrepreneur) applications the Claimant relied upon a business run through a company she controls, called Ash Recruitment Consultants Ltd ("ARC"). As documents provided to the Defendant in support of the applications showed, one of the clients of ARC was City Inn Express Hotel at 144a Mare Street, London ("the Hotel"), the organisation for which the Claimant is said to have been employed as a receptionist illegally.

5. On 10 October 2019, the Defendant's officials/ employees attended the Hotel to carry out an immigration enforcement visit. The events of the visit are the subject of an extensive dispute of fact between the parties. It is agreed between the parties that the Claimant was arrested, questioned at the Hotel, and then placed into immigration detention.

6. Ms Rhazounai, one of the arresting officers, explained what happened at the visit in detail, although the events are disputed by the Claimant. In short, the Claimant was encountered sitting on the sofa in the lounge area; she claimed not to be working and said that she was going to sit in a friend's room (Room 303) as she was visiting her friend (Ms Husna Jabeen) at the Hotel. The arresting officer took her details, and checked them with the Home Office, and allowed her to proceed since, at that point, there was no reason to take further action against her.

7. In the meantime, two persons were arrested for working illegally at the Hotel, namely Mr Motashim Ali Mohammed ("Mr Mohammed") arrested by Immigration Officer John Gascoigne and Salahuddi Md, arrested by Immigration Officer S. Lule, who were found to have overstayed their visas and were illegally present in the UK and were working illegally at the Hotel. A fuller search of the Hotel was authorised under paragraph 25A of schedule 2 to the Immigration Act 1971. One of those individuals was Mr Mohammed, the duty manager. He gave his permission to the Defendant to search the remaining rooms in the Hotel to locate "the cleaner and last employee" in the building; whom he identified as being the Claimant. The interview record with Mr Mohammed records:

> *"....*
> *What is your position here? Front desk and I'm the person charge today*
> *How long have you been working here? 2 weeks…*
> *[Asked about keys for rooms 304/303]*
> *Who lives in the room? The receptionist called Kamal she works and lives here*
> *How long has she been working here? I'm not sure*
>
> *How many days a week does she work? She works two or three shifts at this property*
> *Do you have employee records for her? No*
> *...."*

8. A witness statement dated 5 November 2019 prepared by officer John Gascoigne notes of the interview with Mr Mohammed:

> *"…I proceeded to question Mohammed who was served with the Notice to Occupier and he was subsequently identified as an immigration offender and arrested by me as an overstayer in the UK. Whilst trying to establish his circumstances at the premises, he was asked who else worked there. He stated to me that a female, whom I now know to be Shahnila Kanwal, a Pakistani female, dob 07.04.86 who was present at the time of our visit was also an employee of the hotel, working in the capacity of a receptionist. He clearly pointed her out to me as she was being questioned by IO H Rhazouani. He stated that the role of receptionist was shared by several members of the team, including his cousin who was not present at the time of our visit. He stated that there was no published rota for staff at the hotel*

> *but that each kept in touch with each and the hotel owner by text messages, being made aware of their given shifts via the same method."*

9. The Defendant's officials undertook a search of the rooms and found the Claimant in room 301. The friend she claimed to be visiting was not there, and the room contained the Claimant's belongings, including photographs of her on the dressing table and identity documents (including her current and expired Pakistani passports, old bank statements and correspondence with an address at Blackhorse Lane, which she indicated was no longer her address). There were also clothes, jewellery and make up in the room with suitcases and other bags. The Claimant sifted through those bags when asked to pack a bag for the purpose of detention, despite claiming that the belongings were those of her friend. Room 303, where the Claimant said she was visiting her friend, was in fact empty. The number of belongings at the Hotel indicated that she was living there.

10. The Claimant's account is set out in her two witness statements. In her witness statement dated 20 October 2019, the Claimant stated that, on 10 October 2019, she was at the 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 the Hotel. The Claimant is the sole director and shareholder of ARC.

11. The Claimant stated that she was present when the 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. This was consistent with the contemporaneous digital notes taken by the Defendant's officer, Ms. Rhazouani, on 10 October 2019.

12. The Claimant was interviewed by immigration officers. The Claimant disputes that she was "interviewed". The Claimant's account is that on 10 October 2019 she was visiting the Hotel to provide "consultancy services" and that she had left some belongings with a friend at the Hotel as she was moving address. She said that she attended the Hotel to provide these human resources services and because the Claimant's friend and an employee of the Hotel, Husna Jabeen, had a room at the Hotel (room 301) which the Claimant was using to store some of her belongings as she was in the process of moving address. The Claimant and the owner and manager of the Hotel, Mr Yasser Mussadiq (who was also present at the Hotel on 10 October 2019 during part of the enforcement visit), deny that the Hotel employed the Claimant illegally.

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

    (1) On 10 October 2019, she attended a North London enforcement visit to the Hotel with a team of Immigration Enforcement officers.

    (2) 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.

(3) She said that she saw the Claimant leaving the lounge to go upstairs. Ms Rhazouani asked the Claimant to return to the lounge.

(4) Ms Rhazouani said that she asked the Claimant where she lived, and that the Claimant evaded the question.

(5) 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.

(6) Ms Rhazouani said that other immigration officers interviewed the duty receptionist Mr 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.

(7) The immigration officers then undertook a search of the premises. They say that they found some of the Claimant's possessions in room 301.

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

(9) Ms Rhazouani stated that the Claimant gave contradictory responses to questions about pay and terms of employment.

(10) Ms Rhazouani said that the Claimant denied that she was an employee of the Hotel.

(11) Ms Rhazouani said that she and Immigration Officer Cotterell were not satisfied with the Claimant's answers to questions, and that she arrested the Claimant. She commented that the Claimant did not provide information on her now claimed HR consultancy, she denied residence at the Hotel, gave false information relating to Room 303 and the location of another room (Room 301) which was filled with her personal effects. The Claimant would not listen to instructions, and she was uncooperative following arrest.

14. The sequence of events appears to have been as follows on 10 October 2019, namely:

(1) Immigration Officer IO Gascoigne obtains Mr Mohammed's consent to entry and interviews Mr Mohammed: see para. 7 of Ms Rhazouani's statement;

(2) As IO Gascoigne was doing so, Ms Rhazouani had her first exchange with the Claimant: see para. 8 of Ms Rhazouani's statement;

(3) At this point, Mr Mohammed pointed out the Claimant to IO Gascoigne;

(4) After the interview with Mr Mohammed is complete and Ms Rhazouani returned to the Hotel, Ms Rhazouani interviewed the Claimant again. She

stated at para. 11 of her statement that having facilitated two other arrests, she returned to the Hotel, and she then interviewed the Claimant again.

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

16. The Defendant's officials considered that the Claimant was in fact employed at the Hotel as a receptionist, which was providing her with accommodation, and that she was in breach of the conditions of her leave to remain. She was arrested as a person liable to be detained under paragraph 17(1) of schedule 2 to the Immigration Act 1971; her leave was curtailed, and she was detained with a view to her removal to Pakistan. Ms Rhazounai says that the Claimant was obstructive and evasive and could not give a satisfactory account of why she was at the Hotel.

17. Mr Simon Farid said that he had also considered (para. 18 of his witness statement) that the Claimant was in breach of her conditions of leave because she was not working for KP Electronics. That was an error since she was not required to work for KP Electronics. In any event, the curtailment decision referred to the Claimant being observed to be working at the Hotel as a receptionist and stated:

> *"On 3 July 2019 you were granted leave to remain in the UK until 10th of July 2012 on condition that employment is prohibited. You are specifically considered a person who has failed to observe a condition of leave to remain because on 10th of October 2019 you were observed working at City Inn Express as a receptionist. It is not considered that the circumstances of 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."*

18. The Claimant was served with notice of removal pursuant to section 10(1)(a) of the Immigration and Asylum Act 1999. That notice included notice under section 120 of the Nationality, Immigration and Asylum Act 2002 requiring the Claimant to give notice of any reasons for wanting to stay in the UK. The Claimant was also served with notice of detention and bail rights. 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."*

19. On 11 October 2019, the Claimant's detention was reviewed. The Claimant was assessed as posing a high risk of absconding:

> *"The Claimant is an immigration offender with a history of non-compliance. She appears to have come to the UK for economic reasons. She has failed to comply with the terms and condition of her visa by working in breach. In view of her imminent removal from the UK she is likely to abscond if released."*

20. It was further stated:

> *"Ms Kanwal has no family, children or any other close ties to the UK, which makes it unlikely that she will remain in one place if released. She has failed to comply with the terms and condition of her leave to remain by working without authority. In view of her blatant disregard for the immigration rules and imminent removal, she is unlikely to comply with any terms of immigration bail, now she is aware of the Home Office intention to remove her from the UK. Therefore, detention remains appropriate to affect her lawful removal from the UK."*

21. On 16 October 2019, removal directions were issued for the Claimant's removal to Pakistan on 24 October 2019. On 17 October 2019, the Claimant's detention was reviewed and maintained (this time, the Defendant assessed the Claimant's risk of absconding as medium).

22. On 17 October 2019, the Claimant's solicitors served representations as to why the Claimant should not be removed in reply to the s.120 notice served on the Claimant on 10 October 2019. They opposed her removal on Article 8 grounds, enclosing a number of documents in relation to her business. By a letter of claim dated 17 October 2019 and served on the Defendant, the Claimant's solicitors also challenged the legality of the Defendant's decision to curtail the Claimant's leave, and the decisions to detain and remove her. By letter of the same date, the Claimant's solicitors wrote a letter before action threatening judicial review of the decisions to remove and detain the Claimant.

23. On 18 October 2019, removal directions were deferred due to the Claimant's Article 8 claim. On 21 October 2019, the Claimant issued this claim for judicial review, together with a claim for expedition and interim relief in the form of a stay on removal. On the same day, Lang J granted a stay on removal.

24. On 24 October 2019, the Claimant was released from detention on immigration bail in light of the barriers to removal created by her human rights claim and claim for judicial review (and, presumably, in the light of the order for interim relief).

25. By separate letters dated 25 October 2019 the Defendant replied to the 17 October 2019 letter of claim denying that the decisions challenged were unlawful; and refused the Claimant's human rights claim made on 17 October 2019, which she also certified to be clearly unfounded pursuant to section 94 of the Nationality, Immigration and Asylum Act 2002.

26. The Defendant filed her acknowledgment of service ("AoS") and summary grounds of defence ("SGD") on or around 8 November 2019. This enclosed a series of documents by way of annexes, including the digital notes and Mr Gascoigne's witness statement dated 5 November 2019.

27. By letter dated 25 October 2019, the Defendant replied to the Claimant's letter before action. By a separate letter of the same date, the Defendant refused and certified her human rights claim [JR/116 – 124]. The decision letter summarised the evidence provided by the Claimant and states:

> *"… [60] None of this constitutes as evidence that you were not only living but also working at City Inn Express as an employee.*
>
> *[61] You have been found working in breach of the terms and conditions of your visa and have shown a blatant disregard for the Immigration Rules and your conduct therefore weighs against you when assessing your claim. You are a healthy adult female who has been able to live independently in the UK, and there are no reasons given as to why you would not be able to re-establish yourself and re-utilise these same skills in Pakistan."*

28. The Defendant certified the Claimant's human rights claim as clearly unfounded under section 94(1) of the Nationality, Immigration and Asylum Act 2002, as a consequence of which her right of appeal against that decision must be exercised out of country. The Claimant has not challenged that decision.

29. On 18 February 2020, Mr Anthony Elleray QC sitting as a deputy High Court Judge refused permission to claim judicial review.

30. On oral renewal, permission was granted by Mr James Strachan QC on 27 March 2020.

III Preliminary issue

31. There was ordered to be tried a preliminary issue as to whether the Court's determination in this judicial review depended on finding facts in this case and making

a decision accordingly, or whether any challenge to a decision to curtail must be on ordinary public law grounds. The decision as to whether the decision to curtail rested on any matter of precedent fact was made on 22 July 2021 by Mr Neil Cameron QC sitting as a deputy judge of the High Court ("the Deputy Judge"), with a neutral citation number [2021] EWHC 2071 (Admin).

32. The Deputy Judge accepted a submission of Mr Anderson for the Defendant (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)."*

33. The Deputy Judge also accepted the oral argument of Mr Anderson that the power to detain is discretionary based on 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."*

34. The Deputy Judge accepted 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, and the fact by itself that the consequence of the decision is the deprivation of liberty did not change the basis on which the review is conducted.

35. The Deputy Judge referred to the discretionary powers conferred on the Secretary of State by the Immigration Act 1971. 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.

36. 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.

37. It followed from the decision of the Court of Appeal in *Giri* that the discretionary power conferred by the 1971 Act was reviewable on conventional public law or *Wednesbury* principles. It was 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. The Deputy Judge found that the claim did not raise issues of precedent fact for the court to determine.

38. In the event that the issues of precedent fact had arisen for the court to determine, then an application for cross-examination would have followed. In the light of determination of the preliminary issue, the Claimant confirmed that cross-examination would not be sought.

IV The Grounds of Review

39. The Claimant relies upon three pleaded grounds of review, namely:

(1) The 10 October 2019 decisions are unlawful because they were taken in procedurally unfair circumstances (paras. 9-16 of the detailed grounds for judicial review).

(2) The 10 October 2019 decisions are unlawful because the reasons given for the decisions in the RED 0001 notice are unsupported by evidence so that the decisions are unreasonable.

(3) The Claimant was unlawfully detained between 10 October 2019 and her release on 24 October 2019 because:

(a) If either or both grounds (1)-(2) are correct, the Defendant's decision to detain the Claimant is vitiated by material public law error.

(b) The Claimant's detention was not consistent with the principles identified in by Woolf J in *R (Hardial Singh) v. Governor of Durham Prison* [1983] EWHC 1 (QB), [1984] 1 WLR 704 at [7]-[8] because any detention of the Claimant was of an unreasonable duration as:

(i) The Claimant had not worked in breach of her visa conditions and was treated procedurally unfairly. There was accordingly no basis to curtail her leave.

(ii) There was in any event no serious risk of absconding sufficient to outweigh the presumption against detention, given that:

1. The Claimant had no history of absconding.

2. She held leave to remain until it was curtailed.

3. She has strong ties to the UK, given her length of residence in the UK and her business, and private life, developed during that time.

4. She did not seek to deceive the Defendant as alleged or at all.

5. Although not mentioned in the pleadings, it is also relevant that the Claimant in fact had an address at which she could reside.

40. The Defendant resists these grounds for reasons pleaded in her detailed grounds of defence ("DGD"). She submits:

(1) that the procedural unfairness ground fails because:

(a) The Claimant was interviewed before the decision to curtail her leave was taken and she had an opportunity to explain herself but failed to give a credible account of her circumstances or explain away the fact she had been identified as working as a receptionist by another member of staff (DGD para. 37).

(b) In any event, she had the chance, after the curtailment decision, to explain why she should not be removed from the UK. She made human rights representations (on 17 October 2019) in response to a 's.120 notice', but they were rejected and certified as clearly unfounded (on 25 October 2019). The Claimant did not challenge that decision (DGD para. 38).

(c) It follows that, (i) there was no procedural unfairness; (ii) even if there was, it was not material at common law; and (iii) in any event relief should be refused because the Defendant reached the same conclusion as to the Claimant having breach her visa conditions in the light of the Claimant's s.120 representations (DGD para. 39).

(2) The Claimant's second ground of review fails because the Defendant has provided cogent evidence in support of the allegation that the Claimant was working in breach of her visa conditions (DGD, para. 40).[1] By way of an out-of-country appeal the Claimant can challenge

[1] As noted above, the Claimant's submission that the lawfulness of the curtailment decision is reviewable based on a "precedent fact" approach has been determined against the Claimant.

the Defendant's decision of 25 October 2019 to refuse the human rights claim made by the Claimant on 17 October 2019 (DGD, para. 42).

(3) The Claimant's challenge to the lawfulness of detention fails because:

(a) Grounds (1)-(2) are unfounded, for the reasons already identified (DGR para. 45).

(b) The Defendant was entitled to consider that the Claimant posed a significant risk of absconding in the circumstances (DGR para. 46).

(c) An error in the immigration bail summary does not establish an error of law in respect of the decisions to detain (DGR para. 47).

(d) The mere fact the Claimant had been in the UK for a period does not serve to mitigate an absconding risk (DGR para. 48).

(e) The Defendant reasonably considered that the Claimant had been deceptive (DGR para. 49).

(f) The Claimant did not need to be interviewed in respect of whether detention was appropriate (DGR para. 50).

V The Issues

41. The following issues therefore arise:

(1) Are the 10 October 2019 decisions (particularly the decision to curtail the Claimant's leave), vitiated by procedural unfairness?

(2) Was it open to the Defendant to curtail the Claimant's leave to remain for the reasons set out in the RED.0001 notice of 10 October 2019?

(3) If grounds (1) or (2), the first two issues, have been established, does this entail that the Claimant's detention between 10 October 2019 and 24 October 2019 was unlawful?

(4) Was the Claimant unlawfully detained for any duration because her detention was not compliant with the *Hardial Singh* principles?

(5) If any of the grounds of review are established, what public law relief, if any, should the Court award?

(6) If the Claimant was unlawfully detained, (i) should she be awarded more than nominal damages, and (ii) if substantial damages are due, what quantum of damages should be awarded?

VI Legal Framework

42. 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).*"

43. 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."*

44. 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."*

45. 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)."*"

46. 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."*

47. There must be added section 31(2A) of the Senior Courts Act 1981 which reads as follows:

> "*(2A)The High Court—*
>
> *(a)must refuse to grant relief on an application for judicial review*
>
> *…*
>
> *if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."*

VII Issue (1): procedural unfairness

(a) The law

48. The primary dispute is to the application of the law to the facts. The law can be summarised as follows:

(1) the Defendant was under a duty to act procedurally fairly in respect of the decisions challenged in this case: see *R (Mohibullah) v. SSHD (TOEIC - ETS - judicial review principles)* [2016] UKUT 561 (IAC) at (78) (general duty on Secretary of State to act procedurally fairly in immigration cases); and

(2) The question of whether there has been procedural fairness or not is an objective question for the Court to decide for itself. The question is not whether the decision-maker has acted reasonably, still less whether there was some fault on the part of the public authority concerned: see *R (Balajigari) and Ors. v SSHD* [2019] EWCA Civ 673, [2019] 1 WLR 4647 *("Balajigari") at [46] and R (Osborn) v. Parole Board* [2013] UKSC 61, [2014] AC 1115 at [65]).

(3) *"… [3] The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.*

…

[5] Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.

[6] Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer." per Lord Mustill in *R v Home Secretary ex p. Doody* [1994] 1 AC 531 at 570.

(4) "*Although the courts cannot and have not purported to lay down rules of general application, there is a broad consensus in the decisions of appellate courts as to the factors that affect what is required in a given context. That consensus runs from Lord Upjohn's important statement in Durayappah v. Fernando [1967] 2 AC 337 at 349 to the refinements in more recent cases such as Lloyd v. McMahon [1987] AC 625 at 702, and Doody and Osborn's cases. The factors include the nature of the function under consideration, the statutory or other framework in which the decision-maker operates, the circumstances in which he or she is entitled to act and the range of decisions open to him or her, the interest of the person affected, the effect of the decision on that person's rights or interests, that is, the seriousness of the consequences for that person. The nature of the function may involve fact-finding, assessments of matters such as character and present mental state, predictions as to future mental state and risk, or policymaking. The decision- maker may have a broad discretion as to what to do or may be required to take into account certain matters, or to give them particular or even dispositive weight. The decision may affect the individual's rights and interests, and its effect can vary from a minor inconvenience to a significant detriment."* per Beatson LJ in *R (Howard League for Penal Reform & Anor) v. The Lord Chancellor* [2017] EWCA Civ 244, [2017] 4 WLR 92 at [38].

(5) In *Re HK (An Infant)* [1967] 2 QB 617, an immigration officer suspected that HK, a Pakistani national seeking to enter the UK as the son of a Pakistani national ordinarily resident in the UK was older than the date stated on the passport presented. Lord Parker C.J observed at p.630:

"*I doubt whether it can be said that the immigration authorities are acting in a judicial or quasi-judicial capacity as those terms are generally understood. But at the same time, I myself think that even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act*

fairly. ***Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly.*** [emphasis added]**"**

(6) The requirement of procedural fairness applies in respect of an entitlement to address an immigration officer in other contexts: *R (Humnyntskyi & Ors) v. SSHD* [2020] EWHC 1912 at [270] (entitlement of foreign national offenders *inter alia*, to make representations in advance of a decision as to whether to provide bail accommodation, and to know what factors will be considered significant by the decision maker); *Gaima v. SSHD* [1989] Imm AR 205 (an overstayer who claimed asylum where the issue in that case was that the SSHD had not put to an asylum seeker the matters taken into account in assessing their sincerity and credibility.)

(7) In *Balajigari* in the judgment of the Court (Underhill, Hickinbottom and Singh LJJ), it was said as follows:

"[55]*...where the Secretary of State is minded to refuse ILR on the basis of paragraph 322 (5) on the basis of the applicant's dishonesty, or other reprehensible conduct,* ***he is required as a matter of procedural fairness to indicate clearly to the applicant that he has that suspicion; to give 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; and then to take that response into account before drawing the conclusion that there has been such conduct.***

[56] ***We do not consider that an interview is necessary in all cases.*** *The Secretary of State's own rules give a discretion to him to hold such an interview. However, the duty to act fairly does not, in our view, require that discretion to be exercised in all cases. A written procedure may well suffice in most cases."*

[60] *...unless the circumstances of a particular case make this impracticable,* ***the ability to make representations only after a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness****. The rationale for this proposition lies in the underlying reasons for having procedural fairness in the first place. It is conducive to better decision-making because it ensures that the decision-maker is fully informed at a point when a decision is still at a formative stage. It also shows respect for the individual whose interests are affected, who will know that they have had the opportunity to influence a decision before it is made. Another rationale is no doubt that, if a decision has already been*

made, human nature being what it is, the decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come. [emphasis added]*"*

(8) *R. v. Hackney London Borough Council, ex p Decordova* (1995) 27 HLR 108 at p.113 where Laws J observed: *"... where an authority lock, stock and barrel is minded to disbelieve an account given by an applicant for housing where the circumstances described in the account are critical to the issue whether the authority ought to offer accommodation in a particular area, they are bound to put to the applicant in interview, or by some appropriate means, the maters that concern them. This must now surely be elementary law in relation to the function of decision-makers in relation to subject matter of this kind. It applies in the law of immigration, and generally where public authorities have to make decisions which affect the rights of individual persons. If the authority is minded to make an adverse decision because it does not believe the account given by the applicant, it has to give the applicant an opportunity to deal with it."*

(9) The fairness of the procedure used by the defendant falls to be evaluated at the date of the impugned procedure and decision, not in retrospect. What was unfair then remains unfair now: see *R (Pathan) v. SSHD* [2020] UKSC 41, [2020] 1 WLR 4506 at [131]-[135].

(b) Submissions of the Claimant

49. Applying the principles identified above, the Claimant submits that she was entitled:

(1) to notice of the Defendant's allegation that she was working in breach of her visa conditions (including at least a summary of the evidence in support of the allegation) and a reasonable opportunity to respond to that allegation.

(2) to address any possible exercise of the Defendant's discretion as to whether to curtail her leave.

(3) to notice and the chance to respond *before* a decision was taken to curtail her leave.

(4) to make representations as to whether it was appropriate to remove her and to place her into immigration detention independently of her right to be heard on the curtailment question and the allegation that she was working in breach of visa conditions.

50. Particular circumstances which gave rise to these entitlements included the fact that she was not applying for fresh benefit (indefinite leave, or citizenship such as in the cases

of *Balajigari* and *R v. Secretary of State for the Home Department, ex p. Fayed [1998] 1 WLR 763 "ex p. Fayed"*), but to avoid being divested of her existing rights to remain and not to be detained or removed, and therefore her case was a fortiori the consideration in *Balajigari* and *ex p. Fayed*. The consequence of being in breach of visa conditions was used as the basis for immediate removal basis and immediate detention. Mr Biggs referred to the "hostile environment" of the Immigration Act: see para. 79 of *Pathan v Home Secretary* [2020] 1 WLR 4506 and see also para. 210 of the speech of Lord Wilson (dissenting in part only) who referred to the consequences of becoming an overstayer including becoming liable to detention pending forcible removal..Further, the Claimant submitted that the allegation was criminal in nature- it entailed the commission of a criminal offence under s.24 of the Immigration Act 1971.

51. Given the serious nature of the Defendant's allegation, and the radical interference with the Claimant's interests flowing from it (being the subject of immediate enforcement action (detention and removal) as well as from the curtailment of her leave, she might be entitled to:

(1) an oral hearing, see section 6 of Fordham J's judgment in *JCWI v. The President of the Upper Tribunal (IAC)* [2020] EWHC 3103 (Admin) and the authorities there considered.

(2) at least the "*minded to*" procedure adopted in *Balajigari,* and *ex p. Fayed*.

(3) a meaningful or fair opportunity of defending herself (both in respect of enforcement action and curtailment of her leave) following disclosure of the case or gist of the case which the Claimant had to meet, which did not occur in the "interview" of 10 October 2019;

(4) an interview under caution and questioning compliant with PACE Code C, as it should have been if the Defendant intended prosecution (see *Elsakhawy (immigration officers: PACE)* [2018] UKUT 00086 (IAC)).

52. The Claimant submits that in respect of what occurred on 10 October 2019:

(1) it did not amount to an interview, but the questioning of a person suspected of immigration offending during an immigration enforcement visit;

(2) it did not involve any disclosure of the case the claimant had to meet (not even the gist of that case), nor did it allow the claimant any or any fair opportunity of presenting her case;

(3) there was no meaningful opportunity to address the defendant's allegation of illegal working by obtaining and submitting documentary evidence (for example, ARC's contracts with, and its invoices to, the Hotel) and evidence from witnesses (for example, Mr Mussadiq and Mr Ali);

(4) there was not time given to access legal advice and assistance to help prepare her representations;

(5) it was no answer that the Claimant was given the chance to provide some evidence in support of her position after her leave was curtailed.

53. The Claimant also submits that there was no indication in the evidence or the contemporaneous or subsequent evidence that there was a need to curtail her leave to remain at this stage. Reference was made to the case of *R (Suraj Sapkota) v SSHD* [2016] EWHC 3710 (Admin) (Mr Richard Clayton QC sitting as a Deputy Judge of the High Court) (*"Sapkota"*). That case concerned allegations about a sham marriage in which the procedure was held to be unfair because the procedure was *"unduly attenuated"*, and a decision was made based on the interview having confronted the claimant for the first time with adverse allegation and without affording an opportunity to hear further representations [para. 47]. There was no explanation why it was not practicable to operate a minded to refuse procedure which afforded the claimant some opportunity to make further submissions before being detained in custody [para. 53*]. "issue in this case was the adverse decision formed by the immigration officers about the sham and bigamous marriage. In my view, much of the material alleged against the claimant was ambiguous. It could be construed either way and was, in fact, construed adverse to the claimant because of the negative conclusions about his credibility in relation to his denial of his marriage to Susmita Dahal.*[2] [para. 57]"

54. The Claimant submits that applying the applicable principles, had she been given a procedurally fair chance to address the allegation of working in breach, and to address the other decisions in issue, it is at least possible that her leave would not have been curtailed, and that she would not have been detained and subjected to removal action. Accordingly, this is sufficient to show that the decisions of 10 October 2019 decisions are vitiated by material procedural unfairness, even though the Defendant in fact maintained her initial curtailment decision following the 17 October 2019 s.120 representations.

(c) Submissions of the Defendant

55. The requirement of procedural fairness must be considered in context. The Defendant's officials did not act without giving the Claimant an opportunity to make representations. The Claimant was aware of what was being alleged against her and she had an opportunity to answer questions. The account she gave of herself was not credible in that:

(1) she denied living in the Hotel, whereas she was living in Room 301;

(2) she made a false reference to visiting her friend in Room 303, whereas that room was empty, and this was a distraction from Room 301;

[2] There had been an allegation that the claimant in that case was married to Ms Dahal, and subsequently there was admitted a statement from her that she was never married to the claimant.

(3) her responses about pay and terms of employment were evasive and contradictory;

(4) she was uncooperative and did not provide evidence that she was working for her own company (she said that her employer was her friend Husna Jabeen and Mr Mohammed and then said that Mr Mohammed was not her employer but was someone that she trained).

56. In these circumstances, despite having knowledge what the purpose of the visit was, the Claimant did not take the opportunity to satisfy the immigration officers that she was acting lawfully. She did not take the opportunity to disabuse them of the impression that she was unlawfully employed by the Hotel. The Defendant acted fairly in concluding that the Claimant was working for the Hotel and that she was living there. The Defendant acted fairly in taking a decision to curtail the Claimant and to detain her.

57. It is unrealistic to suggest that there should have been a "minded to" letter and/or an oral hearing before any decision to curtail her leave and/or detain her. If that were the law, then there would be nothing to prevent a person given such notice from simply absconding. An excessively stringent procedure would neuter the powers of the Defendant to impose conditions on leave to remain and to curtail leave where those conditions are breached.

58. Even if there had been a procedural error, a legally flawed decision will not be quashed where the errors identified are immaterial because the result would inevitably have been the same: see *Balajigari* at para. 134. The Claimant was given a further opportunity to identify any reasons why she should not be removed from the UK. She took that opportunity and made representations. The Claimant provided documents including P60s for herself issued by her company and pay slips for someone called Shazia Ahmed claimed to be an employee of her company and a contract with the Hotel along with invoices. She made the representations referred to at paragraph 22 above as to why she should not be removed and opposing her removal on Article 8 grounds and challenging the legality of the decision to curtail her leave and the decisions to detain and remove her.

59. Those representations were considered in the Defendant's decision of 25 October 2019 and the Defendant's refusal of the human rights grounds. The Defendant acted fairly and reasonably in forming the view that the further representations did not show either that she was not working for the Hotel as an employee or that she was not living at the Hotel. The Defendant considered the material she had provided and rejected her claims. The Defendant acted reasonably in rejecting each of the representations and claims of the Claimant.

60. The Claimant has not sought to challenge the Defendant's substantive consideration of the further material which she provided in the context of her s. 120 representations. The Claimant has sought in footnote (number 10) to her skeleton argument to say that such a claim would be unassailable. That is not sufficient. In any event, the Defendant submits that section 31(2A) of the Senior Courts Act 1981 applies, namely that if the conduct complained of had not occurred, it is highly likely that the outcome for the

applicant would have been substantially different if the conduct complained of had not occurred.

(d) Discussion

61. In my judgment, that which occurred on 10 October 2019 and the decisions made were procedurally fair. The Claimant well knew that the Defendant was inquiring about illegal working at the Hotel, and that there was an issue as to whether she had been working there. It was obvious that the inquiries were by reference to the limited condition on which the Claimant was permitted to reside in the UK and a suspected breach of the condition by working at the Hotel as an employee. She was asked about whether she was working at the Hotel and where she was living. There was nothing complex about this inquiry such that she needed time to prepare her answer. There was a process of questions and answers. That can be described as interview, although the term 'interview' is not a term of art. The Claimant was given a fair opportunity to explain, if it was the case, that she was neither working nor living at the Hotel, and to explain why she was in the Hotel.

62. The Claimant had an opportunity to explain herself but failed to give a credible account of her circumstances, why she was at the Hotel, why her belongings were at the Hotel or why she was identified as working as a receptionist by another member of staff. The matters set out in the first two paragraphs in the section above headed "submissions of the Defendant" are a correct summary of how the Claimant failed to give a credible account of her circumstances. This was before the immediate enforcement action (detention and removal) and decision to curtail her leave.

63. The Claimant submits that the "interview" did not involve any disclosure of the case the Claimant had to meet (not even the gist of that case), nor did it allow the Claimant any, let alone a fair, opportunity of presenting her case. In my judgment, the Claimant was asked appropriate questions by the immigration officers, and she had the opportunity to explain her position. If there was a possible lawful explanation for her presence at the Hotel, the Claimant would have had no difficulty in providing it. Instead, she provided contradictory explanations about how she was working for Mr Mohammed and/or Ms Husna Jabeen and then that she had been training Mr Mohammed. She behaved in an evasive way as regards which room she was visiting. She said that her friend Husna Jabeen was in Room 303 and that she was visiting her. However, her friend was not there, and Room 303 was empty. It was then discovered that her belongings were in Room 301 including pictures on the dressing table, and that her luggage was in that room and other possessions were in that room, all indicating that she was living at the Hotel. The Claimant's answers to the questions and her conduct indicated that she was working and living at the Hotel.

64. As regards the decision to detain and remove her and the decision to curtail her leave, the Defendant identified a risk of absconding or disappearance. This view was formed because the Claimant had been found to be in breach of the visa requirements and she did not have children or other persons dependent on her. It was a logical concern that with the prospect of removal, if not detained, the Claimant would or might abscond.

65. The Defendant was not obliged to give to the Claimant some further opportunity before the immediate enforcement action and taking a decision to curtail her leave. There was no reason to believe at that time that she needed the time and opportunity to obtain and submit documentary evidence (for example, her company's contracts with, and its invoices to, the Hotel and evidence from witnesses (for example, Mr Mussadiq) or the opportunity to access legal advice and assistance to help prepare her representations. Nor was there a requirement to provide a "minded to" decision or some written statement to which she could respond. Likewise, despite the very serious consequences of the decisions, on the facts of this case, it was procedurally fair to detain the Claimant and to decide to curtail her leave to remain in the circumstances. The submissions of the Defendant, particularly as summarised at paragraphs 56-57 above, are accepted.

66. By reference to the case law above, the Defendant brought adequately to the attention of the Claimant the concern which the Defendant had about the Claimant working illegally. The Defendant gave to the Claimant the opportunity to address the concern. It is to be borne in mind that the matter in question was not nuanced such as to require a detailed statement of the concern of the Defendant or a full opportunity to prepare and provide an answer. Examples of contrasting cases are as follows. In the case of ex *p. Fayed*, the business affairs of Mr Al Fayed as a high-profile individual were such that he could not be expected to deal with a concern about his character when his reputation was the subject of considerable comment in his numerous business activities. It was impossible for him to address good character without being given in advance notice of the matters of concern and the opportunity to prepare a response. That was unfair. This is very different from a question as to whether the Claimant had been working as a receptionist at the Hotel. This contrast was apparent from the remarks of Woolf J in *ex p. Fayed* at p.777 who said as follows:

> *"…Administrative convenience cannot justify unfairness, but I would emphasise that my remarks are limited to cases where an applicant would be in real difficulty doing himself justice unless the area of concern is identified by notice.* ***In many cases which are less complex than that of the Fayeds the issues may be obvious. If this is the position notice may well be superfluous because what the applicant needs to establish will be clear. If this is the position notice may well not be required.*** *However, in the case of the Fayeds this is not the position because the extensive range of circumstances which could cause the Secretary of State concern mean that it is impractical for them to identify the target at which their representations should be aimed.* [emphasis added]"

67. The case of *Sapkota* involved questions about whether a marriage was a sham marriage which raised sensitive and nuanced questions about the nature of the relationship and whether one of the partners was already married to someone else. The inquiry could not be foreshortened: the answers were ambiguous. Another example might be where there was a question about the age of a person who was said to have come over as a minor. In this case, there were none of these complexities, and in circumstances of a

risk of absconding, the opportunity given on 10 October 2019 at the Hotel was adequate before the decisions were made.

68. For all the above reasons and the reasons submitted on behalf of the Defendant, I reject the case about procedural unfairness. Looking at the matter as of 10 October 2019 and not with hindsight, in my judgment, the decisions made were procedurally fair. The Claimant was given notice of the allegation that she was working in breach of her visa conditions. She was given a reasonable opportunity to respond to the allegation and to address any possible exercise of the Defendant's discretion to curtail her leave. Such opportunity was given before any possible exercise of the Defendant's discretion to curtail her leave.

69. The foregoing suffices for my decision. Without detracting from the foregoing, I consider the alternative submissions based on the Claimant being given a further opportunity to identify any reasons why she should not be removed from the UK. She took that opportunity and made representations. Those representations were considered in the Defendant's decision of 25 October 2019. The Defendant considered the material she had provided and rejected her claims. The matters set out in paragraphs 22 and 25 above are repeated. None of the material that the Claimant and her lawyers provided a case to the effect that she had been acting other than illegally working for the Hotel as an employee.

70. I accept the alternative submission that if, contrary to what I have found there had been procedural unfairness, this did not make a material difference on the facts of this case. The Defendant reached the same decision on receipt of the representations, and in my judgment would have reached that conclusion in the event that it had received the same on 10 October 2019. In accepting this submission, I take full account of the caution in refusing relief on the basis of immateriality and that it is usually insufficient to have the opportunity to make representations after a decision has been taken. I also accept in these circumstances the further alternative submission that it is highly likely that the Defendant would have reached the same conclusion on the basis of the further material which the Claimant relied on: see section 31(2A) Senior Courts Act 1981.

VIII Ground 2: no reasonable basis for the decisions of 10 October 2019

(a) Summary of the arguments in respect of Ground 2

71. The Claimant submits that the 10 October 2019 decisions are unlawful because the reasons given for the decisions in the RED 0001 notice are unsupported by evidence so that the decisions were unreasonable.

72. The failure of the argument on the preliminary issue was that it was not for the Court to determine this matter but that the court was confined to a review on public law and/or *Wednesbury* principles. Not only was the matter not to be determined as a matter of precedent fact, but also the Claimant conceded that there was to be no cross examination. Nevertheless, the Claimant submitted that even on the basis of considering the matter from a public law/Wednesbury perspective, the decisions taken on 10 October 2019 were not supported by evidence such that they were unreasonable.

The Claimant has drawn attention to inconsistencies in the evidence adduced by the Defendant and in particular as follows:

(1) the decision letter stated that the Claimant had "*been found working in breach of the terms and conditions of your visa"* (para. 61). The decision to curtail the Claimant's leave in the RD.0001 form stated that *"you were observed working at City Inn Express as a receptionist".* However, she was not "observed" working as receptionist. In fact, the Claimant was observed leaving the reception/lounge area. The duty manager Mr Mohammed described her as "the receptionist" and pointed her out to Immigration Officer Gascoigne. The Claimant says that this was not the same as being observed working as a receptionist.

(2) according to the statement of Ms Rhazouani at para.11, Mr Mohammed identified the Claimant as the cleaner, but the case record sheet (p.148) and the statement of Mr Gascoigne states that she was identified by Mr Mohammed as a receptionist;

(3) according to the statement of Ms Rhazouani at para.13, she identified Mr Mohammed as her employer and then stated that she had trained him two months ago and had not worked with him. However, the case record sheet does not contain that identification of Mr Mohammed as her employer, but a denial that she was employed;

(4) according to the statement of Ms Rhazouani at para.13, she identified her friend Husna Jabeen as her employer, but this too was not supported by the contemporaneous material.

73. As regards the alleged contradictions, the Defendant answers as follows:

(1) The Claimant was observed leaving the reception/lounge area. The duty manager Mr Mohammed described her as "the receptionist" and pointed her out to Immigration Officer Gascoigne. She gave a false account of what she was doing at the Hotel (visiting her friend). In the circumstances, there was no material difference between being observed at the Hotel where she was working as a receptionist and being observed working at the Hotel as a receptionist.

(2) It is not apparent how there was a reference to the Claimant working as a cleaner, but Mr Mohammed had stated that she was working as a receptionist, and in whichever capacity she worked, that was work as an employee and not as a trainer.

(3) The form completed by Ms Rhazouani did identify her "friend" Husna Jabeen and Mr Mohammed as her employer. There were inconsistencies in the Claimant's account saying that she was employed and that she was not employed. This was coupled with an untrue account of which room she was visiting and of where she was living, to conceal the fact that she was living in Room 301 at the Hotel.

(b) Discussion

74. In my judgment, on the basis of the evidence that was before the Defendant as of 10 October 2018, the Defendant was entitled reasonably to conclude, as the Defendant did, that the Claimant was being employed by the Hotel and was in breach of her visa requirements. The matters relied upon by the Claimant were immaterial and the points referred to by the Defendant made it reasonable for the Defendant to conclude that the Claimant was in breach of her visa requirements. Further, it was reasonable for the Defendant to curtail the Claimant's right to remain with immediate effect.

75. The following points are to be noted:

(1) the enquiry about whether the Claimant was employed at the Hotel was not complex and was easy to address, yet the Claimant's response about employment was contradictory and vague;

(2) the Claimant was living at the Hotel and the evidence that her personal belongings were found in Room 301 and the account which she gave that this was her friend's room was not plausible. Accordingly, the Defendant was entitled to regard her answers about why she was at the Hotel and which room she was visiting as being untrue and evasive and to believe that she was actually living at the Hotel;

(3) the Claimant was identified by Mr Mohammed as an employee, and she was seen in the reception/lounge area (there is no significant difference between the lounge/reception area and the terms can be used interchangeably);

(4) there was no practical difference between saying that the Claimant had been seen working in the Hotel as a receptionist and that the Claimant was at the Hotel and was identified as working there;

(5) it was immaterial if the Claimant was identified as a cleaner rather than as a receptionist: in fact the contemporaneous evidence was that she was identified as a receptionist, and not that she was acting as a trainer;

(6) whether or not the Claimant admitted that she was employed, the Claimant failed to give a clear, consistent or cogent account of what services she provided to the Hotel.

76. As regards the decision on curtailment and detention, the Defendant identified a risk of absconding or disappearance. There was nothing to challenge this decision. The Claimant had been found to be in breach of the visa requirements, she did not have children or other persons dependent on her, and it was rational for the Defendant to be concerned that she might abscond. This was a logical concern, and the Claimant has been unable to show that this was or might have been unreasonable.

77. The Claimant submitted that the immigration officers were required to follow PACE since the enquiries related to matters which might have criminal consequences. The Claimant also refers to the decision of *Elsakhawy (immigration officers: PACE)* [2018] UKUT 00086. I accept the submission of the Defendant that in that case, the Upper Tribunal (a Presidential Tribunal) affirmed that immigration officers are not required to follow PACE in circumstances where they are making administrative (as opposed to criminal) enquiries. It is of no assistance to the Claimant, since this case does not concern criminal sanctions.

78. The Claimant also relied on the fact that no civil penalty notice was imposed on the Hotel. This did not assist the Claimant. The question whether to issue a civil penalty notice was for a different department of the Home Office. There was also a different test as to what constituted "employment" for the purpose of the Immigration Rules (*"includes paid and unpaid employment, paid and unpaid work placements undertaken as a part of a course or period of study, self employment and engaging in business or any professional activity"*) and the much narrower definition for issuing civil penalty notice under s.25 of the Immigration, Asylum and Nationality Act 2006 (meaning *"employment under a contract of service or apprenticeship…"*)

79. It was also submitted that the Defendant's consideration was unlawful because the Defendant relied on an irrelevant consideration. The Defendant understood wrongly that the Claimant had only been permitted to work for KP Electronics and Office Supplies Ltd, whereas in fact she was permitted to work for "the business(es) you are establishing, joining or taking over". In fact, this misapprehension was not the reason given for the curtailment and nor did it have any material bearing on the decision: the positive reason for the decision was that she was working as a receptionist at the Hotel, and therefore in breach of the conditions of her leave: see the statement of Simon Farid para. 18. The Defendant had regard also to the Claimant's evasiveness and the findings of the officer of the Defendant that her account of her circumstances at the Hotel was not true.

80. The Claimant has also sought to contend that the identification of the Claimant as "Kamal" in the written record casts doubt as to whether this was the Claimant who was generally known as Shahnila: see paras. 73-75 of the skeleton argument of the Claimant. The reference to "Kamal" does not cast any doubt on the identity of the Claimant as the person identified at the Hotel. There was no indication that the person referred to as Kamal was someone other than the Claimant.

81. For all these reasons, the attempts on the part of the Claimant to contend that there was a public law basis for a challenge of the decisions of 10 October 2019 fails.

VIII Other grounds

(a) Issue (3): The materiality of grounds (1) and (2) to the lawfulness of the claimant's detention

82. Grounds (1) or (2) are not satisfied, and accordingly the Claimant's detention was not unlawful at inception and thereafter.

(b) Issue (4): The Hardial Singh principles

83. In the circumstances of this case, this issue in reality depends on Issues 1 and/or 2 being determined in favour of the Claimant. In her skeleton argument at para. 100-101, the Claimant has stated as follows:

> *"[100] The Claimant should not have been liable to detention, because she held leave to remain, and the curtailment of leave was wrong in fact and taken in procedurally unfair circumstances. On an accurate understanding of the facts, there was therefore no prospect of the claimant being removed, see R (Khadir) v. SSHD [2005] UKHL 39, [2006] 1 AC 207 at [32].*
>
> *[101] Moreover, and in any event, the claimant presented no real risk of absconding. She had an address to reside at and had an impeccable immigration history. She clearly had substantial ties to the UK in the light of her length of residence here, and her business."*

84. For all the reasons set out above, the curtailment of leave was not wrong in fact nor was it procedurally unfair. Having found reasonably that the Claimant was in breach of the conditions of her visa, the Defendant was entitled to find that there was a high risk of absconding and that she was unlikely to comply with any terms of immigration bail once aware of the Home Office intention to remove her from the UK.

85. The approach which the Court should take in considering a *Hardial Singh* challenge was summarised by Jay J. in *AXD v Home Office* [2016] EWHC 1133:

> "176 In unlawful detention cases, the court does not conduct a Wednesbury review but assumes the role of primary decision maker: see R(A) v SSHD [2007] EWCA Civ 804, per Toulson LJ at paragraph 90. The court can take into account any facts that were known to the Defendant at the time, even if they did not feature in the reasons for detention that were furnished: see R(MS) v SSHD [2011] EWCA Civ 938**. Hindsight is no part of the exercise: see R (Fardous) v SSHD [2015] EWCA Civ 931. The weight to be given to the Defendant's view is a matter for the court, although certain issues are more within the expertise of the executive than the judiciary, for** example the progress of diplomatic negotiations and the attitude of other countries to accepting returnees. **I would add that in my judgment the Defendant knows more than judges sitting in this jurisdiction about the absconding risk of immigration detainees** [emphasis added]**."**

86. The Defendant's position is that, far from her immigration history being impeccable, she was working in breach of conditions. In any event, on the basis of the material available to the Defendant at the time, it was reasonable for the Defendant to consider that she posed a risk of absconding and, as the Claimant accepts, a *Hardial Singh* claim must be assessed without hindsight. Nor do ties to the UK demonstrate that a person is not an absconding risk: the risk is that they will abscond within the UK. The reality is that if the Claimant's grounds 1 and 2 fail, her *Hardial Singh* challenge must also fail. I agree.

87. When it became apparent that the Claimant would not be deported imminently due to the judicial review process and the stay of removal granted by Lang J, the Defendant released the Claimant from custody, thereby not detaining the Claimant for a period beyond that which was reasonable in all the circumstances.

(c) Other issues

88. The remaining issues about relief and damages do not arise for consideration.

IX Conclusion

89. For all these reasons, the claim for judicial review is dismissed.