

**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**  
**The Hon. Mr Justice Pepperall**  
**29 August 2024**

**B E T W E E N:-**

**THE KING**  
**(on the application of**  
**MOHANRAJ SIVAKUMAR)**

**Applicant**

**- and -**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

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**ORDER**

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**UPON HEARING** Shahadoth Karim, counsel for the Applicant, and Michael Biggs, counsel for the Respondent, at the hearing on 23 May 2024

**AND UPON HAVING CIRCULATED** a draft judgment dated 23 August 2024

**AND UPON HANDING DOWN** judgment on 29 August 2024

**AND UPON CONSIDERING** the application for permission to appeal

**AND UPON** the parties having agreed the costs order

**AND UPON CERTIFYING** that any appeal from this order lies to the Court of Appeal

**IT IS ORDERED THAT:-**

1. The application for judicial review is dismissed.
2. The Applicant shall pay the Respondent's costs in the agreed sum of £6,865.50.
3. Permission to appeal is refused.

**REASONS FOR REFUSING**

## **PERMISSION TO APPEAL**

- (1)Ground 1: The judge properly identified the fact this was a certification case and the applicable test upon challenging certification. See paras 16-22.
- (2)Ground 2: This ground fails to distinguish between the applicant having established some private life and a private life that was even arguably sufficient to engage Article 8.
- (3)Ground 3: The judge had considered that this was clear from the draft judgment but, in view of this proposed ground of appeal, has expressly clarified his finding that the human rights claim was so hopeless that it was bound to fail. See para. 22.
- (4)Grounds 4 & 5: This was not a challenge to the 20 April decision but to the refusal and certification of the human rights claim. These grounds get nowhere in view of the judge's conclusions on that claim.



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**  
**Judicial Review**

Case No: JR-2023-LON-002711

29 August 2024

**Before**

**THE HON. MR JUSTICE PEPPERALL**

**Between**

**THE KING**  
**on the application of**  
**MOHANRAJ SIVAKUMAR**  
**(No anonymity order made)**

Applicant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Applicant: Shahadoth Karim, counsel instructed by Liberty Legal Solicitors  
For the Respondent: Michael Biggs, counsel instructed by the Treasury Solicitor

**Heard at Field House on 23 May 2024**

**DECISION AND REASONS**

1. By this application for judicial review, Mohanraj Sivakumar challenges the decision of the Secretary of State for the Home Department made on 5 October 2023 refusing his human rights claim and certifying such claim as clearly unfounded pursuant to s.94 of the Nationality, Immigration and Asylum Act 2002.

**BACKGROUND**

2. Mr Sivakumar is an Indian national. He entered the United Kingdom with leave as a student on 25 September 2022 and enrolled at Coventry University. It was a condition of his limited leave to remain that he should not work more than 20 hours per week during term time. On 20 April 2023, Mr Sivakumar was detained for alleged breach of such condition and his leave to remain was cancelled with immediate effect. Mr Sivakumar was given notice in accordance with s.120 of the

2002 Act that he should tell the Secretary of State of any reasons why he should be allowed to stay in the United Kingdom.

3. By a letter dated 25 April 2023, Mr Sivakumar's solicitors asserted that he had been unlawfully detained and made a human rights claim resisting his removal. On 6 May 2023, Mr Sivakumar was released on immigration bail.

4. The solicitor's letter asserted a private life in the United Kingdom:

"The applicant informs us that he has spent some time in the UK and continues to remain here since his initial entry. The applicant has made extremely good progress with his education whilst in the UK he nonetheless claims to suffer from tension due to his current detention. He came in the UK with the intention to complete his studies and progress academically. He states that he cannot ever imagine returning to India before completing his studies. He has had to lose all social, cultural and familial ties with India if he were to return without completing his studies. He therefore pleads for compassion to be exercised in his favour.

He further states that his standard of English is at a level where is able to communicate effectively and he has accustomed himself to the British way of life having blended in with the British culture and way of life ...

In respect to the applicant's circumstances in the UK he states that he continues to remain in the UK and is being financially and emotionally supported by friends. We are informed that his family and friends are able to and intend to financially support and accommodate the applicant and he feels safe and secure here in the UK in this knowledge. They consider the applicant as their immediate family and pillar of strength and their ties go beyond that of normal emotional ties as they are all wholly dependent on them for support."

5. The Secretary of State observed that Mr Sivakumar did not assert any family life in the United Kingdom and that he did not qualify for permission to remain in the United Kingdom under Appendix Private Life under the Immigration Rules. She then considered the claim under Article 8 and concluded that there were no exceptional circumstances that would support a claim for leave outside the rules on the basis of Mr Sivakumar's private life. She noted that while it may be Mr Sivakumar's preference to continue his private life in the United Kingdom, he had failed to establish that his removal would breach Article 8. Accordingly, she concluded that his removal was proportionate to the legitimate aim of protecting the economic wellbeing of the United Kingdom and maintaining effective immigration control. She then referenced the reasons for cancellation of Mr Sivakumar's visa and concluded that there were no exceptional or compassionate circumstances in this case and that the Immigration Officer had been entitled to cancel his leave.

6. The Secretary of State concluded that the human rights claim was clearly unfounded since it was bound to fail. She observed:

"You have provided no evidence that a grant of leave in your case would be appropriate. You do not meet the Immigration Rules and do not qualify for leave outside the rules as there are no compelling or compassionate

circumstances in your case. You have provided no reasons why you cannot reintegrate into your home country or that there are compelling factors why you can only continue your private life in the UK. We do not accept that you have lost all ties to your country in the short period of time you have resided in the UK.

While you may prefer to continue your private life in the UK a wish or preference is not a reason to be granted leave. You have provided no evidence to demonstrate that you have established a private life in the UK which cannot be continued upon return to India. You have provided no evidence that your removal from the UK would result in unjustifiably harsh consequences. It is accepted that you will have established a private life in the UK, however, there is no reason to suggest that you could not continue your private life on your return to India.

It is considered that the private life you have established was within the full knowledge of the restrictions of your visa in which you breached. Once you were encountered and found to be in breach of your employment restrictions, you were subsequently treated as a person liable to removal from the UK. As your leave was cancelled you should not have expected to be allowed to remain in the UK.

For these reasons it is considered that your claim cannot succeed on any legitimate view and any immigration judge, properly directing him or herself and applying the law to the facts and the same evidence, would inevitably conclude the same.”

7. On 5 October 2023, the Secretary of State refused and certified the human rights claim. Mr Sivakumar now challenges that decision on two grounds:
  - 7.1 First, he argues that the decision to certify his application was unlawful and irrational.
  - 7.2 Secondly, he asserts that the Secretary of State acted in a procedurally unfair manner.

#### **GROUND 1: THE ARGUMENT**

8. Shahadoth Karim, who appears for Mr Sivakumar, argues that it is well established that a human rights claim can be used to determine a historical injustice. Mr Karim submits that the Secretary of State’s decision that Mr Sivakumar had been working in breach of the terms of his visa was mistaken and that he has accordingly been the victim of historical injustice. He submits that the First-tier Tribunal would inevitably consider how and why Mr Sivakumar finds himself in the position that he does and that, if the tribunal made favourable findings in respect of the working-hours issue, that would weigh heavily in its Article 8 balancing exercise. He asserts that the public interest in removal and the maintenance of effective immigration control would be likely to be diminished if the cancellation decision was premised on incorrect facts.
9. Further, he argues that the human rights claim was not clearly unfounded if there was any reasonable doubt as to whether it should succeed. He stresses the low burden on an applicant seeking to challenge certification and that the Secretary of State was required to take Mr Sivakumar’s claim at its highest.

10. Mr Karim argues that it is clear from the decision letter that the Secretary of State accepted that Mr Sivakumar has a private life that engages Article 8 but concluded that his removal would be proportionate. He asserts that the tribunal is likely to conclude that Article 8 is engaged and consider the link between his private life and the working-hours allegation.
11. As to the working-hours issue:
  - 11.1 Mr Karim argues that the Secretary of State mistakenly relies on the Perfect Chicken payslips whereas those payslips related to Mr Sivakumar's surety.
  - 11.2 As to UberEats, he argues that the evidence does not identify the account holder and is in any event unconvincing. Furthermore, he submits that the Secretary of State wrongly aggregated the UberEats earnings across two weeks and failed to take into account that it was not term-time when Mr Sivakumar was stopped.
12. Michael Biggs, who appears for the Secretary of State, argues that there can be no doubt that Article 8 is not engaged in this case and that the human rights claim was bound to fail. Mr Sivakumar arrived in the United Kingdom on 25 September 2022 and his leave was cancelled less than seven months later on 20 April 2023. The Secretary of State submits that Mr Sivakumar provided no, or no real and substantial, evidence that he had built up a private life in that period capable of giving rise to an Article 8 claim. Further, he argues that enrolment on a course of study cannot of itself constitute a private life protected by the convention.
13. Mr Biggs acknowledges that the decision letter stated that Mr Sivakumar would have established a private life in the United Kingdom but asserts that this was a clear error that made no difference to the outcome and is immaterial.
14. Mr Biggs argues that the historical-injustice argument is bound in any event to fail on the evidence:
  - 14.1 First, he asserts that Mr Sivakumar provided no, or no real or substantial, evidence in support of his 25 April representations.
  - 14.2 The witness statements and exhibits postdate the decision and are irrelevant.
  - 14.3 The apparent error in the Secretary of State's detailed grounds of defence in referring to the Perfect Chicken payslips is irrelevant since she did not rely on those payslips when making the decision on 5 October 2023.
  - 14.4 Further, Mr Biggs relies on the admitted employment with the care home.
15. In any event, Mr Biggs argues that the decision-maker carefully considered the representations made on 25 April and the limited supporting evidence and properly concluded that the human rights claim was bound to fail. No historical injustice argument was then made.

**GROUND 1: ANALYSIS**THE HUMAN RIGHTS CLAIM

16. When considering whether to certify a claim as clearly unfounded pursuant to s.94, the Secretary of State must take the claim at its highest. Where the applicant puts forward material which is capable of being objectively well founded and sufficient to establish a claim, the Secretary of State should not certify the claim as clearly unfounded. Put another way, a claim should not be certified where any reasonable doubt exists as to whether the claim may succeed. [See R (FR)(Albania) v. Secretary of State for the Home Department [2016] EWCA Civ 605, [2016] Imm AR 1341; SP (Albania) v. Secretary of State for the Home Department [2019] EWCA Civ 951, [2019] Imm AR 1288; and ZI (Kosovo) v. Secretary of State for the Home Department [2009] UKHL 6, [2009] 1 W.L.R. 348.]
17. In R v. Secretary of State for the Home Department, ex parte Razgar [2004] UKHL 27, Lord Bingham said, at [9], that private life is a broad term and that the European Court of Human Rights had “wisely eschewed any attempt to define it comprehensively”. In the context of an asylum seeker whose private life claim had been certified as manifestly unfounded, Lord Bingham observed, at [17]:
- “In considering whether a challenge to the Secretary of State’s decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on Article 8, these questions are likely to be:
- (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant’s right to respect for his private or (as the case may be) family life?
  - (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
  - (3) If so, is such interference in accordance with the law?
  - (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
  - (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?”
18. In R (Ahsan) v. Secretary of State for the Home Department [2017] EWCA Civ 2009, [2018] INLR 207, Underhill LJ addressed the issue of when a foreign student studying in the United Kingdom might establish a private life protected by Article

8. He considered the earlier caselaw and, in particular, Patel v. Secretary of State for the Home Department [2013] UKSC 72, [2014] A.C. 651, MM v. Secretary of State for the Home Department [2009] UKUT 305 (IAC) and CDS (Brazil) v. Secretary of State for the Home Department [2010] UKUT 305 (IAC). He then said, at [86]:

“What those observations authoritatively confirm is that the right to complete a course of education is not as such a right protected by Article 8. However, neither the AIT in MM nor the UT in CDS (Brazil) said that it was, and Lord Carnwath was not addressing either decision (to which indeed the Supreme Court had not been referred, since they were not material to the issues before it). Rather, what those decisions say is that persons admitted to this country to pursue a course of study are likely, over time, to develop a private life of sufficient depth to engage Article 8. So far as that relates to ordinary social relationships, that is obviously correct. It is true that the UT in CDS (Brazil) goes rather further, in that it enumerates as possible components in a student’s private life not only ordinary social relationships but also a ‘connection with the course, the institution, an educational sequence for the ultimate professional qualification sought’. That is perhaps a little ambiguous, but I do not think it should be read as meaning that the mere fact that the student is part-way through a course leading to a professional qualification by itself engages Article 8. In my view it means only that a student’s involvement with their course and their college can itself be an important aspect of their private life; and, so read, I regard it as unexceptionable. Whether those and other factors are sufficient to engage Article 8 in any particular case will depend on the particular facts, and I would not venture on any generalisations beyond making the trite point that the longer a student has been here the more likely he or she is to have generated relationships of the necessary quality and depth.”

19. Thus, the interest of a foreign student in completing a course of study in the United Kingdom is not of itself a right protected by Article 8. Rather the question of whether the student has established a private or family life that engages Article 8 is a fact-sensitive question that must be established upon the evidence in any individual case.
20. In this case, Mr Sivakumar has spent just under seven months in the United Kingdom when his leave to remain was cancelled. There was no family life claim. The only evidence of private life placed before the Secretary of State was the letter of 25 April. As to that:
- 20.1 The assertion that he had spent “some time” in the United Kingdom added nothing.
- 20.2 The claims to have made good progress over 1½ semesters; to have come to this country with the intention of completing his studies; and of not being able to imagine returning to India before completing his studies plainly could not of themselves support an Article 8 claim.
- 20.3 The claim that after such a short period of study in the United Kingdom he had lost all social, cultural and familial ties with India is somewhat incredible, but is in any event an assertion that is not supported by any evidence.



Further, it does not of itself evidence that he had established a private life in the United Kingdom that engaged Article 8.

20.4 The claims to speak good English and to having – over a period of just seven months – become accustomed to and having blended with the British way of life and culture and way of life do not establish a private life.

20.5 The unevicenced assertion of financial and emotional support from friends over a short period of time could not establish a private life sufficient to engage Article 8.

21. Accordingly, in my judgment the Secretary of State was right both to conclude that Mr Sivakumar had failed to provide evidence of a private life that engaged Article 8 and that the human rights claim was clearly unfounded.
22. Such conclusion is not affected by the apparent acceptance in the decision letter that Mr Sivakumar “will have established a private life in the UK”. At some level, everyone has and is entitled to a private life; the question was whether there was evidence to establish that Mr Sivakumar’s Article 8 rights were engaged. For the reasons already explained, that claim was, in my judgment, so hopeless that it was bound to fail.

#### THE HISTORICAL INJUSTICE ARGUMENT

23. It is important to understand that this is not a challenge to the 20 April decision to cancel Mr Sivakumar’s leave but to the 5 October decision to refuse and certify his human rights claim. Accordingly, there is no direct challenge to cancellation but only an indirect challenge that is dependent upon his having a human rights claim in the first place.
24. In Ahsan, the appellant sought to resolve his claim that he had been the victim of historical injustice in being removed from the United Kingdom upon the Secretary of State’s allegedly mistaken conclusion that he had been guilty of deception in taking his English language test. Underhill LJ observed, at [113]:

“Mr Biggs in particular submitted that persons against whom a finding of deception was made by the Secretary of State were entitled as a matter of justice to a judicial decision about whether that finding was justified, both because of its effect on their reputations and because of its specific consequences for future applications for leave to enter ... A human rights appeal would not necessarily achieve that outcome. It is true that if (a) the tribunal accepted that the appellant’s human rights were engaged by their proposed removal and (b) the only justification advanced for the removal were that they had used deception, then that issue would have to be determined. But one or other of those conditions might be absent. As to (a), not every person against whom a decision based on deception is made may have established a significant private or family life in this country. As to (b), the proposed removal might be justified on other grounds ...”
25. Similarly here, since Mr Sivakumar has failed to establish an arguable human rights claim, there is no vehicle to which his historical injustice argument could

attach and it is not strictly necessary to consider Mr Sivakumar's arguments that the Secretary of State's earlier cancellation decision was mistaken. Nevertheless, and lest I am wrong on the Article 8 point, I consider the historical injustice argument.

26. An immigration officer reported that, on 20 April 2023, Mr Sivakumar was seen in Croydon riding away on a bicycle with an UberEats bag. He was then seen acting suspiciously in that he peeked his head around a building to observe officers. Mr Sivakumar was arrested and examination of his mobile telephone contained evidence of someone having worked for UberEats in the Croydon area on 16 April and then about 25 hours in the week that ended 23 April 2023. Specifically:
- 26.1 On 16 April, £74.90 was earned from delivering 19 orders between 11:03 and 22:01.
- 26.2 On 17 April, £69.82 was earned from delivering 18 orders between 13:22 and 23:20.
- 26.3 On 18 April, £36.78 was earned from delivering 9 orders between 19:09 and 23:04.
- 26.4 On 19 April, £66.35 was earned from delivering 18 orders between 12:24 and 22:52.
- 26.5 On 20 April, £13.47 was earned from delivering 4 orders between 12:02 and 12:55.
27. Further examination revealed evidence of timesheets showing Mr Sivakumar's work in a care home on three separate days in March 2023. The timesheets record that on each of Monday 20, Tuesday 21 and Wednesday 29 March he worked an 11-hour shift between 08:00 and 20:00 with, presumably, a break of one hour.
28. Mr Sivakumar was then interviewed. The notes record the following questions and answers:

<b>Officer's questions</b>	<b>Mr Sivakumar's answers</b>
How long have you been working as a Deliveroo rider?	Only 3 days.
The Deliveroo rider account on your phone indicates that you have been working for weeks. Earlier you stated that you have been working for a week.	It's not me using it, somebody else. Only this week.
You also have timesheets on your phone showing that you worked for Excellent Care for 24 hours in two days?	I work two days per week at a care home.
When did you last work at the care	Last week I didn't get any shifts.

home?	
Why do the timesheets show that you worked 24 hours in two days at the care home?	It shows 24 hours but I get one hour break.
That would still mean that you worked over 20 hours in those two days?	11 hours per day, 22 hours per week.
Do you understand that your visa only permits you to work for 20 hours per week?	I explained to the care home that I could only 20 hours per week but they told me that they could only give me 22 hours per week.
Which care home do you work at?	It's for an agency, Excellent Care. I don't work at one place. Different homes.

Are you using a Deliveroo rider account in your name or someone else's?	This is someone else's account. Only the last few days I am using that. Now I have an internship - a six-month break from college. That is why I started the second job.
Is Coventry University aware that you have started an internship?	After two semesters, I am on a six-month break from my studies.
Do you have evidence of this break from your studies?	It's on my mobile phone.
When did your internship start?	It doesn't start until 5 <sup>th</sup> May but I started early.
When did your six-month break from your studies start?	It starts 5 <sup>th</sup> May 2023.
The internship email that you have presented states that you have not secured an internship and that it would not begin until 5 <sup>th</sup> June 2023.	I have confirmed it 100%. I have sent the documents but I haven't had confirmation from the college.
Any internship would not begin until June 2023. You are not currently permitted to work in excess of 20 hours per week?	I started a few days early because I can dodge the system and not get caught.

29. By the letter dated 25 April 2023, Mr Sivakumar's solicitor made representations as to his position. In respect of the allegation that his client had worked in excess of 20 hours per week in breach of the conditions imposed upon his leave to remain, he asserted:

"The Home Office alleged that the applicant was working for UberEats. In fact, he was working for Mr Abbas Ali. The Home Office also alleged he was working for more than 20 hours a week. The applicant is however aware he does not have the right to self-employment and doing so would be a breach of immigration rules. Neither is he able to open an account with Deliveroo or UberEats with his most recent leave to remain as his current leave does not permit him to do so."

30. Later in the letter, the solicitor asserted:

"Furthermore, the allegation of the Home Office is not true as he was an employee working with Deliveroo."

31. The solicitor lodged a further document in support of an application for bail. That document asserted, at paragraph 4:

- “(b) The applicant is aware of his visa condition, and he was abiding by those conditions by working 20 hours a week.
- (c) He was not working as self-employed but rather working for Abbas Ali, the owner of the Deliveroo account.”

32. The solicitor also provided payslips showing that Loganadhan Sivakumar worked 20 hours for Perfect Fried Chicken in the weeks that ended 9, 16, 23 and 30 April 2023.

Deliveroo/UberEats

33. There appears to be some confusion between Deliveroo and UberEats in the questions asked by the officer, the solicitor’s letter and the bail representations. Nothing appears to turn on that and the evidence was of someone working for UberEats. Save for denying that he had his own account with either Deliveroo or UberEats, Mr Sivakumar did not deny delivering food orders. Taking the letter together with the bail representations, Mr Sivakumar was asserting that he was working for Abbas Ali who himself had an account with Deliveroo/UberEats. He provided, however, no evidence whatever of the hours worked for Mr Ali.

34. There was therefore evidence of someone having worked for UberEats for 25 hours in the week ended 23 April 2023. On Mr Sivakumar’s claim that this was not his account and that he had only worked for the last three days, his admitted hours for UberEats would reduce to a little over 15 hours.

35. While in interview Mr Sivakumar talked about a looming internship and of being on a break from his studies, there is now evidence before me that the university’s second semester ended on 14 April 2023 and the summer term was not due to start until 15 May 2023. Accordingly, it was not actually term-time when Mr Sivakumar was stopped on 20 April such that he was not in fact in breach of the terms of his visa even if he had worked in excess of 20 hours for UberEats that week.

36. That simple point was not, however, made to the Secretary of State and the term dates have only been put in evidence in these judicial review proceedings. Nevertheless, given that the relevant restriction was on term-time working; Easter fell on 9 April in 2023; and I take judicial notice of the fact that English universities tend to observe three terms across two semesters with the second semester interrupted by an Easter break, I consider that the Secretary of State’s duty of reasonable inquiry should have led to the conclusion that the week ended 23 April 2023 was not subject to the 20-hour limit.

Perfect Fried Chicken

37. The position with Perfect Fried Chicken is curious:

37.1 It is now said that the payslips did not relate to the applicant at all but to another man who shared his surname; his proposed surety, Loganadhan Sivakumar. It is true that the payslips are in that name and that they can be reconciled with the identity documents provided for Loganadhan Sivakumar.

I also note that they show a different national insurance number from the payslips issued to the applicant by Excellent Care.

37.2 No explanation was, however, given in respect of the payslips in either the solicitor's 25 April letter or in the bail representations.

37.3 The Secretary of State did not refer to the Perfect Fried Chicken payslips in the decision of 5 October.

37.4 While Mr Sivakumar now criticises the Secretary of State's reliance on the payslips in the Detailed Grounds of Defence, it appears that the confusion was of his own making.

(a) At paragraph 7 of his grounds, he asserted:

"The applicant denied [working for UberEats for 35 hours in a week] and therefore made a human rights claim on 25.04.2023 addressing this issue and providing payslips to prove that he was working for a different employer for 20 hours and did not have an UberEats account."

(b) The only payslips showing someone working for 20 hours per week were those provided by Perfect Chicken.

38. Despite the confusion, it is now agreed that the Perfect Chicken payslips are irrelevant to the issues in this case. In any event, I observe that the weeks ended 23 and 30 April fell entirely within the university's Easter holiday.

#### Excellent Care

39. On their face, the timesheets provided to the Secretary of State evidenced that Mr Sivakumar had worked for 22 hours for Excellent Care in the week ended 26 March 2023. That is supported by his clear answers in interview in which he not only admitted having worked 22 hours per week but that he had raised the 20-hour cap with the care home and been told that they could only offer 22 hours per week.

40. In his evidence in these proceedings, Mr Sivakumar says:

"I was engaged by Excellent Care, a care service, which allegedly provided me with 22 hours for the week beginning 20 March 2023, but I was not working more than 20 hours a week between any period. There was an error in the timesheet. This is why I took pictures so that I can ask the employer to resolve it ... It simply does not make sense to work just two hours extra and risk my immigration status. I have asked my employer to address this issue and they have now provided me with an actual time sheet of this period. Although the timesheet shows that my work schedule was for 22 hours, I have actually worked for 20 hours for the said week."

41. Mr Sivakumar has now provided an amended timesheet and payslips purporting to show that he only worked 9 hours on 20 March such that this total working hours for Essential Care in the week ended 26 March did not exceed 20 hours.

Conclusion

42. While:
- 42.1 upon reasonable inquiry, the Secretary of State should have identified that the UberEats evidence was of work done delivering food orders during Mr Sivakumar's Easter break; and
- 42.2 the Perfect Fried Chicken payslips are not relevant, the unchallenged evidence before the Secretary of State was that Mr Sivakumar had worked in breach of the terms of his visa by working 22 hours per week for Excellent Care.
43. Mr Sivakumar's evidence in these proceedings that he was not in fact working for more than 20 hours per week for Excellent Care and that the original payslips were mistaken was not before the Secretary of State. It is, in any event, incredible:
- 43.1 The answers in interview about this employment were very clear and consistent with the original timesheets. In particular, Mr Sivakumar's response that he had raised the 20-hour cap with the care home but been told that they could only offer 22 hours per week was compelling.
- 43.2 The amended timesheet is curious in that it does not alter the working hours or payment due for 20 March 2023 but simply asserts that a shift worked from 08:00 to 20:00 with a one-hour break equates to nine rather than eleven hours' work.
44. I am not therefore satisfied that Mr Sivakumar has established that he has been the victim of historical injustice in the Secretary of State's conclusion on the evidence then available to her that he had been working in breach of the terms of his visa.
45. Accordingly, I would in any event have dismissed the historical injustice argument.

**GROUND 2: THE ARGUMENT**

46. Mr Karim argues that the Secretary of State's failure to give notice that she was minded to refuse Mr Sivakumar's claim; her failure to disclose evidence to substantiate the allegation that he had been working for 35 hours during term time; and her failure to ask for clarification amounted to procedural unfairness.
47. Mr Biggs responds that Mr Sivakumar was fairly interviewed and the decision-maker made reasonable enquiries before cancelling his leave on 20 April. There was, he argues, nothing complex about the allegation and Mr Sivakumar did not need disclosure fairly to advance his own position. In any event, the evidence largely emanated from his own mobile phone.

48. Further, Mr Biggs observes again that this is not a challenge to the April decision and that the 5 October decision was taken on the basis of Mr Sivakumar's representations. Further, Mr Biggs submits that Mr Sivakumar had an in-country right of appeal from the October decision in so far as the claim was not bound to fail and certified pursuant to s.94. Such potential right of appeal, he argues provided an adequate procedural safeguard.

## **GROUND 2: ANALYSIS**

49. The context for this ground is not promising. Having determined that it is not arguable that the Secretary of State was wrong to refuse and certify the human rights claim, and that Mr Sivakumar has not established any case of historical injustice in the 20 April decision, I do not accept that the refusal and certification of the human rights claim, which was not then advanced on the basis of any alleged historical injustice, is affected by the criticism of the procedure by which the Secretary of State concluded that Mr Sivakumar had been working for more than 20 hours in term time.
50. Mr Sivakumar was interviewed and given an adequate opportunity to put forward his case. There was nothing complex about the allegation and there was no need to give Mr Sivakumar disclosure, which in any event would have been of evidence from his mobile phone and from his own clear answers in interview. In interview, he clearly admitted, as supported by the timesheets then made available to the Secretary of State, to having worked in excess of 20 hours per week. See also R (Kanwal) v. Secretary of State for the Home Department [2022] EWHC 110 (Admin), at [61]-[68], in which Freedman J reached a similar conclusion in a case where there was in fact a direct challenge to the cancellation decision.

## **DECISION**

51. Accordingly, I dismiss this claim for judicial review.