



Neutral Citation Number: [2024] EWHC 3313 (Admin)

Case No: AC-2023-LON-002210

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 December 2024

Before :

Simon Tinkler
(sitting as a Deputy Judge of the High Court)

Between :

THE KING
on the application of
SAGAR

Claimant

- and -

SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Defendant

Zainul Jafferji and Arif Rehman (instructed by My Legal) for the Claimant
Paul Erdunast (instructed by the Government Legal Department) for the Defendant

Hearing date: 12 November 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 19 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Simon Tinkler sitting as a Deputy Judge of the High Court:

Parties

1. This is an application for judicial review of decisions communicated by the Defendant (“**SSHD**”) to the Claimant (“**Mr Sagar**”) on 10 July 2023 (the “**Decisions**”). The Decisions
 - i) rejected Mr Sagar’s claim that he was entitled to remain in the UK;
 - ii) certified that Mr Sagar’s claim was “*clearly unfounded*”;
 - iii) issued Mr Sagar with a notice of intended removal; and
 - iv) authorised the detention of Mr Sagar pending removal.

Introduction

2. The grounds on which Mr Sagar challenged the Decisions have evolved somewhat over time.
3. Mr Sagar first set out his grounds as to why he should not be removed from the UK in June 2022. Those were rejected by SSHD in July 2023 and certified as being “*clearly unfounded*”.
4. Mr Sagar applied for judicial review of that rejection and his intended removal. His initial Statement of Facts and Grounds set out grounds of challenge that differed slightly from the grounds in his s120 Response. Permission to bring a claim for judicial review was refused on the papers.
5. Mr Sagar then renewed his application for permission to bring a claim for judicial review. He raised additional arguments at the hearing of that application. Permission to bring the claim was granted at the renewal hearing having heard the additional arguments. The SFG was amended to reflect those arguments (the “**Amended SFG**”).
6. The skeleton argument served ahead of the full hearing of the claim focussed on one principal argument from the Amended SFG. The hearing itself also focussed on that principal submission.
7. The submission was that service of the notice of intended removal in July 2023 triggered an obligation on SSHD at that time to consider all claims Mr Sagar had made to remain in the UK. Those included Mr Sagar’s claim to be granted leave to remain under Appendix EU of the Immigration Rules (“**Appendix EU**”) even though Mr Sagar had not completed a proper application under that Appendix. SSHD had not considered whether Mr Sagar had rights under that Appendix. Mr Sagar said that SSHD could not therefore lawfully have determined that Mr Sagar had no rights under Appendix EU. Consequently, the Decisions were necessarily and fundamentally flawed.
8. The court is required under s31 (2A) Senior Courts Act 1981 to refuse applications for judicial review if “*the outcome is highly likely to have been not substantially different if the failure complained of had not occurred*”.

9. SSHD submitted that in this case the failure complained of was the failure by SSHD in July 2023 to consider Mr Sagar's rights under Appendix EU. If SSHD had in July 2023 considered Mr Sagar's claimed rights under Appendix EU then SSHD would have determined that Mr Sagar did not have any such rights. Accordingly, the court was required to refuse this application because the outcome for Mr Sagar would have been not substantially different.
10. There were a number of more detailed points which were raised and disputed. These are set out below. I have not included details of submissions which were not disputed, nor pursued or which were not relevant to the issues to be decided in this case.

Evidence and factual background

11. There was no witness statement from Mr Sagar. There was also no witness statement from the SSHD. This application was therefore decided on the basis of documentary evidence alone.
12. Mr Sagar is an adult national of India, born in August 1994. On 18 August 2021 he entered the UK with entry clearance to stay for six months as a visitor. Mr Sagar says that throughout his time in the UK he has resided with his brother, his brother's wife and his parents. His leave to stay in the UK expired on 18 February 2022. He did not leave the UK. It is accepted by both parties that he became an overstayer at that point and has been so ever since.
13. On 28 May 2022 Mr Sagar was detained by the Defendant during an enforcement visit. He was served with a "*one stop*" notice pursuant to section 120 of the Nationality, Immigration and Asylum Act 2002 (the "**s120 Notice**"). The s120 Notice required him to provide reasons why he should not be removed from the UK. The s120 Notice was accompanied by RED.0001 and RED.0003 notices setting out an intention to remove him from the UK. On 4 June 2022 Mr. Sagar was granted bail by the First-tier Tribunal (IAC).
14. On 10 June 2022 Mr Sagar's solicitors responded on his behalf to the s120 Notice (the "**s120 Response**"). The s120 Response contained statements that did not seem tailored to Mr Sagar. It stated, for example, that Mr Sagar had entered the UK as a student on 14 January 2020. This was wrong as Mr Sagar actually entered the UK on 18 August 2021 on a visitor visa. It also said that Mr Sagar was arrested and detained on 19 January 2022 (whilst he still had leave to be in the UK as a visitor). That was also wrong; he was detained 28 May 2022 after his leave to remain had expired.
15. The s120 Response set out several bases on which Mr Sagar said he should not be removed. The bases were:
 - i) Mr Sagar should be granted "*leave to remain pursuant to Appendix EU as an extended dependant family member / member of the household member in the UK of his brother*".
 - ii) Mr Sagar should be "*granted pre-settlement status pursuant to Appendix EU or outside rules but pursuant to the UK's obligations under the [Withdrawal Agreement]*"

- iii) Under Article 8 of the ECHR as brought into English law by s6 Human Rights Act 1998 as it would be “*unjust and duly harsh for Mr Sagar to leave the UK and relocate to India..[as] Mr Sagar has now been residing in the UK for a considerable period of time continuously with his settled family...and that he does not wish to return to India where he fears he has no one to turn to*”; it was said this would be a “*direct, disproportionate and unjust interference with the continuation of private life in the [UK]*”.
- iv) He should in any event be granted leave to remain outside the rules.

The s120 Response asserted that Mr Sagar would be entitled to appeal if his claim to “*pre-settlement status under the Appendix EU*” or “*human rights claim*” were refused. It went on to set out the legal provisions that were said to apply if he were to make either of those appeals. Again, not all of these seemed tailored to Mr Sagar. They included references to the FTT needing to take into account the interests of a qualifying child (which Mr Sagar was not, and of which he had none) and that he need not show that he was at imminent risk of dying to have a claim against removal on medical grounds (which he had not claimed).

- 16. Finally, the s120 Response summarised the core arguments he would make on any such appeal:
 - i) “*He...was entitled to grant of EU settlement status*”
 - ii) “*He...would be in a debilitating state of affairs if he returned to India. Mr Sagar knows only his life here in the UK*”
 - iii) “*Mr Sagar has resided in the UK for a considerable period. ...he has not returned to India and has no connections there....public interest lies in granting [him] leave to remain for [he is] no burden on the state*”
 - iv) “*...it would be disproportionate to dismiss the appellant’s eventual appeal*”
- 17. Some 11 months later, on 23 May 2023, SSHD issued a letter in response to the s120 Response (the “**May 2023 Letter**”). The letter refused his application as a Family Member (Private Life) and refused his human rights claim. The decision letter certified that claim as clearly unfounded under s94 Nationality, Immigration and Asylum Act 2002 with the consequence that there was no right of appeal against the decision. The letter advised Mr Sagar that if he wished to apply under Appendix EU then he should make an application in line with the correct procedure.
- 18. The May 2023 Letter was served on Mr Sagar on 10 July 2023 when he reported in compliance with his immigration bail conditions. He was served on the same day with a RED0001 Notice that notified him of his liability to be removed from the UK. It stated that the Defendant considered that there was no barrier to his removal. The Defendant detained him with a view to his removal. He was subsequently released on immigration bail.
- 19. His solicitors served notice of intention to bring JR proceedings on 13 July 2023. Those proceedings were issued on 18 July 2023.

20. As at the date of the hearing Mr Sagar has still not made an application under Appendix EU using the required procedure.

The challenges to the Decisions

21. The Amended SFG sets out five decisions that Mr Sagar wishes to challenge. These are:
- i) The rejection in the May 2023 Letter of Mr Sagar's human rights claim in his s120 Response (the "**Human Rights Claim Decision**").
 - ii) The decision in the May 2023 Letter to certify under s94 of the NIAA 2002 that the human rights claim was clearly unfounded (the "**Certification Decision**").
 - iii) The failure to consider Mr. Sagar's representations seeking grant of leave to remain in the UK pursuant to Appendix EU of the Immigration Rules (the "**Appendix EU Decision**");
 - iv) The associated decision RED.0001 made on 10 July 2023 making Mr Sagar liable to removal from the UK (the "**Removal Decision**"); and
 - v) The decision on 10 July 2023 to detain him pending removal (the "**Detention Decision**").

The Amended SFG did not clearly set out the point at which the Appendix EU Decision triggered Mr Sagar's right of challenge. I am prepared to accept that it challenged the failure to consider Mr Sagar's rights under Appendix EU in the May 2023 Letter and also on 10 July 2023.

22. The Amended SFG set out two grounds of challenge to those decisions. The wording of Ground 1 and associated paragraph 9 is taken verbatim from the s120 Response including typographical errors.
23. The first ground was:

“Ground 1: Refusal to Consider Mr. Sagar’s representations amounting ground/ reasons seeking grant leave under Section 120 of the NIAA 2002 (as amended)

This ground was broken down into five sub-grounds in paragraph 9 of the Amended SFG:

“9. This follows that the Defendant’s decision not to consider OR her failure to consider [Mr. Sagar’s] grounds / reasons resisting his removal under Appendix EU of the Immigration Rules is irrational on the following:

a) The decision or failure is in contravention of the United Kingdom’s obligations under the Withdrawal Agreement (see above at paragraph 5)

b) The decision or failure is contrary to the Defendant’s policy (see above at paragraph 6).

c) The decision or failure is in contravention of the authority [of Hydar¹] (see above at paragraph 7).

d) The assessment of [Mr. Sagar's] Article 8 ECHR claim was inherently flawed by failure to consider whether [Mr. Sagar] had any entitlement under the EUSS as the Defendant cannot have properly considered whether the interference with Article 8 ECHR rights was in accordance with the law (any interference in the form of removal in circumstances where [Mr. Sagar] had an entitlement to the grant of leave under the EUSS would be unlawful), and whether it was proportionate (for the same reason- the assessment cannot be complete without consideration of any asserted entitlements under the EUSS).

e) The Defendant could not lawfully remove [Mr. Sagar] until his claim under the EUSS had been considered and determined.”

24. Paragraphs 10 and 11 of the Amended SFG went on to add further detail in relation to paragraph (e) above. It asserted that even if SSHD was entitled to refuse the Appendix EU application, SSHD was not entitled to take action to remove Mr Sagar without considering all matters he had raised.
25. Paragraph 12 asserted that it followed that the Human Rights Decision and the Certification Decision were “*irrational and, therefore, unsafe*”.
26. Paragraph 13 said that the Removal Decision was “*also premature and irrational*”.
27. The second ground was that Mr Sagar had been unlawfully detained, by virtue of the principles in *R v Governor of Durham Prison, Ex parte Hardial Singh* [1984] 1 WLR 704 or alternatively, under the principles provided in *Lumba (WL) v SSHD* [2011] UKSC 12. Mr Sagar is currently on immigration bail. There is therefore no live application for the court to direct his release. It is agreed that any claim for damages on this ground if his detention was unlawful be transferred to the County Court at Central London.

Arguments and conclusions

The primary argument

28. The primary argument related to the obligation on SSHD in July 2023 to consider Mr Sagar's rights under Appendix EU. This was set out in paragraph 18 of Mr Jafferji's skeleton as follows:

“[T]he Defendant failed to consider [Mr Sagar's] entitlement to status under Appendix EU of the Immigration Rules – a matter that was relevant to whether any interference with Article 8 ECHR rights would be in accordance with the law as well as whether any interference would be proportionate.”

29. Mr Jafferji submitted that the serving of the removal notice in July 2023 triggered this obligation on SSHD to look at Mr Sagar's entitlement to Appendix EU status. This

¹ Hydar v SSHD [2021] UK UT 176 (IAC)

obligation applied, he said, irrespective of whether Mr Sagar had submitted an application in the proper form.

30. He submitted that because in July 2023 SSHD had not considered whether Mr Sagar had any such rights, SSHD could not have lawfully determined Mr Sagar's human rights claim because the SSHD was not aware whether or not Mr Sagar had valid rights under Appendix EU.
31. Mr Erdunast accepted that SSHD had not considered in July 2023 whether Mr Sagar had the right to remain under Appendix EU. This was, he said, because Mr Sagar had never made any application for such a right.
32. Mr Erdunast did not, however, accept that Mr Jafferji's submissions were a correct description of SSHD's obligations. He submitted, furthermore, that even if Mr Jafferji was correct on all points then Mr Sagar's claim was still bound to fail. This was because the outcome for Mr Sagar would not have been substantially different if SSHD had done what Mr Sagar said should have been done, namely consider whether Mr Sagar had rights under Appendix EU.
33. Mr Sagar had, he said, never provided any explanation of how he might have such rights, and in his pleadings, his skeleton arguments, and his submissions Mr Jafferji had never disputed SSHD's contention that Mr Sagar had no such rights. Mr Erdunast submitted that if SSHD had considered Mr Sagar's rights in July 2023 under Appendix EU then SSHD would inevitably have concluded that Mr Sagar had no such rights. Accordingly, Mr Erdunast submitted, the court was bound to dismiss the application under s 31(2A) SCA 1981.
34. Before turning to s31(2A) SCA it is necessary to consider as a matter of fact what rights Mr Sagar had under Appendix EU. Mr Erdunast submitted that the prospects of Mr Sagar having any rights to remain under that Appendix were "*hopeless*". Mr Jafferji did not say that an application under Appendix EU would have been successful; indeed, he accepted that the prospects of it being successful were "*not the strongest*".
35. The rules in relation to Appendix EU are clear. The "*extended family member*" exemption applies to a person who was resident in the UK on or prior to 31 December 2020 or who had applied by that time for facilitation to be treated as so resident. This position has been considered and confirmed by the courts – see for example *Siddiq*² at paragraphs 65 and 71.
36. There is no evidence that Mr Sagar was resident in the UK before that date. Indeed, he had not even entered the UK as a visitor before that date. As far as I can see, Mr Sagar has never claimed that he was resident in the UK before that date. Nor had he made an application by 31 December 2020 for facilitation which would have allowed him to have been treated as so resident.
37. There is a second hurdle for Mr Sagar to overcome. If Mr Sagar had been resident on 31 December 2020 or had applied by that time for facilitation then the rules required him to apply for EU settled status under Appendix EU ("**EUSS**") by 30 June 2021. He did not do so. Again, he had not even entered the UK by this date. It is possible to apply

² [2024] EWCA Civ 248

for permission to make an application after 30 June 2021 if there are reasonable grounds for the delay in applying. Mr Sagar has not made any such application.

38. Finally, Mr Sagar had no family permit or residence card issued on the basis of an application made prior to 31 December 2020. That is a pre-requirement for being granted leave to remain as an “*extended family member*”.
39. I note that Mr Sagar had family members in the UK in August 2021. That is relevant to the human rights claim he made in his s120 Response. It has no relevance, however, as to whether he is entitled under Appendix EU to remain in the UK.
40. At no point in his correspondence with SSHD or in these proceedings has Mr Sagar offered any explanation or evidence as to why he is entitled to leave to remain under Appendix EU. Mr Jafferji did not engage in his skeleton or submissions with the points made by SSHD that Mr Sagar has no such entitlement.
41. In my judgment, it is clear that as a matter of fact Mr Sagar has no entitlement under the Appendix EU to the Immigration Rules to remain in the UK.
42. Section 31(2A) of the Senior Court Act provides that:

*“(2A) The High Court—
(a) must refuse to grant relief on an application for judicial review, and
(b) may not make an award under subsection (4) on such an application,
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.
(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.”*
43. There are no considerations of exceptional public interest under section 31(2B) of the Senior Courts Act which were suggested by the parties which would justify a court disregarding the requirements of section 31(2A) in this case.
44. There is therefore a statutory obligation on the court to refuse to grant relief on an application for judicial review “*if it appears highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*”.
45. The conduct complained of in this case is the failure by SSHD to consider Mr Sagar’s rights under Appendix EU. What would the outcome have been had that conduct not occurred? In other words, what would the outcome have been if SSHD had in July 2023 considered Mr Sagar’s entitlement to remain under Appendix EU?
46. There was no direct documentary evidence from SSHD as to what decision they would have made in July 2023. The only documentary evidence from SSHD at that time was the May 2023 Letter which directed Mr Sagar to make an application under Appendix EU if he wished.
47. It seems to me, however, that there is clear evidence from which the court can and should draw inferences about the decision that SSHD would have made if they had

examined the evidence put forward on or before July 2023 by Mr Sagar regarding Appendix EU.

48. I do so, bearing in mind the observations made in Plan B Earth³ at [273] that “*courts should still be cautious about straying, even subconsciously into the forbidden territory of assessing the merits of a public law decision under challenge by way of judicial review . . . Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, . . . “the threshold remains a high one”*”.
49. There are, in my judgment, two critical areas of evidence from which the court should draw inferences.
50. The first is that in July 2023 Mr Sagar had not provided any explanation as to the basis on which he was entitled to remain under Appendix EU. He had not provided any evidence to support any such explanation or application. An application that is unsupported by explanation and evidence as to how the applicant has any entitlement to the rights claimed is, in most circumstances, highly likely to fail. Mr Jafferji submitted that SSHD may have been under a duty to seek such evidence but for the reasons set out in paragraphs [85] and [86] below I do not consider that to be the case. In any event, Mr Sagar has had the opportunity since July 2023 to put forward any explanations and evidence supporting his assertion that he has a right to remain under Appendix EU. He has not provided any. I infer that even if SSHD had a duty to seek such evidence, which I do not consider there was, then there is no explanation or evidence that Mr Sagar wishes to put forward or that he wished in July 2023 to put forward.
51. The second element is that in these proceedings SSHD has consistently assessed Mr Sagar’s assertion that he has an entitlement to remain under Appendix EU as “*hopeless*”. I see no reason why SSHD would have made a different assessment in July 2023 when presented with exactly the same underlying (lack of) explanation and evidence.
52. This question as to what SSHD would have decided in July 2023 would of course have been dealt with completely if there had been a witness statement on that topic on behalf of SSHD but the court did not have the benefit of one.
53. In my judgment and considering those two elements, in particular, it is highly likely that if in July 2023 SSHD had considered all the evidence put forward by Mr Sagar then SSHD would have decided that Mr Sagar had no right to remain under Appendix EU. Accordingly, the outcome for Mr Sagar would not be likely to be substantially different. His claim for judicial review on the basis that SSHD failed to consider his rights under Appendix EU therefore fails because this court is required to refuse it under s31(2A) Senior Courts Act 1981.
54. That is the case irrespective of whether or not SSHD had an obligation in July 2023 to consider Mr Sagar’s rights under Appendix EU notwithstanding the absence of any application and the fact that Mr Sagar had no such rights.

³ [2020] PTSR 1446 at [273]

55. In submissions Mr Jafferji was at pains to say that this was not a case of principle, but it was one that turned on its specific facts. Mr Jafferji relied on *TZ (Pakistan) and PG (India) [2018] EWCA Civ 1109* in which the Court of Appeal confirmed that there would be a breach of Article 8 ECHR if a person were to be removed in circumstances where he satisfied the requirements of the Immigration Rules:

“34. That has the benefit that where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed.”

56. Mr Jafferji, however, invited me to ignore the weakness of Mr Sagar’s rights under Appendix EU and to consider the case as if Mr Sagar had strong rights under Appendix EU. That is, in my view, the core problem with Mr Sagar’s case. If Mr Sagar had a strong claim under Appendix EU then, by definition, he may well be someone in the category of persons, as described in *TZ*, who have a right to remain under the rules but who have not followed the correct procedure. Mr Sagar is, however, in a different position. He is someone who has not followed the correct procedure and who does not have any rights under the rules to remain.
57. Mr Jafferji raised the additional argument that the failure of SSHD to consider the Appendix EU rights in and of itself rendered the Decisions procedurally flawed. He said that the Decisions were therefore unlawful and as such under the criterion in paragraph 17(3) of *Razgar*⁴ they should be quashed for procedural unfairness. Mr Erdunast submitted that if SSHD succeeded on the s31(2A) argument then any question as to the existence of a duty to consider applications not made and which would be bound to fail need not be addressed by this court.
58. I agree with Mr Erdunast that any such question, if it ever arises, is best addressed when the answer will affect the outcome of a particular case. Given my findings in this case, I do not need to address it here.
59. I will now turn to the other challenges to the Decisions made by Mr Sagar both in his Amended SFG and his submissions.

The Human Rights Decision

60. The Human Rights Decision was made on 23 May 2023. It rejected the human rights claim put forward by Mr Sagar in the s120 Response. The Human Rights Decision was made prior to the decision made on 10 July 2023 to remove Mr Sagar from the UK. The only ground set out in the Amended SFG on which the Human Rights Decision was challenged was that it was:

“inherently flawed by failure to consider whether the Claimant had any entitlement under EUSS as [SSHD] cannot have properly considered whether the interference with Article 8 rights was in accordance with the law (and any interference in the form of removal in circumstance where [Mr Sagar] had an entitlement to the grant of leave under the EUSS would be unlawful) and whether it was proportionate for

⁴ R (Razgar) v SSHD [2004] UKHL 27

the same reason – the assessment cannot be complete without consideration of any asserted entitlement under the EUSS)” and

“It follows that the decision to reject the human rights claim...is irrational and ...unsafe”

61. This ground asserts that the Human Rights Decision made in May 2023 was flawed because at that time SSHD had not considered whether Mr Sagar had any rights under Appendix EU.

62. The first question, therefore, is whether SSHD had any obligation in May 2023 to consider Mr Sagar’s rights under Appendix EU. It is common ground that Mr Sagar has never submitted an application in the manner prescribed by SSHD. That requires completion of an application form and submission of supporting documentation. The closest Mr Sagar came to submitting an application in the form, and with the evidence and explanation, required was in his s120 Response when his solicitors asked SSHD to:

“consider our’ client’s these [sic] submissions in response to the general invitation under s120 above as application for grant of pre-settlement status and grant the same”.

63. In his submissions Mr Jafferji argued that the s120 Response was sufficient to constitute a valid application under Appendix EU. He said that required SSHD to make a decision on Mr Sagar’s rights. If SSHD required more information from Mr Sagar, then SSHD could have asked for it. This obligation to consider the Appendix EU application was, implicitly, said to be independent of any obligation to consider Mr Sagar’s rights under Appendix EU in July 2023.

64. Mr Erdunast submitted that it was plain that Mr Sagar had never made an application under the EUSS. He referred the court to the dicta of Irwin LJ in *Singh v Secretary of State for the Home Department* [2018] EWCA Civ 1669 at [21]:

“The suggestion that a telephone call to an official or a shout in the street could constitute an “application”, whether valid or otherwise, is nonsensical.”

65. Mr Erdunast said it was clear that SSHD in May 2023 had no obligation to treat the s120 Response as an application. Mr Erdunast implicitly accepted, however, that SSHD had a discretion to accept the s120 Response as an application. He submitted, however, that SSHD had exercised that discretion in the May 2023 Letter when declining to treat Mr Sagar’s s120 Response as an application and directing him as to the correct procedure to make one.

66. In the May 2023 Letter SSHD said the following:

“Your representative states that you should be granted leave to remain in the UK pursuant to Appendix EU of the Immigration Rules and claim to have a familial relationship with an individual with pre-settled status and an EA national. Please note your submissions have been considered under the parameters of the Article 8 and that there is a separate application process for extended family members of EEA nationals that meet specific circumstances”

67. SSHD did therefore address the points that Mr Sagar’s solicitors had raised in the s120 Response regarding Appendix EU. SSHD had considered the contents of the letter, determined that they did not constitute an application, and directed Mr Sagar to the correct means of making such an application. In doing so, SSHD clearly declined to exercise in Mr Sagar’s favour any discretion that SSHD had to treat the s120 Response as a valid application notwithstanding that it was made in a non-prescribed form.
68. In my judgment, SSHD has no obligation in May 2023 to consider Mr Sagar’s rights under Appendix EU because there was no application in the prescribed form and there was no notice of intended removal that might have triggered such an obligation. SSHD may have had a discretion to treat the s120 Response as an application in a form that was not prescribed but the May 2023 Letter made it clear that SSHD was not exercising any such discretion in Mr Sagar’s favour; he had to make an application in the prescribed manner.
69. The skeleton argument from Mr Jafferji attempted to introduce a new line of argument on this topic. The new submission was that SSHD had not properly considered the family situation of Mr Sagar in assessing proportionality in the human rights claim Mr Sagar had made. That argument was not included in the Amended SFG. SSHD has not had the opportunity to consider it. On that basis alone the argument is rejected.
70. In any event, the argument seems to me doomed to failure. The May 2023 Letter sets out the evidence and arguments put forward by Mr Sagar as to his family circumstances. That included evidence that Mr Sagar’s brother and parents had residence cards for the UK.
71. The May 2023 Letter then continues under the heading “Private Life” (which included assessment of whether “*it would be a breach of your human rights under the ECHR to return you to India*”):

“it is not accepted that there would be very significant obstacles to your integration back into life in India ... as you last arrived from India just 1 year and 8 months ago. It is therefore considered that you will have extended family and friends in India who you are still in contact with and will also be familiar with the language, culture and customs there.

Further as a citizen of India you will be entitled to all the privileges and benefits that this status affords as well as being entitled to work upon you return there, a right you do not have currently enjoy in the UK.

As part of your visa application you stated that you were employed by a successful private IT company in Chandigarh as PHP developer. It is considered that being experienced in this are[a] of work, employment will be available to you on your return to India.”

72. This conclusion was repeated, in shorter form, later in a specific section on his human rights claim:

“As previously outlined you have only been in the UK 1 year and 8 months. You will still have family and friends in India and will be familiar with the cultures and

customs there. You will also have the right to work when returning to India as an Indian citizen.”

73. The May 2023 Letter contained an error regarding Mr Sagar’s family situation. It correctly noted Mr Sagar did not have a spouse or any dependent children in the UK. It said, however, that Mr Sagar did not have any parents in the UK. That is not correct; he did. The explanation for this may be that under the family life rules at the time a parent was relevant if the parent was dependent on Mr Sagar or indeed if Mr Sagar was dependent on the parent. Mr Sagar did not provide any evidence to show either of these cases. Accordingly, the reference to “parents” should probably be read as “dependent parents” and it correctly identified that Mr Sagar did not have any dependent parents.
74. The May 2023 Letter considers the evidence put forward by Mr Sagar, and balances that against an assessment of Mr Sagar’s position were he to return to India. That assessment had included a review of Mr Sagar’s own evidence as to his employment in India. It also considered the very limited time that Mr Sagar had spent in the UK, some 6 months of lawful time and some 12 months unlawfully, in contrast to over 25 years of his life spent in India. SSHD was perfectly entitled to reject Mr Sagar’s assertions in the s120 Response that “*Mr Sagar knows only his life here in the UK* “. The decision made by SSHD in the May 2023 Letter to reject Mr Sagar’s human rights claim cannot, in my judgment, be said to be irrational or improperly made. It was one that was plainly open to SSHD to make.
75. Mr Jafferji relied on *Dzineku-Liggison*⁵ as authority for the submission that it would not be lawful for there to be a removal when there were human rights claims that had been advanced but had not been considered. That is correct, but in this case human rights claims put forward had been considered. The failure to consider any rights Mr Sagar may have had under Appendix EU did not constitute, in my judgment, a failure to consider a human rights claim. It was a failure to consider rights under Appendix EU but for the reasons set out above the claim on that ground fails as the outcome would have been not substantially different if those asserted rights under Appendix EU had been considered. There was nothing further or different put forward by Mr Sagar in relation to his human rights that would have altered the conclusion under Appendix EU or which were not considered in his human rights claim.

The Certification Decision

76. The pleaded grounds of challenge to this Decision, which was also made on 23 May 2023, were the same as to the Human Rights Decision.
77. The May 2023 Letter certified that the application by Mr Sagar in relation to his human rights claim was clearly unfounded under s94 of the 2002 Act. That meant that he had no right of appeal against that decision.
78. The only pleaded challenge to that decision to certify Mr Sagar’s claim as “*clearly unfounded*” was for the alleged failure to consider the Appendix EU request. I have set out above why even if there was such a failure the outcome for Mr Sagar would not have been different.

⁵ [2020] UKUT 00222 (IAC)

79. I reject the challenge in relation to the Certification Decision on the same basis as set out above in relation to the Human Rights Decision and the Appendix EU Decision.

The Removal decision

80. The pleaded grounds of challenge to this Decision, which was made on 10 July 2023, were related to the failure to consider the Appendix EU rights in July 2023. I have already rejected the claim regarding that failure because the outcome for Mr Sagar would have been substantially the same if SSHD had considered his claim. I reject his challenge to the Removal Decision on the same basis.

The Detention Decision

81. I have concluded that there is no successful challenge to the Removal Decision. It follows that SSHD was entitled to detain Mr Sagar pending such removal.

Further sub-grounds

82. There were three further sub-grounds raised by Mr Sagar in his Amended SFG. I will deal with these briefly.

Withdrawal Agreement

83. The first was that the decision not to consider Mr Sagar's rights was in breach of SSHD's obligations under the Withdrawal Agreement.
84. Dove J considered in a judgment handed down shortly before this hearing (*Here for Good*⁶) the point in time at which an application should be treated as being made. His assessment built on the matters considered by the Court of Appeal in *Siddiqi*⁷ (at paragraph 80), which in turn followed on from the consideration in *R (IMA)*⁸ of the Withdrawal Agreement obligations. The point in time when the application is made is important because certain protections only begin to apply once an application is made. Those include the protections in Article 18(o) which requires the competent authority to "*help the applicants to prove their eligibility*". In essence, Dove J confirmed that there is a fundamental difference between making an application and having a right to make an application. A person cannot rely on those protections until an application has been made even if a person has a right to make an application.
85. The s120 Response was not an application in the prescribed form. SSHD explicitly rejected in the May 2023 Letter the suggestion by Mr Sagar's solicitors that it be treated as an application "*outside the rules*" in a non-prescribed form by requiring him to make an application in the proper form. It follows that Mr Sagar has not made any application under Appendix EU. He therefore does not have the benefit of the protections in the Withdrawal Agreement Article 18, and there was thus no requirement on SSHD to help Mr Sagar prove his eligibility.

⁶ [2024] EWHC 2817

⁷ [2024] EWCA Civ 248

⁸ [2022] EWHC 3274 (Admin)

Policy

86. The Amended SFG asserted that the decision not to consider the rights of Mr Sagar under Appendix EU is in breach of SSHD's Policy (subground b). Neither the Amended SFG or the skeleton argument identified any specific part of the policy that D is said to have failed to follow, and this argument was not pursued at the hearing.

Failure to follow authority of Hydar

87. Finally, the Amended SFG asserted that the decision not to consider the rights of Mr Sagar under Appendix EU was in breach of the authority in *Hydar*⁹. That case requires SSHD to consider matters afresh if there is a matter “*of different origin*”. There was no such matter identified, and this argument was not pursued at the hearing by Mr Jafferji.

Decision

88. The application is refused for the reasons set out above.

⁹ *Hydar v SSHD* [2021] UKUT 176 (IAT)