Neutral Citation Number: [2025] EWHC 64 (Admin)

Case No: AC-2023-LON-003869

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 January 2025

Before:

HHJ KAREN WALDEN-SMITH,
sitting as a Judge of the High Court

- -

Between:

THE KING (on the application of) **ANCY LAZER SALU ANDREWS**	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

SHIVANI JEGARAJAH (instructed by **CHELIAN LAW SOLICITORS**) for the **CLAIMANT**
JOSHUA YETMAN (instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the **DEFENDANT**

Hearing date: 11 December 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ KAREN WALDEN-SMITH :

Introduction

1. The claimant, Ms Andrews, seeks to challenge the decision of the defendant, the Secretary of State for the Home Department (SSHD) dated 3 November 2023 cancelling her permission to stay in the UK as skilled worker (health care). Ms Andrews was detained on 19 September 2023 and a notice of removal was issued on 18 December 2023. She had been taken to an airport on 29 December 2023 and was at risk of removal on 30 December 2023. On 29 December 2023 Ellenbogen J. granted interim relief to allow time for a response from the SSHD to the application. Communication from officials at the Home Department indicated that Ms Andrews would not be removed and was being released from detention. Lang J. granted an extension of the interim relief until determination of the application for permission in order to maintain the status quo until a determination had been made with respect to permission to bring judicial review proceedings.

2. Permission to bring judicial review proceedings was granted by Mr Tim Corner KC, sitting as a Deputy High Court Judge. He expressed concern that Ms Andrews was allowed to work voluntarily and there was a lack of evidence that she was working for pay. He also stated that as she had been released from immigration detention, there was no need to order her release.

Factual Background

3. Ms Andrews is an Indian national, her date of birth being 22 December 1986. She entered the UK on a skilled worker visa (health care) on 8 June 2023 for the purpose of commencing work on 1 July 2023. She was encountered by Immigration Enforcement while working in the Charlton Convenience Store in Andover on 28 June 2023. She says that she was merely volunteering in a friend's off-licence store in order to give assistance.

4. The store owner explained to the Civil Penalty Compliance Team that Ms Andrews had been a volunteer and on 19 July 2023, a 'No Action Notice' was issued notifying Charlton Village Limited, who operate the Charlton Convenience Store, that they were not liable pursuant to the provisions of section 15 of the Immigration, Asylum and Nationality Act 2006. It is the claimant's case that this establishes that the SSHD was accepting the store owner's explanation that Ms Andrews had been a volunteer.

The Challenge

5. The substantive grounds upon which Ms Andrews challenges the decisions of the SSHD are:

   (i) The decision to cancel leave to remain on 3 November 2023;

   (ii) The decision dated 11 December 2023 to refuse representations made on 10 September 2023;

(iii) The decision to impose a removal window from 18 December to 30 December 2023;

(iv) The decision to detain Ms Andrews from 19 October 2023 (incorrectly drafted to be 19 September 2023) to 5 January 2024, there being no lawful basis to do so.

6. In the skeleton argument on behalf of the claimant it is contended that the operative decision was made on 28 June 2023 when it was set out that:

> "You entered the UK on 08 June 2023 on a skilled worker visa (Health Care) valid from 20/04/2023 until 14/07/2026. You were observed working in the Charlton Convenience Store, in Andover on 28/06/2023 serving customers behind the counter. You are therefore specifically considered a person who has failed to observe a condition of leave to enter or remain. You were encountered working in breach of your leave on the 28/06/2023, an offence under section 24(1) (b)(ii) Immigration Act 1971"

7. This is not the decision challenged in the claim form and is not the decision with respect to which permission to bring judicial review proceedings was granted. There was nothing within the grounds appended to the claim form to challenge any decision of 28 June 2023. The claim form was filed on 29 December 2023 together with the application for interim relief. Even by that date, a challenge to the 28 June 2023 decision was out of time. Permission has not been granted to challenge the 28 June 2023 decision and to raise the challenge now, within a skeleton argument provided in late November 2024 for the hearing on 11 December 2024, is clearly a long way outside the time periods allowed for bringing a judicial review challenge pursuant to the provisions of CPR 54.

8. The 3 November 2023 decision was made as a consequence of a review of the 28 June 2023 decision after an internal referral on 23 October 2023. The internal referral led to a new decision and the 28 June 2023 decision is subsumed into that 3 November 2023 decision. In the letter from the SSHD dated 11 December 2023, the situation was explained in these terms:

> "17. The team who made the original finding that Ms Andrews was working in breach of the conditions of her permitted leave, completed the review on 3rd November 2023 and it is confirmed that a new notice of liability to removal from, RED.0001 dated 3rd November 2023 was served."

9. The issues for the court to determine are therefore with respect to grounds (i) and (ii) as set out in the substantive grounds appended to the claim form, and not as rewritten in the skeleton argument. Grounds (iii) and (iv), the decision to impose a removal window and the decision to detain Ms Andrews, are parasitic on grounds (i) and (ii).

10. If the decision of the SSHD to cancel leave to remain is lawful then the decision to issue a removal notice and detain are also lawful, the decision to detain has in any event been rendered academic by the fact that she was released from detention on 5 January 2024.

The interim application brought on behalf of Ms Andrews with respect to detention and removal therefore falls away.

The Law

11. The Immigration Act 1971 (IA 1971) sets out the following legislative framework.

12. Section 1(2) of the IA 1971 provides that "Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act …" and section 1(4) of the IA 1971 sets out that the rules laid down by the SSHD 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 not having the right of abode shall include provision for admitting persons for the purpose of taking employment, along with other activities:

13. Section 3(1) of the IA 1971 provides, amongst other things, that a person who is not a British citizen shall not enter the United Kingdom unless given leave to do so, and limited to leave to enter or remain may be subject to conditions restricting work or occupation (s.3(1)(c)(i)).

14. Section 3(2) of the IA 1971 provides for the laying before Parliament of the rules made by the SSHD (generally referred to as the Immigration Rules):

> "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).
>
> …"

15. Section 3(3) of the IA 1971 provides that:

> "In the case of limited leave to enter or remain in the United Kingdom, -
>
> (a) A person's leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave shall cease to apply; and

> (b) The limitation on and any conditions attached to a person's leave (whether imposed originally or on a variation) shall, if not superseded, apply also to any subsequent leave he may obtain after an absence from the United Kingdom within the period limited for the duration of the earlier leave"

16. Section 4 of the IA 1971 provides that the power to vary any leave or to cancel leave is exercised by the SSHD.

17. Finally, section 24(1) of the IA 1971 provides as follows:

> "Illegal entry and similar offences
>
> 24(1) A person who is not a British citizen shall be guilty of an offence punishable on summary conviction with a fine of not more than level 5on the standard scale or with imprisonment for not more than six months, or with both, in any of the following cases: —
>
> (a). . . . .
>
> (aa). . . . .
>
> (b) if, having only a limited leave to enter or remain in the United Kingdom, he knowingly fails to observe a condition of the leave;"

18. The significance of section 3(2) of the IA 1971 (as set out above) in relation to the Immigration Rules and the extent to which the rules may be qualified or supplemented by policies which have not been laid before Parliament, is at the heart of the decisions in *R(Alvi) v SSHD* [2012] UKSC 33 and *R(Munir) v SSHD* [2012] UKSC 32, as was set out Ingrid Simler KC sitting as a Deputy HCJ (as she then was) in *Cakani v Secretary of State for the Home Department* [2013] EWHC 16 (Admin):

> "The following principles emerge from the Supreme Court judgments in these cases:
>
> (a) The 1971 Act is to be seen as the source of all the powers vested in the Secretary of State to control immigration previously exercised under the prerogative. For all practical purposes, the 1971 Act gave statutory force to all the prerogative powers previously exercised in this field (save only in respect of enemy aliens where the prerogative power is expressly preserved by the 1971 Act).
>
> (b) It is still open to the Secretary of State to grant leave to enter or remain to a foreign national person whose application does not meet the requirements of the Immigration Rules, but this power derives from the 1971

Act and not the prerogative. Her discretion under section 3 of the 1971 Act to control the grant *and* refusal of leave to enter or remain is wide;

(c) The power to make rules relating to the grant/refusal of leave to enter and remain is vested by the Secretary of State by the 1971 Act. It is for the Secretary of state to determine the practice to be followed in the administration of the 1971 Act, but given that the 1971 Act is the sources of those powers, it is not open to her to exercise them in a way that is not in accordance with the rules she has laid before Parliament.

(d) Section 3(2) requires statements of the rules, and of any changes to the rules, as to the practice to be followed in the administration of the 1971 Act for regulating the control of entry into and stay in the United Kingdom of people who require leave to enter to be laid before Parliament.

(e) For these purposes, any requirement which, if not satisfied will lead to an application for leave to enter or to remain being refused, is a rule within section 3(2) and must be laid before Parliament.

(f) The 1971 Act also empowers the Secretary of State to issue instructions or guidance to assist decision makers in the exercise of discretion, but without compelling a particular outcome. There is no obligation on the Secretary of State to lay such instructions or guidance before Parliament, But, the less flexibility inherent in the instructions or guidance, the more likely it is to be regarded as a statement "as to the practice to be followed" within the meaning of section 3(2) of the 1971 Act, requiring it to be laid before Parliament."

19. The hierarchy of legislation, rules and regulations, and then guidance is clear – with the more inflexible the guidance *"the more likely it is to be regarded as a statement 'as to the practice to be followed'"*.

20. Ms Andrews was given leave to enter the UK on 8 June 2023 for the purpose of starting work as a care worker on 1 July 2023. She did not have permission to work in any other role. She accepts that when she was encountered by Immigration Enforcement on 28 June 2023 she was working. However, she contends that she was working in accordance with the Home Office Guidance for Skilled Workers in that while working in the Charlton Convenience Store she was carrying out voluntary work.

21. Within the Immigration Rules, the definitions provisions set out that "work" has the same meaning as "employment", except that work does not include being party to an

employment contract but not work. "Working illegally is working in breach of a condition of leave or working in the UK without valid leave where such leave is required.

22. "Voluntary work" is defined in the Immigration Rules as having the same meaning as applies to a voluntary worker in the National Minimum Wage Act 1988 (NMWA 1998). Section 44 of the NMWA 1998 provides, amongst other things:

> "(1)A worker employed by a charity, a voluntary organisation, an associated fund-raising body or a statutory body does not qualify for the national minimum wage in respect of that employment if he receives, and under the terms of his employment (apart from this Act) is entitled to,—
>
> (a) no monetary payments of any description, or no monetary payments except in respect of expenses—
>
> (i) actually incurred in the performance of his duties; or
>
> (ii) reasonably estimated as likely to be or to have been so incurred; and
>
> (b) no benefits in kind of any description, or no benefits in kind other than the provision of some or all of his subsistence or of such accommodation as is reasonable in the circumstances of the employment."

23. Consequently, to be a voluntary worker within the meaning given by section 44 of the NMWA 1998, an individual is not merely working for no remuneration. The worker has to be employed by a charity, voluntary organisation, an associated fund-raising body or a statutory body who is not entitled to any monetary payments of any description and no benefits in kind.

24. Insofar as there is a conflict between the interpretation of the rules and regulation and guidance, the former takes precedent (as set out above in *Cakani*). Lady Carmichael in the Scottish case *(RF) & Another v SSHD* [2017] CSOH 130 held that:

> "The rules are, as the Upper Tribunal indicated in Sultana, hierarchically superior to statements of policy in immigration directorate instructions. The content of prescribed applications forms likely cannot override or modify the statements of policy in the rules."

25. The hierarchy is, therefore, the statute, the rules and regulations, and then the guidance. In this matter, where the rules refer to 'voluntary work' the meaning is to be taken from the NMWA 1998. "Voluntary work" is not only for no remuneration but is, crucially, for the benefit of a charity, voluntary organisation or related fund-raising or other statutory body.

Circumstances of this case

26. Ms Andrews had leave to enter the United Kingdom as a skilled health care worker. Ms Andrews' own case is that she was at the Charlton Convenience Store "working voluntarily". She was serving customers and behind the till.

27. She contends that she is entitled to carry out "voluntary work in any sector" by reason of the provisions contained in the Home Office Guidance for Skilled Workers. What the Home Office Guidance provides is that a skilled worker can also work up to 20 hours a week in another job, or for their own business, "as long as you're still doing the job you're being sponsored for". Ms Andrews does not contend that she was doing the job she was being sponsored for. The Home Office Guidance further provides that a skilled worker can carry out unpaid voluntary work. Ms Andrews contends that she falls within this provision, but the work she was carrying out (on her case) was unpaid but was not, in accordance with the Immigration Rules and the definition within section 44 of the NMWA 1998, voluntary work.

28. Section 44(4) of the NMWA 1998 provides a definition for the various organisations referred to in section 44(1) as providing voluntary employment, namely a charity, a voluntary organisation, an associated fund-raising body or a statutory body. It is not suggested that the Charlton Convenience Store fulfils any of these definitions. The definition given to "voluntary fieldwork" within the Immigration Rules gives support to the interpretation that "voluntary work" is not merely that it is work that is not paid for but has to be work for a charity or voluntary organisation, or similar. The definition of "voluntary fieldwork" being "activities which would not normally be offered at a waged or salaried rate, and which contribute directly to the achievement or advancement of the sponsor's charitable purposes."

29. The 3 November 2023 decision set out as follows:

> "You claimed to not be aware you were working illegally and stated to officers that you had run out of funds and friend had offered a temporary job to tide you over – this was taken to be an admission of working.
>
> When a co-owner of the shop attended the premises, he responded to questions about illegal working that you working there was a 'technicality' and that you weren't working there, just helping, but when it was pointed out that you had been serving customers, and were the only person at the premises, behind the till he again referred to this as a 'technicality'.
>
> The additional work being undertaken is not within the same occupation that the Visa was granted. There are no records or attempts to vary the visa… you have knowingly work outside the confines of your visa…This decision has been based upon the breach of your Visa conditions; your leave has been cancelled with immediate effect under Part 9.8.8 of the Immigration Rules for the breach of visa conditions as detailed above."

30. That decision is entirely consistent with the Immigration Rules. The decision is within the requirements of being intelligible and adequate as set out by Lord Born in *South Bucks DC v Porter (No 2)* [2004] UKHL 33, namely that:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues'; disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds…"

31. The decision of 3 November 2023 that Ms Andrews was in breach of her conditions and that her leave be cancelled was not an irrational decision. It was not a decision that it is so unreasonable that no reasonable decision maker could make that decision; but further it is not outside the range of reasonable decisions that a decision could make. The test of irrationality was reaffirmed by Underhill LJ in *Sharon Pantellerisco and ors v The Secretary of State for Work and Pensions* [2021] EWCA Civ 1454, para 54:

> "In *Johnson* [2020] PTSR 1872 Rose LJ noted that the court had not received detailed submissions on the test of irrationality: see para 48 of her judgment. The claimant had relied squarely on "the *Wednesbury* unreasonableness that has been a ground for a public law challenge since the early days of the modern jurisprudence on judicial review". Rose LJ referred to para 98 of the judgment of Leggatt LJ and Carr J, sitting as a Divisional Court, in *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649. This reads (so far as relevant):
>
> "The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of 'irrationality' or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is 'so unreasonable that no reasonable authority could ever have come to it' see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police* [1999] 2 AC 143, 175 (Lord Steyn). The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached."

32. Insofar as there is any conflict between what is given as guidance and the rules or statute, then the Immigration Rules prevail over any guidance and the statute (namely the Immigration Act 1971) takes precedence over both the Rules and regulations and the guidance. Voluntary work is permitted for someone with a specific job to take

up but only in accordance with the regulations. Ms Andrews was not working in accordance with the regulations.

33. As a consequence of failing to abide by the regulations with respect to her work in the Convenience Store, even for 2 hours (which is all that Ms Andrews concedes), means that Ms Andrews was in breach of the conditions of her leave. Rule 9.8.8 provides that:

> "Permission (including permission extended under section 3C of the Immigration Act 1971) may be cancelled where the person has failed to comply with the conditions of their permission."

34. Ms Andrews may say it is a harsh decision to cancel her permission when, on her case, she was merely carrying out a 2-hour shift for which she was not being paid in order to assist a friend who was in difficulties due to family illness. The guidance on cancellation and curtailment provides that when cancellation under rule 9.8.8 is being considered, it is a discretionary step and so all the circumstances must be considered in deciding whether to cancel permission. It is clear that an individual's permission must not be cancelled automatically if there are reasons that suggest it may not be appropriate to do so:

> "It is the Secretary of State's responsibility to establish the reasons why an individual's entry clearance or permission is to be cancelled. You must establish the relevant facts and then carefully consider all an individual's relevant circumstances and the proven facts of the case before you make a final decision." (see Cancellation and Curtailment, 11 October 2023 p 53 of 102).

35. In the decision of 3 November 2023, with the reasons for the cancellation, the following was set out:

> "You entered the UK on 8/06/2023 with entry clearance (Health Care) given under the Skilled Worker route and valid from 20/04/2023 until 14/07/2026
>
> On 28/06/2023 South Central Immigration Officers visited Charlton Convenience Store, Andover and you were seen serving customers (including alcohol). As the only staff member, you were in control of a Commercial business premises at the time, as well as holding the keys to that premises.
>
> You claimed to not be aware you were working illegally and stated to officers that you had run out of funds and a friend had offered a temporary job to tide you over – this was taken to be an admission of working.
>
> When a co-owner of the shop attended the premises, he responded to questions about illegal working that you working there was a "technicality" and that you weren't working there,

> just helping, but when it was pointed out that you had been seen serving customers, and were the only person at the premises, behind the till, he again referred to this as a "technicality".
>
> The additional work being undertaken is not within the same occupation that the Visa was granted. There are no records of attempts to vary the visa.
>
> During interview with Immigration Officers, you attempted to use deception to conceal the whereabouts of your Indian passport. Giving all of the foregoing you are therefore specifically considered a person who has failed to observe a condition of leave to enter or remain. You were encountered working, this is an offence under Section 24(12)(b)(ii) of the Immigration Act 1971.
>
> I have considered whether to exercise discretion regarding the cancellation of your entry clearance/permission. It is not considered that the circumstances in your case are such that discretion should be exercised in your favour because there has been no attempt made to vary the conditions of your visa, you have knowingly worked outside the confines of your visa, attempting to deceive Immigration Officers in the course of their duties. When initially asked your place of residence you intimated that you were living away from the business and did not have a key to access the premises. You admitted later to living about the shop with your husband and was where we located and seized your passport."

36. It is clear from this decision and the response to the pre-action protocol letter on 27 December 2023 that the discretion to cancel permission was considered properly. Ms Andrews was found to have knowingly worked outside the confines of her visa and that she had deliberately attempted to deceive the Immigration Officers.

37. The decision-making process undertaken in this matter is clear form the decision letter itself. This is not a case where further evidence from the SSHD was required to explain why the discretion was exercised in the way that it was (contrary to the criticisms levelled by Sales J, as he was then in *R(Das) v Secretary of State for the Home Department* [2013] EWHC 682). The decision to cancel was a rational decision based upon the evidence and is not amenable to challenge.

Conclusion

38. For the foregoing reasons, this claim for judicial review fails. The SSHD did not err in finding that Ms Andrews was working outside that which her visa permitted, even if she was not receiving remuneration that did not make her work 'voluntary'. The decision to remove and detain pending that removal were matters based on the lawful determination to cancel her permission to work in the United Kingdon. These challenges therefore also fail.