Neutral Citation Number: [2023] EWHC 1741 (Admin)

Case No: CO/3220/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2023

Before:

HIS HON JUDGE DIGHT CBE

- -

Between:

The King	**Claimant**
on the application of Manish Kumar	
- and -	
The Secretary of State for the Home Department	**Defendant**

- -
- -

Michael Biggs (instructed by **My Legal Limited**) for the **Claimant**
Kathryn Howarth (instructed by **The Government Legal Department**) for the **Defendant**

Hearing dates: 31 January 2023 and 10 February 2023

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Approved Judgment

This judgment was handed down at 10.30am on 11 July 2023 in court and by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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His Hon Judge Dight CBE:

Introduction

1. The claimant, an Indian national born on 27 February 2002, asks the court to quash a decision of the defendant's Border Force officials made at Manchester Airport on 1 September 2022 ("the Decision"), following his arrival from overseas two days earlier, pursuant to paragraph 9.9.2 of the Immigration Rules to cancel his previous permission to enter the United Kingdom which derived from a student visa which had been granted to him (while overseas) earlier in the year to allow him to study at York University. The Decision states that it was made on the grounds that the claimant had failed to allow himself to be interviewed without reasonable excuse. The reason which the claimant gave at the time for not participating in the interview was that he wanted his solicitor to attend the interview. The defendant said at the time that the claimant had no right to a solicitor at interview and did not permit the claimant's solicitor to attend in person or remotely.

2. There is a live dispute as to the effect on the claimant's visa if I were to quash the Decision. Because that issue was not central to the application for judicial review and because it is not necessary to decide that issue in the course of determining the application for judicial review I will not do so. Nor will I determine the potential effect of quashing the decision on the immigration status of the claimant in the UK. It would be both premature and inappropriate to do so.

3. Because the defendant's officers formed the view that following the Decision the claimant no longer had entry clearance the claimant was detained until 27 October 2022 when, having sought asylum on 26 October, he was released on immigration bail. The claimant alleges that the period of detention between 1 September 2022 and 27 October 2022 was unlawful and he therefore also seeks damages for unlawful detention.

4. The claimant advanced four grounds of challenge, which are that:

    i) There was procedural unfairness in making the Decision and/or there was an unlawful interference with the claimant's right of access to justice not to allow the claimant's solicitor to attend the proposed interview with an immigration officer by remote means;

    ii) The Decision is undermined by material procedural impropriety because of the failure to consider whether to allow the claimant's solicitor to attend the proposed interview as a matter of discretion;

    iii) The Decision is vitiated by irrationality in the Wednesbury sense;

    iv) The defendant's detention was unlawful because of the errors in reaching the Decision or on Hardial Singh grounds.

5. Permission to proceed on amended grounds was granted by Hugh Southey KC, sitting as a Deputy Judge of the High Court, in an order dated 11 November 2022 who said, in his reasons, that

> "The issue in this case is whether the claimant had a reasonable excuse for refusing to provide biometrics or attend an interview. He relies on matters such as the failure to provide him with information about the concerns of the Secretary of State and a failure to permit a solicitor to attend. … It appears to me that the claim crosses the low threshold that justifies a grant of permission. Important issues are raised about what procedural safeguards apply in the context of immigration interviews."

6. Following the first substantive hearing in this matter before me the defendant made further disclosure of relevant material relating to her policy in respect of immigration interviews. I then received further written and oral submission at a hastily convened subsequent hearing in respect of which I ordered the defendant to pay the costs because there was no good reason for the failure to have given disclosure of the additional documents at an earlier stage and certainly before the first substantive hearing. I will refer to that further material and the additional submissions below.

Is the public law issue academic?

7. On 27 November 2022 the defendant notified the court that the claimant had been released from detention. The defendant therefore argued that the claim for judicial review had been rendered academic and asked that the remaining private law claim for damages for unlawful detention be transferred to the county court for determination of the issues of liability and quantum of damages (if any) and the hearing in the Administrative Court vacated. I heard argument on this issue at the commencement of the first substantive hearing and concluded that even though the claimant had been released from detention, with the consequence that the unlawful detention claim may have now turned into a damages only claim, given that the challenge to the immigration decision (ie the Decision, as I have defined it) was still pursued and that there would be a practical outcome to the challenge and a public law remedy might be granted if the challenge succeeded, the claim should stay in the Administrative Court and only be transferred to the county court at Central London if the immigration claim succeeded in which case the assessment of damages for the consequent unlawful detention should be undertaken in the county court after appropriate statements of case had been prepared and further disclosure given followed by live evidence at trial to determine what sum should be awarded.

The power to cancel permission to enter

8. Part 9 of the Immigration Rules is headed "**grounds for refusal**". The Decision is said to have been made pursuant to rule 9.9.2. Rules 9.9.2, which appears in Section 2 of Part 9, described as "**Grounds for refusal, or cancellation, of entry clearance, permission to enter and permission to stay**", provides as follows:

> "**Failure to provide required information, etc grounds**
>
> 9.9.1. …

> 9.9.2 Any entry clearance or permission held by a person may be cancelled where the person fails without reasonable excuse to comply with a reasonable requirement to:
>
> (a) attend an interview; or
>
> (b) provide information; or
>
> (c) provide biometrics; or
>
> (d) undergo a medical examination; or
>
> (e) provide a medical report."

9. It seems to me that the use of the word "may" in the phrase "any entry clearance or permission held by a person may be cancelled" gives rise to a discretion to be exercised by a Border Force Officer but the words which follow demonstrate that the stage of considering whether to exercise that discretion is only reached if the following four conditions are first satisfied:

   i) the person seeking to enter must have failed to comply with a requirement to take one of the steps identified in subparagraphs (a) to (e);

   ii) the requirement had been, in the circumstances, a reasonable requirement, which necessarily incorporates an objective evaluative test to be applied by the officer;

   iii) any excuse offered for non-compliance must be considered by the officer; and

   iv) the excuse must, in the circumstances, have been found not to be a reasonable excuse, which again necessarily incorporates an objective evaluative test.

   Once the four conditions are satisfied the officer has the discretion which I have mentioned as to whether to cancel the relevant entry clearance or permission.

10. The document which the defendant disclosed after the substantive hearing is headed **"Immigration interviews"** and states that it is the second version of the guidance and was published for Home Office staff on 19 February 2018. I was not told that it is not the current guidance nor that it was not the guidance in place at the date of the Decision. I will refer to it as the "Interview Policy". It describes its purpose on the front page as follows:

> "This guidance explains how Border Force officers should conduct immigration interviews. This includes interviews at the primary control points and further interviews. It includes details of the role of the PEACE model and the interview question and answer (Q and A) format. It is also provides details on the use of interpreters."

The document states in a number of places throughout its body that its contents are classified as "official-sensitive" and should not be disclosed outside of the Home Office, which may be why it did not surface in this case until after the first substantive hearing had taken place. It is unclear to me why this document is so classified given its obvious relevance and materiality. Certain parts of it, a few words in or towards the end of sentences only, have been redacted. I find it surprising, to say the least, that, given the defendant's duty of candour, this document had not been disclosed much earlier in the proceedings and had not been referred to in any of the numerous statements, logs and notes which have been relied on by the defendant in the claim prior thereto. There is no evidence that it was relied on or referred to by any of the officers involved in the steps leading up to the making of the Decision or the making of the Decision itself. It is not mentioned in any of the witness statements filed on behalf of the defendant prior to the first substantive hearing before me.

11. Pages 6 and 15 of the document contain what immediately appears to be highly relevant material. Page 6 deals with interviews which take place at the point at which a passenger has arrived in the UK and seeks entry into the country. As I understand it the primary control point is in the arrivals hall of the airport when passengers first present their identity documents and visas. Page 6 says:

> "Initial interview at the primary control point
>
> This page gives Border Force officers guidance on the presence of representatives at the initial interview and how to deal with language difficulties encountered at the primary control point (PCP).
>
> **All the content of this page is classified as official – sensitive and must not be disclosed outside of the Home Office.**
>
> Presence of representative at the initial interview
>
> When you interview a passenger on arrival, that passenger has no right to have a legal representative present. You should normally refuse requests for such representation unless the representative is already at the port or airport, in which case it may be appropriate to allow them to be present. On no account must you delay an initial interview to allow a representative to attend."

That section of the document then goes on to deal with any potential language difficulties and interpreters. In the Government Legal Department's covering letter dated 2 February 2023 disclosing the document the author cited page 6 (above) as the relevant information which led to disclosure of the document in these proceedings but it seems to me that there is a section which is of much greater, direct, relevance to the matter which I have to consider and will turn to below.

12. The document deals with the various potential stages of the entry process at which interviews might take place and page 15 gives guidance on the potential presence of third parties, including legal representatives, at subsequent interviews, ie those which take place after the initial screening at the primary control point. It says:

> "Third parties at interviews
>
> This page gives Border Force officer guidance on the rules and regulations regarding third parties at interviews.
>
> **All the content of this page is classified as official – sensitive and must not be disclosed outside of the Home Office.**
>
> There are occasions when a third-party requests to sit in or the passenger requests the presence of a third party at an interview. In either case, the third party, if they are acting in the course of a business, should be qualified under the terms of the regulatory scheme established by Part V of the Immigration and Asylum Act 1999 to provide immigration and advice services, or be exempted from the scheme.
>
> A person is deemed qualified to provide immigration advice or services if they:
>
> - are registered with the Office of the Immigration Services Commissioner (OISC), or work under the supervision of a registered person
> - hold a practising certificate, or work under the supervision of someone who holds one, from one of the following designated professional bodies:
>   - The Law Society
>
> …
>
> …
>
> You should refuse attendance to those who are not qualified or exempted. However, consideration may be given to people who are not in the business of providing immigration advice or services, such as friends, family or constituency MPs.
>
> Permission to attend an interview will generally be on the understanding that the representative will only be given any opportunity before or after the interview to make observations. **The agreement of the passenger must, however, be given for the representative's presence.**
>
> There may be occasions when it is essential to conduct an interview in private and it is within your discretion to do this.

> You must exclude a third party if the passenger indicates that they wish to make some or all of their statement in private.
>
> Where a third party is present, you must ask them to identify themselves and state in what capacity they are acting. You must advise them that they are present only as observers and they must not take part in the interview unless you specifically invite them to do so. You must also give them an opportunity at the end of the interview to make a statement or to amplify the passenger's answers.
>
> If, in spite of a warning, a representative attempts to prompt the passenger in any way or answers on their behalf when uninvited, you must ask them to leave."

13. The claimant submitted that that the relevant part of this guidance was not that to be found on page 6, which concerns an initial interview at the Primary Control Point, but that which appears on pages 15 to 16. As I have already said, I agree. He further submitted that those pages "aptly allows the Claimant to have a legal representative present". I also agree.

14. The whole tenor of page 15 of the guidance, and its place in the document, suggests to me that where, as in this case, the passenger has a legal representative who wishes to be present (and whom the passenger consents to being present) at an interview which takes place at a later stage than at the primary control point in the arrivals hall there is a presumption that they will be allowed to be present, in the circumstances and subject to the conditions which page 15 describes. The structure of the relevant section identifies, first, those who are qualified to give appropriate advice before directing the Border Force officer to refuse attendance to others. In other words the starting point, as I read the document, is to allow those who are qualified to attend the interview. The proposed representative in this case was a solicitor who therefore automatically fell within the category of those qualified to give relevant advice and not within the group of persons who should prima facie be refused permission to attend.

15. The sentence "There may be occasions when it is essential to conduct an interview in private and it is within your discretion to do this" is a powerful indication that the default position is that the interview is to be conducted in the presence of a suitably qualified third party when their attendance has been requested by the passenger. The discretion referred to in the quoted sentence is a discretion to diverge from the default position, for which I am of the view that there have to be reasons which should be recorded if the passenger does not agree to a private interview.

16. That the guidance also expressly provides for the third party to make observations, to make a statement or amplify the passenger's reasons, or for the officer to invite the third party to take part in the interview, recognises the potential importance to the interview process of the involvement of a third party in making sure that it is a fair process and that the interviewee's rights are properly protected. Those provisions support my view that that the starting point is intended to be an assumption that a suitably qualified third party will be admitted to the interview. In any event, it is

obvious, in the light of this guidance, that there have to be good reasons (which should be recorded) if a suitably qualified third party is not to be admitted.

The Decision

17. The Decision document, which is headed "Notice of Cancellation of Leave to Enter", dated 1 September 2022 reads as follows:

> *"You sought entry to the UK on 30/08/2022 to study at York University and held an entry clearance to that effect.*
>
> *However, you did not satisfy the Border Force Officer with your answers on arrival and spoke almost no English, and were therefore subjected to further examination.*
>
> *Since your arrival, you have failed to consistently comply with the reasonable requests of the Border Force Officer, as was demonstrated by your initial refusal to have your biometrics taken and refusal to answer questions on 30/08/2022. You then failed to give information to another officer on 31/08/2022 when interviewed through the use of a Hindi interpreter. You were given the reasons for needing to question you and were warned then that you must comply, with the consequences being outlined.*
>
> *On 01/09/2022, having had time to consider your position overnight, you again refused to be interviewed by a Border Force Officer. You were given ample opportunities to comply with the interview, and you were again warned of the consequences of not doing so, but you chose not to engage. You have therefore failed without reasonable excuse to comply with the Officer's reasonable request.*
>
> *I therefore refuse you permission to enter the UK under paragraph 9.9.2 of the Immigration rules.*
>
> *I have also therefore made the decision to cancel your visa. As you have no entry clearance you are also refused under paragraph 9.14.1 of the Immigration rules.*
>
> *I therefore refuse you leave to enter the United Kingdom.*
>
> *REMOVAL DIRECTIONS*
>
> *I have given directions for your removal to India by flight:*
>
> *AY1362 to Helsinki at 10:15 on 02/09/2022*
>
> *connecting with AY121 to Delhi at 18:35 on 02/09/2022."*

18. Although the fourth paragraph of the document refers to the claimant having failed to comply with Border Force's requests "without reasonable excuse" it is apparent from

a cursory reading of that document that it does not identify the excuse which it is accepted was put forward by the claimant (ie that he had said that he wanted his solicitor to attend or be involved in the proposed interview), it does not evaluate that excuse nor does it explain why the officer came to the conclusion that it was not a reasonable excuse. Neither does it specifically address as a separate step the factors upon which the officer, having concluded that there was no reasonable excuse, decided to exercise his discretion to cancel the claimant's visa and his permission to enter the UK, although I can infer that it is because of the various findings of lack of cooperation with the officials that the claimant had dealt with since arriving at the border, although there is no evidence from the documents that any other factors were weighed in the balance before the final decision was made. The impression one would have from reading that written notification without any knowledge of the background facts is that no excuse had been put forward by the claimant, whether reasonable or otherwise, and that the decision to cancel his permission to enter resulted from a series of failures to cooperate with the defendant's officers' requests. The notification does not demonstrate any engagement with the excuse which had in fact been put forward. It should also be noted at this point that, as will become apparent from what I say below, the claimant did ultimately comply with all the defendant's other requests, that is other than the request to attend an interview without a solicitor, and had by the time of the Decision already complied with those other requests although, save by use of the word "initial" in respect of the refusal to be fingerprinted mentioned in the third paragraph of the document the Decision letter does not say so.

19. The claimant submitted at the hearing, perhaps with inadvertent judicial encouragement, that by virtue of the defendant's failure to give adequate reasons as to the issue at the centre of the claimant's case, namely whether it was reasonable for the claimant to ask for a solicitor to attend the interview, the claimant's challenge should succeed; that it was a knock-out blow because it showed that the correct process had not been followed in that there was no evaluation of the excuse put forward by the claimant; and that I should hold that there was a failure by the defendant's officers to engage with the proper decision-making process.

20. The defendant, while accepting that the Decision did not deal specifically with the allegedly reasonable excuse, submitted that the court could look at the other contemporaneous material, and the evidence filed for the substantive judicial review hearing, for the reasons which led the defendant's officers to the conclusion to cancel the claimant's permission to enter.

21. The claimant referred me to Inclusion Housing Community Interest Company v Regulator of Social Housing [2020] EWHC 346 (Admin) in which Chamberlain J considered a public law challenge to the decision of a social housing regulator that the claimant in that case, who was a health and social care landlord, did not comply with the relevant financial viability and governance requirements of the regulatory regime. One of the five grounds of challenge was that the defendant regulator had failed to give adequate reasons for its decision. In relation to that ground the issue before Chamberlain J was as to the extent of the duty to give reasons for the decision. The judge referred to the decision of the House of Lords in South Buckinghamshire District Council v Porter [2004] UKHL 33 at [36], a planning case concerning a mobile home, and held that the question whether reasons are adequate is context-

specific. The relevant paragraph is to be found in the speech of Lord Brown of Eaton-under-Heywood at [36]:

> "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. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

22. As to the case before him Chamberlain J held:

> "So far as *ex post facto* reasons are concerned, the authorities draw a distinction between evidence elucidating those originally given and evidence contradicting the reasons originally given or providing wholly new reasons: *Ermakov*, pp. 325-6. Evidence of the former kind may be admissible; evidence of the latter kind is generally not. Furthermore, reasons proffered after the commencement of proceedings must be treated especially carefully, because there is a natural tendency to seek to defend and bolster a decision that is under challenge: *Nash*, [34(e)]. The evidence contained in the regulator's witness statements is certainly not inconsistent with those given in the RJ. I regard it for the most part as elucidatory. In any event, the need for caution that applies when considering *ex post facto* reasons does not apply to the reasons contained in the RED logs or other records of meetings prior to the decision under challenge. They are a contemporaneous record of the regulator's reasons and may, in my judgment, properly be taken into account to the extent that they are not inconsistent with what was said in the RJ."

23. The claimant submitted that the Inclusion case meant that while in principle the court might in certain limited circumstances look to the evidence filed in the case to amplify the reasoning in a decision it could not do so if the evidence contradicted those reasons or if the basis of the reasons was not already present in the decision document.

24. In my judgment the evidence filed by the defendant should have set out clearly the process and factors which it relied on in coming to the conclusion expressed in the Decision. It is not enough in this case, given the failure to record whether, and if so how, the decision-maker followed the step by step structured reasoning which I think is required by rule 9.9.2 (see my para 9 above) for the gaps in the reasoning to be filled in by way of submissions.

25. The way in which the Decision is expressed leads me to doubt that the decision-maker directed themselves correctly as to the 9.9.2 test and it seems to me therefore, taking the reasons which were expressed in the Decision (as opposed to those which were not), and in the absence of any better or fuller explanation in the evidence that they erred in law. I will however, turn to the other grounds of challenge.

The factual context

26. On 12 July 2022 the claimant submitted a student visa application which was granted on 27 July. I have not seen a copy of the visa nor have I been told whether, and if so what, conditions were attached to it, other than it was to enable the claimant to study at York University from September 2022.

27. On 30 August 2022 the claimant arrived at approximately 13:35 at Manchester Airport from Delhi via Helsinki on Finnair flight AY1365 and sought entry into the UK as a student in reliance on his visa. During the initial desk interview on that day, at what is known as the primary control point, the immigration officer was not satisfied that the claimant was a genuine student, because the claimant could not provide the address where he would be staying while in the UK nor could he explain how he would be supporting himself financially although the contemporaneous notes indicate that he did not refuse to answer any of the questions which were put to him. The interviewing officer, BFO Younas, recorded the following:

> "Manish stated that he was visiting the UK as a student and presented a student visa vignette [a type of sticker] in his passport. I asked Manish what course he was studying and he stated he was studying a BA in science at York University starting in September 2022. I asked what subject in Science he was studying and he repeated Bachelor's in Science. I prompted him further regarding a specific subject and he stated he was going to study business and accounting. I asked Manish where he would be living during his studies and he stated he would be living in Manchester. I asked Manish how he would get to York from Manchester and he then stated he would live in York during part of the week when he was studying.
>
> …

> I asked Manish if he had an address where he would be residing whilst in the UK and he stated he did not know his address. I asked Manish if he had any available funds to support himself whilst he was in the UK and he stated he did not understand and could not tell me how he was going to support himself whilst in the UK."

28. Because of the view formed by the officer at the Primary Control Point, at 17.47 the claimant was served with a form IS81 ("Notice to a Person Detained at the Border/Required to Submit to Further Examination") explaining that he would be detained pending further examination before he could pass through Immigration Control. By that form the claimant was also notified that his permission to enter the UK had been suspended pending completion of his examination and pending a decision as to whether to cancel his existing permission to enter. It was at that point, therefore, that his initial detention commenced.

29. At 17.55 the claimant was asked further questions about his address, funding and other arrangements which he answered before being placed in what is described as the "holding area" in Terminal 1 of the airport at 17.59 because, I assume, those further answers did not allay the defendant's concerns that the claimant was not seeking to enter as a genuine student.

30. At 20.02 on 30 August the claimant's solicitor, Mr Zubair Awan, emailed the duty officer for the Border Force Team at Manchester Airport saying that his firm had been *"instructed by the above named client, a Tier 4 student with valid visa/leave to enter and who arrived at Manchester Airport today, 30 August 22 from India via Helsinki."* He asked for a letter of authority to be passed to his client to authorise Mr Awan to deal directly with Border Force as the claimant's solicitor. He also requested, as a matter of urgency, copies of various documents, including interview notes and decision notices. Mr Awan requested that his client be released pending conclusion of enquiries and threatened judicial review proceedings if a decision were made to cancel the claimant's visa or permission to enter. Mr Awan enclosed a completed bail application. At the time he had three clients held at Manchester Airport awaiting interview.

31. At 21.05 the claimant appears to have cooperated in a search of his luggage (a suitcase and a backpack), the contents of which are listed in the defendant's contemporaneous internal case notes, although the claimant refused to sign what has been referred to as the baggage search proforma. After the search of his suitcase and backpack the claimant was returned to the holding area at 21.25 before being photographed at 21.33. However, at 22.32 he again refused to allow his fingerprints to be taken saying that he was tired and, it is alleged, pretended to be unwell. He was told that reasonable force would be used to take his prints and that he should think again about complying with this request.

32. At 23.09 he was served with various immigration forms. Border Force Higher Officer Helen Mynett's contemporaneous notes recorded that at 01.15 she told the claimant *"that unfortunately we could not allow him to proceed at this moment as he had refused to answer questions and we weren't satisfied he is genuinely here to study.."* adding *" we could resolve this issue by proceeding with the case and trying to establish why the passenger is in the UK"*. I note that no other reason for being in the

UK than studying in the UK is expressed anywhere in the papers which I have seen and it is unclear what the officer meant which she asked herself why the claimant was in the UK. In the same notes the officer recorded her view that the claimant was *"attempting to bypass immigration control and be granted immigration bail by faking illness and being obstructive to officers on the [Primary Control Point]."*

33. At round 01.30 in the morning of 31 August, however, the claimant agreed to have his finger prints taken having again suggested that he was unwell but refused medical assistance. The view of the officers was that he was being deliberately uncooperative. Following this he was moved from Terminal 1 to Terminal 2 where he was handed over to Mitie to be held in their "Care & Custody Suite". The defendant's officers intended to interview him further.

34. Shortly after seven o'clock in the morning on 31 August the claimant was taken to an interview room in Terminal 2 and the following occurred, as appears from the defendant's contemporaneous internal notes:

> "Interview commenced at 07:15 with big word Hindi interpreter…
>
> Mr Kumar stated that he wanted his solicitor present. I advised him that he does not have the right for a solicitor to be present. He then refused to be interviewed. I asked him again was he ready to be interviewed and he said not without his solicitor.
>
> I left the room for 5 minutes, then entered again and asked if he willing (sic) to be interviewed again he responded no
>
> I escorted Mr Kumar back to C&C at 07.30"

35. The claimant's position is that he was willing to be interviewed but only if his solicitor was permitted to attend the interview, which he contends was a reasonable position to take and would not have frustrated the defendant's wish to interview him.

36. At 10.09 Mr Hickery, a Border Force officer, notified Mr Awan that the claimant had provided authority for his solicitors to speak on his behalf and that he was currently in the defendant's holding room at Manchester Airport Terminal 2 awaiting interview.

37. Mr Awan had also been instructed by another passenger who had arrived on the same flight as the claimant, referred to as "Mr S". In Mr S' case Mr Awan was permitted by the defendant's officers to assist his client in two interviews via a three-way conference call while his client and the interviewing officer were at Manchester Airport. Those interviews, which lasted approximately an hour and half an hour respectively, also involved an interpreter for Mr S.

38. At 09.46 on 1 September (the following day) Mr Awan sought an update on the bail applications which he had submitted for three of his clients, including the claimant and Mr S.. At 09.50 he wrote as follows, specifically in connection with the claimant:

> "We refer to the above mater and your attempted interview with our client. **Whilst we confirm that we remain available to be present during any interview, we wish to place it on**

> **record that if you force our client to sit in the interview without his repeated requests for his legal representative being present, we will challenge this by way of judicial review essentially on the grounds that the process is both a) denial of access to justice, and b) procedural fairness."** [Mr Awan's underlining and use of bold in the original email].

Thus the defendant's officers had plain knowledge that the reason why the claimant was unwilling to cooperate with the interview process was because he wished to have his solicitor present and it is surprising that they did not know that Mr Awan had participated in the interviews with Mr S in the way in which he describes.

39. In his witness statement dated 30 January 2022 Senior Officer Grant said that at an interview it was not possible to have anyone other than an interpreter dial in, adding "*It is certainly outwith my knowledge to provide conferencing facilities in these basic interview rooms, and I can say that I have never conducted an interview this way or seen anyone else do so."* At the hearing the claimant submitted that because of the apparent conflict between the evidence of Mr Awan and the evidence of Mr Grant as to the feasibility of allowing Mr Awan to participate in the interview permission ought to be given to cross-examine Mr Grant. However, given that the defendant did not seek to cross-examine Mr Awan's evidence or suggest that it was not credible it seemed to me that there was no need for live oral evidence to be given and I accepted Mr Awan's evidence at face value.

40. On that same morning the defendant's officers attempted to carry out a further interview of the claimant with the assistance of a Hindi interpreter. The defendant alleges that the claimant did not comply with the interview process. Immigration Officer Kelsey Weaver recorded her role in the interview as follows in her witness statement:

> "I began the interview with the use of a Hindi Telephone interpreter and asked if he was ready for the interview to start. Through the (sic) Mr Kumar stated he wanted his solicitor present. I told Mr Kumar that he did not have the right for his solicitor to be present. He then refused to be interview (sic) without his solicitor present. As there was another officer present, I left the interview for a few minutes to give Mr Kumar an opportunity to review his options. I returned after a few minutes and asked again was he ready to be interviewed in which he replied, no. I then escorted Mr Kumar back to the short-term holding facility."

41. Senior Officer Grant then authorised the refusal of entry on the grounds of the claimant's alleged non-compliance and the claimant was served with an IS82 RD No AR refusal notice, along with notification of his removal directions for 10.15 the following day, 2 September 2022. Mr Grant's evidence on the making of the Decision is to be found in paragraphs 4 and 5 of his witness statement dated 26 January 2023 in which he said:

> "5. I understood that Mr Kumar was refusing to answer questions without his solicitor present. There is no right to

> have a solicitor present in Border Force interviews which are generally routine in nature and they are no akin to police interviews under the Police and Criminal Evidence Act. Furthermore it is not possible to accommodate visitors such as solicitors in the Security Restricted Area of an International Airport as there are Civil Aviation Rules governing access. In Mr Kumar's case, where he spoke no English, we were required to have an interpreter dial-in to translate which took up the only telephone line.
>
> 6. On 1 September, given the potential for refusal on non-compliance alone being a likely outcome, I decided to speak with Mr Kumar myself and try to persuade him to answer the Immigration Officers enquiries. I told Mr Kumar, via a Hindi interpreter, the exact reasons why we wanted to speak to him about his circumstances, assured him that he should not be overly worried and that there are a number of outcomes dependant on his answers. I advised him that he did not have a right to a solicitor attendance at the interview, but that he could have free access before and afterwards. I advised him that it was not likely to be in his best interests to simply refuse to answer any questions whatsoever and that if that was the case, the immigration rules allowed for him to be refused. Mr Kumar was almost completely silent, bar some words to indicate he had no intention of complying. That being said, and with him having been given sufficient opportunity to comply, the interview was terminated and I authorised cancellation of his leave to enter."

42. I should record the submission that the claimant does not accept that he does not speak English but nothing of significance turns on that conflict so far as this application is concerned and I do not need to resolve it in order to determine the application for judicial review.

43. The defendant notified the claimant's solicitors of the cancellation of his visa which prompted a request by email from Mr Awan timed at 17.05 for a copy of the Decision and deferral of the removal directions failing which an application would be made to this court. A copy of the Decision was provided to the claimant's solicitors, with whom the defendant's Border Force officer was on first name terms, at 17.45.

44. Out of hours on 1 September the claimant lodged an application for urgent consideration and interim relief with the Administrative Court indicating that an application for Judicial Review proceedings would be issued. As a result the defendant agreed, at a telephone hearing before Williams J, that the removal directions for the following day would be deferred for a period of 48 hours. Williams J granted interim relief preventing the removal of the Claimant if the proposed proceedings for Judicial Review were issued by 4pm on 5 September 2022. On 5 September 2022 the Claim, which is now before, me was issued and the claimant was not removed.

45. On 6 September the Claimant made a bail application to the First Tier Tribunal (Immigration and Asylum Chamber) which was rejected on 8 September 2022 by Immigration Judge Komorowski on the grounds that the claimant's failure to co-operate with the fingerprinting and interview process and lack of candour led the judge to conclude that there was a high risk of non-compliance with any bail conditions.

46. On 26 October 2022 the claimant claimed asylum, as a consequence of which the defendant reconsidered her decision to continue to detain him and released him on 27 October 2022 on immigration bail.

47. The claimant relies on the following grounds:

(1) Procedural fairness and access to justice by legal assistance

48. The claimant submits that the Decision is unlawful because it is undermined by procedural unfairness and/or by an unlawful interference with the claimant's right of access to justice. It is said that he was not given notice of the proposed grounds for the Decision and was not given an adequate opportunity to respond to those grounds in advance of the Decision being made. Additionally, it was submitted that it was both procedurally unfair and contrary to his right of access to justice not to allow the claimant to have his solicitor present (in person or remotely) during the proposed interview with an immigration officer.

49. The defendant accepted that she was under a duty to act procedurally fairly but she submitted that in the context of basic inquires conducted by Border Force officials at the border the claimant was (1) not entitled to a "minded to" decision and (2) had no right to the presence of a solicitor at the initial interview with Border Force Officials. In support of that latter submission the defendant relies on the decision of Sedley J (as he then was) in R v SSHD ex parte Lawson (Vera) [1994] Imm. A.R. 58 and argues that an applicant in the claimant's position has no right to legal representation but the immigration officer has a discretion as to whether to admit a legal representative to be present, which she accepts should be exercised on proper and relevant grounds (see p.60 of the reported decision).

50. The claimant relied on the decision of the Supreme Court in R (UNISON) v Lord Chancellor [2017] UKSC 51 [at 66 to 71 and 78 to 82] as a statement of the principles and nature and scope of what is described as the constitutional right of access to justice, in that case concerning access to the courts, which it is submitted supports the conclusion the claimant was entitled, in exercise of that right, to legal advice and assistance and to the presence of a solicitor at his interview. It was further submitted that any interference with that right could only be authorised by clear words in primary legislation. Lord Reed gave the leading judgment, with which all of the other Justices agreed, only Lady Hale giving additional reasons in relation to an argument about discrimination which the majority did not rule on. At paragraph 68 of his judgment Lord Reed said:

> "At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which

> makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other."

He continued at paragraphs 78 to 82 as follows:

> "78. Most of the cases so far mentioned were concerned with barriers to the bringing of proceedings. But impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible. More recent authorities make it clear that any hindrance or impediment by the executive requires clear authorisation by Parliament. Examples include *Raymond v Honey* [1983] 1 AC 1, where prison rules requiring a prison governor to delay forwarding a prisoner's application to the courts, until the matter complained of had been the subject of an internal investigation, were held to be ultra vires; and *R v Secretary of State for the Home Department, Ex p Anderson* [1984] QB 778, where rules which prevented a prisoner from obtaining legal advice in connection with proceedings that he wished to undertake, until he had raised his complaint internally, were also held to be ultra vires."
>
> 79. The court's approach in these cases was to ask itself whether the impediment or hindrance in question had been clearly authorised by primary legislation. In *Raymond v Honey,* for example, Lord Wilberforce stated at p 13 that the statutory power relied on (a power to make rules for the management of prisons) was "quite insufficient to authorise hindrance or interference with so basic a right" as the right to have unimpeded access to a court. Lord Bridge of Harwich added at p 14 that "a citizen's right to unimpeded access to the courts can only be taken away by express enactment".
>
> 80. Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question.

This principle was developed in a series of cases concerned with prisoners. The first was *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198, which concerned a prison rule under which letters between a prisoner and a solicitor could be read, and stopped if they were of inordinate length or otherwise objectionable. The rule did not apply where the letter related to proceedings already commenced, but the Court of Appeal accepted that it nevertheless created an impediment to the exercise of the right of access to justice in so far as it applied to prisoners who were seeking legal advice in connection with possible future proceedings. The question was whether the rule was authorised by a statutory power to make rules for the regulation of prisons. That depended on whether an objective need for such a rule, in the interests of the regulation of prisons, could be demonstrated. As Steyn LJ, giving the judgment of the court, stated at p 212:

"The question is whether there is a self-evident and pressing need for an unrestricted power to read letters between a prisoner and a solicitor and a power to stop such letters on the ground of prolixity and objectionability."

The evidence established merely a need to check that the correspondence was bona fide legal correspondence. Steyn LJ concluded:

"By way of summary, we accept that [the statutory provision] by necessary implication authorises some screening of correspondence passing between a prisoner and a solicitor. The authorised intrusion must, however, be the minimum necessary to ensure that the correspondence is in truth bona fide legal correspondence." (p 217)

81. The decision in *Leech* was endorsed and approved by the House of Lords in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, which arose from a prohibition on visits to serving prisoners by journalists seeking to investigate whether the prisoners had, as they claimed, been wrongly convicted, except on terms which precluded the journalists from making professional use of the material obtained during such visits. The House considered whether the Home Secretary's evidence showed a pressing need for a measure which restricted prisoners' attempts to gain access to justice, and found none.

82. A similar approach was adopted in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532, which concerned a policy that prisoners must be absent from their cells when legal correspondence kept there was examined. Lord Bingham of Cornhill, with whose

> speech the other members of the House agreed, summarised the effect of the earlier authorities concerning prisoners, including *Raymond v Honey, Ex p Anderson,* and *Ex p Leech*:
>
> "Among the rights which, in part at least, survive [imprisonment] are three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment." (pp 537-538)
>
> After an examination of the evidence, Lord Bingham concluded that "the policy provides for a degree of intrusion into the privileged legal correspondence of prisoners which is greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners" (para 21). Since that degree of intrusion was not expressly authorised by the relevant statutory provision, it followed that the Secretary of State had no power to lay down the policy."

51. Mr Biggs, for the claimant, submitted that the test to be applied by the court in determining whether access to justice has been unlawfully denied is to be found in paragraph 88 of Lord Reed's judgment:

> "But a situation in which some persons are effectively prevented from having access to justice is not the only situation in which the Fees Order might be regarded as ultra vires. As appears from such cases as *Leech* and *Daly,* even where primary legislation authorises the imposition of an intrusion on the right of access to justice, it is presumed to be subject to an implied limitation. As it was put by Lord Bingham in *Daly,* the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve."

52. The question here is whether that undoubted common law right extends to allowing a solicitor to be present at an interview where a visitor to the UK who, following questioning at the initial point of contact (the primary control point), has been detained for a more formal interview to examine the matters which the Border Force officer found to be of concern at the initial point of contact.

53. I was referred to the following judgments which considered challenges made to immigration related decisions. First to the decision of Sedley J in the Lawson case, concerning the right to have a legal representative present, then to that of Scott Baker J in R v SSHD ex parte Bostanci [1999] Imm AR 411 at 413, concerning the right to have an interpreter present, and finally Silber J in R v The Chief Immigration Officer ex parte Sari (unreported 05 June 2000) again concerning the right to have a legal

representative present. In each of those cases it was held that there was no right to have an interpreter or lawyer present but, first, as I read those cases such a right was not an issue in the proceedings, the issue was the fact specific exercise of the discretion available to the public authority in the particular case. Secondly, they were cases of their time and noone would now suggest, I think, that there was, for example, no right to have an interpreter involved in the process where the applicant does not speak English. Thirdly, this trio of cases predated the decision of the UKSC in Unison and the FB (Afghanistan) decision referred to below and contain no consideration of the principles of access to justice identified by Lord Reed in his judgment in Unison. I do not therefore view those three cases as compelling me to accept the defendant's present submission that there was, in the context of this case, no right for the claimant to have a solicitor present, albeit by telephone, at his interview(s).

54. In R (FB (Afghanistan) v Home Secretary [2020] EWCA Civ 1338 the Court of Appeal considered how the principles set out in the Unison case were to be applied in relation to the Home Secretary's then new policy for removal of individuals who did not have permission to enter the UK, whether the scheme created by that policy denied access to justice to some of those to whom it applied and whether it was therefore unlawful to that extent. The emphasis in that case was on what the right of access to justice meant in real or practical terms. The factual context was that under the Home Secretary's new policy removal of a certain category of migrants would be possible in such a short space of time that it arguably deprived them of the opportunity of challenging the decision to remove them. The relevant policy was, the Court of Appeal held, to that extent, unlawful. In the leading judgment in the case (concurring reasons being given by Coulson LJ and the Lord Chief Justice) Hickinbottom LJ held at [91 and 92], having cited paragraph [68] from the judgement of Lord Reed JSC in Unison, as follows:

> "91.…Thus, the right to access to justice is an inevitable consequence of the rule of law: as such, it is a fundamental principle in any democratic society which more general rights of procedural fairness are to a large extent designed to support and protect (see, e.g., R (CPRE Kent) v Dover District Council [2017] UKSC 79: [2018] 1 WLR 108 at [54] per Lord Carnwath of Notting Hill JSC, and R (Citizens UK) v Secretary of State for the Home Department [2018] EWCA Civ 1812; [2018] 4 WLR 123 at [83-[84] per Singh LJ)."
>
> 92. The right of access to justice means, of course, not merely theoretical but effective access in the real world (UNISON at [85] and [93]): it has thus been said that "the accessibility of a remedy *in practice* is decisive when assessing its effectiveness" (MSS v Belgium and Greece (European Court of Human Rights ("ECtHR") Application No 30696/09) (2011) 53 EHRR 2 at [318], emphasis added). This means that a person must not only have the right to access the court in the direct sense, but also the right to access legal advice if, without such advice, access to justice would be compromised (R (Daly) v Secretary of State for the Home Department [2001] UKHL

> 26; [2001] 2 AC 532 at [5] per Lord Bingham of Cornhill; and MSS at [319]). For these rights to be effective, as the common law requires them to be, an individual must be allowed sufficient time to take and act on legal advice."

55. In paragraph 98 Hickinbottom LJ held, reflecting what had been said by Lord Reed in Unison, that the common law right to access to justice may be restricted but only by Parliament and then only by clear authorisation in the form of express statutory provision or necessary implication.

56. More recently in R (Kanwal) v SSHD [2022] EWHC 110 (Admin) Freedman J summarised the relevant legal principles of procedural (un)fairness as follows [at 48]:

> "**VII Issue (1): procedural unfairness"**
>
> **(a) The law**
>
> 48. The primary dispute is to the application of the law to the facts. The law can be summarised as follows:
>
> (1) the Defendant was under a duty to act procedurally fairly in respect of the decisions challenged in this case: see *R (Mohibullah) v. SSHD (TOEIC – ETS – judicial review principles)* [2016] UKUT 561 (IAC) at (78) (general duty on Secretary of State to act procedurally fairly in immigration cases); and
>
> (2) The question of whether there has been procedural fairness or not is an objective question for the Court to decide for itself. The question is not whether the decision-maker has acted reasonably, still less whether there was some fault on the part of the public authority concerned: see *R (Balajigari) and Ors. V SSHD* [2019] EWCA Civ 673, [2019] 1 WLR 4647 *("Balajigari") at [46] and R (Osborn) v. Parole Board* [2013] UKSC 61, [2014] AC 1115 at [65]).
>
> (3) *"... [3] The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.*
>
> ...
>
> *[5] Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result;*

or after it is taken, with a view to procuring its modification; or both.

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

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

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

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

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

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

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

"[55]*...where the Secretary of State is minded to refuse ILR on the basis of paragraph 322 (5) on the basis of the applicant's dishonesty, or other reprehensible conduct, he is required as a matter of procedural fairness to indicate clearly to the applicant that he has that suspicion; to give the applicant an opportunity to respond, both as regards the conduct itself and as regards any other reasons relied on as regards "undesirability" and the exercise of the second-stage assessment; and then to take that response into account before drawing the conclusion that there has been such conduct.*

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

[60] *...unless the circumstances of a particular case make this impracticable, the ability to make representations only after a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness. The rationale for this proposition lies in the underlying reasons for having*

> *procedural fairness in the first place. It is conducive to better decision-making because it ensures that the decision-maker is fully informed at a point when a decision is still at a formative stage. It also shows respect for the individual whose interests are affected, who will know that they have had the opportunity to influence a decision before it is made. Another rationale is no doubt that, if a decision has already been made, human nature being what it is, the decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come.* [emphasis added]*"*
>
> (8) *R. v. Hackney London Borough Council, ex p Decordova* (1995) 27 HLR 108 at p.113 where Laws J observed: *"... where an authority lock, stock and barrel is minded to disbelieve an account given by an applicant for housing where the circumstances described in the account are critical to the issue whether the authority ought to offer accommodation in a particular area, they are bound to put to the applicant in interview, or by some appropriate means, the maters that concern them. This must now surely be elementary law in relation to the function of decision-makers in relation to subject matter of this kind. It applies in the law of immigration, and generally where public authorities have to make decisions which affect the rights of individual persons. If the authority is minded to make an adverse decision because it does not believe the account given by the applicant, it has to give the applicant an opportunity to deal with it."*
>
> (9) The fairness of the procedure used by the defendant falls to be evaluated at the date of the impugned procedure and decision, not in retrospect. What was unfair then remains unfair now: see *R (Pathan) v. SSHD* [2020] UKSC 41, [2020] 1 WLR 4506 at [131]-[135].

57. In the light of the above authoritative decisions the claimant submits that the failure to notify him of the challenges he was facing and allow his solicitor effectively to participate in the process (including by being present at the interview) prevented his access to justice and was contrary to his common law rights as explained by the Supreme Court and Court of Appeal, given that there is no express statutory restriction on that right.

58. The defendant submits that there is no absolute right, in the present context, to have a solicitor present at interview and that to hold otherwise would be a dangerous precedent with serious resource consequences. Insofar as there may be a right of access to justice in the context of this case it is submitted that the right is satisfied by facilitating contact between the claimant and his solicitor before and after the interview but not during.

59. In my judgment a distinction is to be drawn between the type of short interview conducted at the first point of contact (at the preliminary control point) as an applicant

seeks to enter the UK and a subsequent more searching or in-depth interview away from the pressure of the queue of arriving passengers. This case is concerned with that latter stage. I do not need to consider what if any rights of access to justice and procedural fairness are engaged at the first point of contact.

60. At the first point of contact the officers in this case had already formed the view that there was a need for further investigation and that the claimant should be interviewed in greater depth. Of crucial importance to what followed were, in my view, the facts that, first, the claimant was from that point being detained without his consent, secondly, that his right to enter the UK was suspended, thirdly, he was to be interviewed to ascertain information which would enable a decision-maker to apply a complex set of rules and potentially exercise a discretion to determine whether the claimant should be allowed into the UK in accordance with his pre-existing visa to study at a UK university for the next few years or whether his leave to enter should be cancelled and he be returned to his country of origin, and fourth, there is, as I understand it, no way of appealing or challenging the decision made following interview other than by the route used in this case, namely an application for judicial review. In other words, as Mr Biggs correctly submitted, the claimant was at that point in jeopardy. Which route the decision maker would then take depended in very great part on the information which the claimant would be asked to provide in interview in the absence of an understanding of the complex rules in play and in the absence of legal advice.

61. I agree that this was not a "minded to" situation but it is in my view important that a visitor to the UK in the position of the claimant is made aware of the grounds which were being considered or formulated by the Border Force decision maker(s) as part of their determination as to whether to terminate the visitor's previously granted permission to enter the UK, including alleged non-cooperation or to allow him to continue on his way with his plan to study in the UK.

62. In my judgment the principle of access to justice and procedural fairness required the claimant to be put in a position where (1) he was made aware of the true nature of the challenge which he was facing and of the jeopardy which he faced, (2) was enabled to obtain the involvement of a legal representative to assist him to access his rights, take advice on his position and meet the challenges which he faced and address the jeopardy. It is to be borne in mind in this case that the claimant, aware of the need to protect his rights, had already retained a solicitor to act for him. Facilitating access to justice in those circumstances should not have been too difficult to achieve.

63. The claimant's right of access to justice in this case was engaged, there is no statutory scheme which would enable the defendant to restrict the claimant's access to justice and there is no apparent justification of a denial of that right in this case or at least no reasons other than logistical reasons (which I discount as neither good nor sufficient) have been put forward to justify it.

64. Having regard to paragraph 92 of FB (Afghanistan) it seems to me that the way of meeting the right of access to justice is fact specific and does not mean that in every case an interviewee in the claimant's position is entitled to have a lawyer present but the way of ensuring access has to reflect the situation in which access is needed. Here it seems to me that the claimant's right of access could have been met either by either of two obvious solutions. On the one hand, the defendant's officers could have

provided the claimant and his solicitors with appropriate information prior to interview to enable the solicitors to understand the detail of the challenge which the claimant was facing. Then the claimant should have been afforded an opportunity to be given advice by his solicitors prior to the substantive interview. On the other hand, the defendant's officers could have allowed Mr Awan to be present at the interview, albeit remotely by telephone, as in Mr S's case.

65. Neither of those routes were taken in this case and in my judgment the claimant's right of access to justice was not honoured and the process adopted by the defendant in the circumstances was unfair and fundamentally flawed.

(3) Procedural impropriety and failure to act consistently with the defendant's own policy

66. The claimant submits that insofar as the defendant's officers had a discretion as to whether to permit a solicitor to attend the claimant's interview that discretion was to be exercised on proper and relevant grounds but that on the facts the defendant's evidence shows that there was no lawful consideration of that discretion.

67. The defendant submits that her officers acted in accordance with relevant Home Office policy documents and that the decision not to allow the claimant's solicitor to attend the proposed interview was reasonably open to the defendant's Border Force officers in all the circumstances of the case as was, therefore, the decision to cancel his entry clearance.

68. The apparent reason given by Mr Grant in his evidence for not allowing a solicitor to be present (cited above) was that there was no right to have a solicitor present. The inference to be drawn therefore is that Mr Grant viewed the request for the presence of a solicitor as an unreasonable excuse for not cooperating with the interview process. His evidence does not go on to demonstrate the exercise of any discretion to allow a solicitor to be present.

69. As I have said above, page 15 of the defendant's Interview Policy, dated 19 February 2018, when properly construed gives rise to a presumption or default position that a properly qualified representative such as a solicitor will be permitted to be present at an interview. I accept that there is a discretion to exclude them, including in the specific circumstances identified in the document. However, the difficulty for the defendant in the present case is that the starting point taken by the Border Force officers at Manchester Airport was directly contrary to the policy such that the stage was never reached when consideration was given to the discretion to exclude Mr Awan from the interview. The evidence before me does not support the consideration of any form of discretion, whether to include or exclude him.

70. In her skeleton argument counsel for the defendant sets out in paragraph 38 eight potentially powerful factors which might be relevant in consideration of the discretion to exclude a legal representative and make a decision to cancel the claimant's permission to enter the UK. However, those factors do not appear in the evidence of the decision maker as the basis upon which he acted and do not address the step by step structured decision making required by rule 9.9.2 which I consider in paragraph 9 of this judgment.

71. In those circumstances it seems to me that the defendant cannot justify the exclusion of Mr Awan from the interview(s) nor the process by which the Decision was reached.

(3) Irrationality or Wednesbury unreasonable

72. Essentially the claimant again relies on the defendant's statement that there was no right for a solicitor to be present and a failure to give reasons for refusing the claimant's request to allow his solicitor to be present at his interview (other than the statement of an absence of entitlement) and why this did not amount to a reasonable excuse for not complying with a requirement. It is submitted that this indicates a failure to consider the request and a failure to consider whether to exercise the discretion under rule 9.9.2. It was submitted that no reasonable decision-maker would use rule 9.9.2 in those circumstances. Heavy reliance is placed on the absence of reasons in the Decision in respect of the various steps that the rule requires the decision-maker to take before reaching a conclusion.

73. The defendant repeats her earlier submissions and says that the Decision was not Wednesbury unreasonable in the context.

74. There is considerable overlap between this ground of challenge and the earlier grounds and it seems to me that the argument is effectively subsumed in the earlier arguments. There is therefore, in my judgment, no need to rule on this ground separately.

(4) Unlawful detention

75. The short point made by the claimant is that if any of his grounds for challenging the Decision are found to be good grounds then he was unlawfully detained. Alternatively it was unlawful by virtue of the principles in R v Governor of Durham Prison, Ex parte Hardial Singh [1984] 1 WLR 704 from the point at which the present Claim was issued or at some later date.

76. The defendant simply invites me to transfer this issue to the county court

77. Given that I have come to the conclusion that the Decision was unlawful it follows that the claimant was unlawfully detained from at least the point when the Decision was made and the question as to the appropriate remedy in that respect ought to be transferred to the county court.

Conclusion

78. For all the above reasons I have come to the conclusion that the Decision was unlawful. I agreed with counsel that the precise form of relief would be the subject of further argument when the judgment is handed down unless in the interim they agree an order dealing with the consequences of this judgment.

Post script

Since circulating this judgment in draft counsel have agreed a form of order to reflect my decision, which I have approved.