Neutral Citation Number: [2014] EWHC 652 (Admin)

Case No: CO/13422/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2014

Before :

HHJ COE QC
SITTING AS A JUDGE OF THE HIGH COURT

Between :

The Queen (on the application of Neeraj Kumar)	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

Miss J Smeaton (instructed by **Charles Simmons Solicitors**) for the **Claimant**
Mr R Kohli (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 4 March 2014

Approved Judgment

HHJ Coe QC :

Introduction

1. This is an application by the Claimant for judicial review of the Defendant's decision to remove him from the UK by exercise of her power under s.10 Immigration and Asylum Act 1999.

Chronology

2. The Claimant is an Indian national born on 16th February 1978 who entered the UK on 7th December 2011 with entry clearance as a domestic worker.

3. On 14th February 2012 he was granted further leave to remain as a domestic worker valid until 14th February 2013.

4. In July 2012 the Claimant began working for Rajesh Chohan as a domestic worker in his private household.

5. On 13 October 2012 immigration officers went to the Pakwaan restaurant in Ilford run by Mr Chohan. The Claimant was standing behind the bar at the restaurant wearing a name badge. It is the Defendant's case that he was wearing a uniform and working. The Claimant was questioned. It is the Defendant's case that he admitted working in the restaurant.

6. The Claimant was served with an IS.151A notice stating that he had admitted under caution + 2 interview working as a waiter and that he had breached the terms of his visa. He was further served with an IS.151A part 2 notice informing him of the decision to remove him from the UK under s.10 of the Immigration and Asylum Act 1999. That decision carried an out-of-country right of appeal.

7. On 16th October 2012 removal directions were served on the Claimant and removal to India was due to take place on 19th October 2012. On 17th October the Claimant made Article 8 submissions which were refused and certified under section 94(2) of the Nationality, Immigration and Asylum Act 2002 on 18 October 2012 (Notice IS.151B). That decision also carried an out-of-country right of appeal.

8. On 11th December 2012 removal directions were re-set for 14th December 2012. On 13th December 2012 the Claimant applied for permission to judicially review the decision to remove him and the decision to certify his claim as clearly unfounded.

9. On 19th April 2013 permission was refused on the papers by Supperstone J. On 12th July 2013 before HHJ Walden-Smith the application was adjourned and permission was given to the Claimant to re-amend his grounds.

10. On 3 October 2013 Michael Fordham QC granted the Claimant permission at an oral renewal hearing. The Claimant contended at that hearing that the Defendant had acted unlawfully, unreasonably and/or irrationally in:-

    a) failing to follow its own guidance regarding the need for firm and recent evidence of working in breach, properly recorded, before making a decision to remove under s.10 and thereby failing properly to

consider whether removal under s.10 was proportionate or whether curtailment of the Claimant's leave or no action at all would have been more proportionate; and

b) making a decision to certify the Claimant's human rights claim without due regard to the authorities on certification, high threshold or guidance.

11. It is not clear on the face of the order but permission was only given for judicial review in respect of the first ground namely, "the linked points of adherence/non-adherence to the guidelines and the unlawfulness of the choice between s.10 and curtailment". The learned Judge considered the decision to certify was unassailable.

12. Thus the matter came before me on 4 March this year. It was listed for two days but in fact took half a day to hear. In respect of the hearing I should note two matters. Firstly it seems that the Claimant had at least initially intended that oral evidence should be heard. No application had been made in this regard nor were any directions given. In the event the parties agreed to proceed without oral evidence although the bundle contains some statements which were referred to. In proceeding in this way the Claimant indicated that he did not concede, in the circumstances of this case, that the court should automatically resolve any evidential dispute in the Defendant's favour. Secondly having indicated that he would need an interpreter to enable him to give his oral evidence the Claimant after being fully advised, I was told, agreed to proceed in the absence of an interpreter on the basis that he would be able to follow the proceedings sufficiently well and because he wished to get on with the hearing rather than wait for an interpreter who would not have been available until the afternoon.

Preliminary issue

13. I was invited to consider the court's jurisdiction as a preliminary issue. The Claimant argued that by granting permission for judicial review Michael Fordham QC had decided the jurisdiction issue in favour of the Claimant so that this claim should proceed by way of judicial review rather than the out-of-country right of appeal. The Defendant argued that the matter had not been resolved and that I should, as a preliminary issue, decline jurisdiction.

14. Although counsel for the Claimant made her submissions on this issue first and exercised her right of reply it makes more logical sense to begin by setting out the Defendant's position. On behalf of the Defendant it was argued that it cannot be right that merely by granting permission the question of an alternative remedy is effectively res judicata. The test when granting permission is whether or not the Claimant's case is properly arguable and does not go beyond that. Granting permission does not mean that the Claimant's argument was accepted. The Defendant contended I should decline jurisdiction because the Claimant's arguments relate to issues of fact, albeit "dressed up" as a procedural argument. Thus if I were to accede to the Claimant's stance any Claimant would only have to raise an allegation of breach of the Defendant's own guidance to bring a claim within the jurisdiction of the Administrative Court and that would subvert the statutory scheme (including the out-of-country right of appeal) provided by ss.82, 92 and 94 of the Nationality, Immigration and Asylum Act 2002.

15. The Defendant placed reliance on two authorities, firstly, R (on the application of Lim) v Secretary of State for the Home Department [2007] EWCA Civ 773 and secondly R (on the application of Zahid) v Secretary of State for the Home Department [2013] EWHC 4290 (Admin). In both cases the Administrative Court declined jurisdiction. In Lim it was on the basis that whilst questions of "precedent fact" fall into a different category, it would not be appropriate for the High Court to determine the question of whether a person had been working in breach of their leave. Questions of precedent fact were identified as being for example, questions of identity or nationality which are not in issue in this case. In Zahid the Court declined jurisdiction because the Claimant had an alternative remedy, namely the out-of-country right of appeal and the case was not exceptional. The Defendant submitted that the key issues to be decided here were issues of pure fact suitable for determination by the statutory appeal process. If it were to be found that the decision to remove was not merely mistaken but unlawful then, as identified in Lim, the Claimant would be brought back at public expense.

16. On behalf of the Claimant it was argued that the jurisdictional issue had been fully ventilated at the permission hearing and that the matter was resolved in favour of judicial review and that I should ignore the existence of the out-of-country right of appeal. It was also argued that reliance on Lim and Zahid is misplaced because neither case involved allegations of procedural impropriety. The Claimant relies on a catalogue of failures on the part of the Defendant to follow her own guidance. Whilst those contentions or at least some of them may depend on findings of fact, if those failures are established they amount to an abuse of power and the Administrative Court has jurisdiction.

17. I gave a ruling on this preliminary point which is to be transcribed. In essence I concluded that the issue had not been resolved at the permission hearing. Michael Fordham QC concluded that if there was a departure from the guidance even if it involved consideration of disputed issues of fact that would principally be a matter for judicial review. He accepted that that analysis was properly arguable. He did not accept that it was right.

18. The case of Lim establishes (paragraph 19) that there are some material facts upon which the application of s.10 depends and which cannot be for an immigration officer, subject only to an out-of-country appeal, to decide (although I accept that only the issues of identity and nationality were referred to).

19. Sedley LJ sets out at paragraph 22 of the judgement that resolution of the conflict between a situation in which either all cases or no cases would fall within the jurisdiction of the High Court is to continue to regard every question arising under s.10 as in principle both appealable and reviewable but to calibrate the use of judicial review, through the exercise of judicial discretion, to the nature of the issue or issues. In the circumstances I ruled that I would hear the substantive claim and then decide whether or not to accept jurisdiction in particular since that decision seemed to me to depend upon a finding as to whether the Claimant was asking me to resolve pure factual issues or issues of procedural impropriety.

The legal framework

20. S.10 of the Immigration and Asylum Act 1999 ("the 1999 Act") provides:

> **"10. Removal of certain persons unlawfully in the United Kingdom.**
>
> (1) A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if—
>
> (a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;
>
> ...
>
> (8) When a person is notified that a decision has been made to remove him in accordance with this section, the notification invalidates any leave to enter or remain in the United Kingdom previously given to him"

S.82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") provides:

> **"82. Right of appeal: general**
>
> (1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.
>
> (2) In this Part "immigration decision" means—
>
> ...
>
> (g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (c. 33) (removal of person unlawfully in United Kingdom),
>
> ...
>
> (4) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part."

Section 84 of the 2002 Act provides:

> **"84. Grounds of appeal**
>
> 1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds—
>
> (a) that the decision is not in accordance with immigration rules;

...

(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;

...

(e) that the decision is otherwise not in accordance with the law;

(f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;

..."

Section 92 of the 2002 Act provides:

"**92. Appeal from within United Kingdom: general**

(1) A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.

(2) This section applies to an appeal against an immigration decision of a kind specified in section 82(2)(c), (d), (e), (f) and (j).

...

(4) This section also applies to an appeal against an immigration decision if the appellant—

(a) has made an asylum claim, or a human rights claim, while in the United Kingdom,

..."

Section 94 of the 2002 Act provides:

"**94. Appeal from within United Kingdom: unfounded human rights or asylum claim**

(1) This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both).

...

(2) A person may not bring an appeal to which this section applies in reliance on section 92(4)(a) if the Secretary of State

certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded.

..."

The Guidance

21. The relevant guidance as to breaches of condition is set out at Chapter 50.6 of the Defendant's Operation Enforcement Manual. It provides:

"Section 10(1)(a) Working in breach.

A person is liable to administrative removal under section 10 if found to be working in breach of a restriction or prohibition on employment. The breach must be of sufficient gravity to warrant such action.

There must be firm and recent evidence (within six months) of working in breach including one of the following:

- An admission under caution by the offender of working in breach;
- A statement by the employer implicating the suspect;
- Documentary evidence such as payslips, the offender's details on the pay roll, NI records, tax records, P45;

Sight by the Immigration Officer, or by a police officer who gives a statement to that effect, of the offender working, preferably on two or more separate occasions, or on one occasion over an extended period, or of wearing the employer's uniform. In practice this should generally be backed up by other evidence..."

22. The relevant guidance as to interview is set out at Chapter 37. It provides:

"37.2.5 Evidence gained under a caution + 2 interview

An admission under a caution + 2 interview, on its own, may not be sufficient grounds to justify enforcement action. This is in case the subject decides to apply for a judicial review against the setting of removal directions and disputes what was said. If this were to happen a judge may ask to see the evidence that was obtained to justify the decision making process. As caution + 2 interviews are conducted in a non-PACE environment, although likely to be admissible, they will carry less weight as there will be no independent record of what was said. Supporting evidence i.e. payslips/shift rotas etc in WIB cases should be obtained wherever possible.

37.2.6 Recording the use of a caution + 2

After the initial status interview, if the officer decides to administer a caution + 2 the same questions used in the initial status check should be repeated. This time it would be in the 'Notes Made at Scene' section of the Visit Report Book (VRB), in Q & A format. The individual must also be given the opportunity to sign afterwards. Officers may also conduct the Q & A in their personal notebook (PNB) but they must clearly write that a caution + 2 has been administered.

If a caution + 2 interview concludes with an administrative arrest the individual must be conveyed to the appropriate place of detention and processed accordingly. The "Notes made at Scene" section of the VRB should be swiped through an Automatic Time Recorder (ATR) machine as soon as possible afterwards (where the facility exists) to ensure a consistent timeline...

37.2.7 Other Factors in relation to Caution + 2

...If an individual does not speak any English or only appears to have a limited understanding of English then officers should make every attempt to use language line and to conduct a status check. As a result of the checks an officer may wish to arrest the individual and take them to a police station for an interview under PACE where they can have access to a solicitor and interpreter. A caution + 2 interview would not be appropriate under such circumstances..."

The Claimant's case

23. At paragraph 15 of the Claimant's skeleton argument it is set out that the central issues which the Court must determine are whether the Defendant departed from her guidance and secondly in circumstances where there was no "firm evidence" that the Claimant was working in breach whether the Defendant acted unlawfully and/or unreasonably in seeking to remove him from the UK under s.10 of the 1999 act instead of considering curtailment.

24. In respect of the first issue the Claimant contends that the Defendant failed to follow her own guidance relying on an alleged admission made by the Claimant and sight by an immigration officer of the Claimant allegedly in full uniform and working behind the bar. The Claimant by reference to the guidance says: the evidence is not supported by a statement from the Claimant's employer; there is no documentary evidence or statements from officers from any other occasion when the Claimant has been seen working in breach of his visa; the only documentary evidence originally relied on by the Defendant was an unsigned and undated CID note; the Defendant has produced (late) a witness statement dated 14.10.12 from the arrest officer on the enforcement visit setting out a summary of the caution+2 interview; the Claimant denies saying all that he is alleged to have said on arrest; that officer says that the interview was conducted in Hindi which the Claimant strenuously denies; the contention that the

interview was carried out in Hindi is not documented and was only referred to later and by e-mail rather than formal witness statement; the arrest officer should not have carried out that role as well as the role of interpreter; the interview was not carried out in accordance with the guidance where the Claimant had no or limited English; the Claimant has not signed any record of interview; and the Defendant has not produced a photograph taken at the time.

25. The Claimant contends that there is a requirement that the evidence of the officer(s) who saw the Claimant working should be backed up by other evidence and that the admission evidence cannot be relied upon where the interview was not carried out in accordance with guidance. In short on his behalf it was argued that if the guidance is not followed there is no way of knowing if the decision was a lawful one.

26. I have set out in the foregoing two paragraphs the breaches of guidance relied upon by the Claimant which may involve consideration of factual issues but which are said to be apt for consideration by this Court. However, at the heart of the Claimant's case is a more fundamental factual dispute. He strenuously denies that he was working in the restaurant on 13.10.12 and seeks to rely on evidence in support of that position. In this regard he sets out in his first statement dated 8th July 2013 which is at p.69 in the Bundle beginning at paragraph 11 his account of what he was actually doing. There is a second statement from him dated 26th September 2013 which begins at page 84 when he deals in more detail with his account of the interview. The Claimant has also obtained a witness statement dated 9th July 2013 from his employer, Mr Chohan. That statement deals with the Claimant's presence at the restaurant on the day in question and also exhibits some photographs.

27. Briefly, the Claimant says that he was working as a domestic worker and on the day in question he went with his employer to the restaurant which his employer checked every day. The Claimant was left in the restaurant where there were two employees. The manager was not there and his employer asked him to stay behind the bar and look to look after things because that was where the money was kept. He had been to the restaurant many times before. When the immigration officers came in (about eight of them) they questioned him in English and continued to do so despite the fact that he told them that his English was not very good. When asked he said that he was helping his boss and he said that he was a cleaner although by that he meant his role as a domestic worker which was his main task. He denies saying that he was working for/or employed by the restaurant. He denies wearing the uniform. He was wearing dark trousers and a dark grey shirt. The two staff there were in proper uniforms which had gold colouring on them saying "Pakwaan".

28. He said that when he got to the restaurant one of the members of staff was laughing at him saying that he looked like a manager and that he should wear a suit jacket and put a badge on. He went to where the badges were kept and found a badge with the Claimant's first name and gave it to him. The Claimant put it on. He says that he found out later that the badge belonged to a previous member of staff with the same first name as his and underneath that name there was another name which had been overwritten. The immigration officers searched where he lived above the restaurant and asked him to put the badge on and took a photograph of the Claimant wearing it.

29. The Claimant says that he told them when he was asked that he did housework for his employer and was paid approximately £800 a month. He says that the officer repeatedly

asked him to confirm that he was working in the restaurant but he did not do so. He lived above the restaurant because that was the accommodation that he was offered by his employer. In his second statement he disputes in some fundamental respects the account of the interview denying that some questions were asked and denying that he said that he was working in the restaurant. He says that the questions were asked of him in the flat upstairs and he was not spoken to in Indian. He says that his impression of the officer was that he was of Pakistani background and would speak Urdu if anything other than English. The Claimant says that Punjabi is his first language.

30. Mr Rajesh Chohan's statement (signed Rajesh Kumar) confirms that he took the Claimant to his restaurant on 13th October 2012, that the Claimant was not working there and that he was wearing his own clothes. He exhibits photographs of the uniform worn by the staff in the restaurant. He confirms that there was a badge worn by a previous employee called Neeraj Mistry and there are pictures of the badge and Mr Mistry's payslip.

The Defendant's case

31. The Defendant argues that when considering whether or not the decision was properly made I should only consider the evidence available to the Defendant at the time that the decision was made. The Defendant argues that I should ignore the later witness statements: which are not in any event compliant with the Civil Procedure Rules; have been included without any appropriate directions having been sought; and in respect of which I have not, by agreement, heard oral evidence. The statement from Mr Chohan does not have a statement of truth attached. The photographs exhibited were not available to the Defendant at the time.

32. Thus the Defendant argues that the question for me is whether or not the Defendant irrationally concluded that that the Claimant was working in breach and should be removed based on the position as at the 13 October 2012. Further the Defendant says that even if I do take any account of this later evidence I should note the inconsistencies and in particular I should not afford it any credibility relying as it does on the "spectacular coincidence" that the Claimant due to the series of circumstances set out in his account just happened to be standing behind the bar of the restaurant wearing a jacket and a name badge bearing his own name at the very moment that the immigration officers arrived.

33. With regard to the allegations of breach of guidance the Defendant says that there was no breach of policy guidance sufficient to render the decision unlawful. There was "firm and recent evidence" of the Claimant working in breach. By reference to Chapter 50.6 the Defendant had evidence of an admission under caution by the offender and sight by the immigration officer of the offender working and wearing the employer's uniform. The evidence was clearly recent. The evidence was firm because there were two examples, the admission and the sighting. The guidance only refers to the need for one although it does say that the sighting should generally be backed up by other evidence. In this case it was backed up by the admission.

34. The Defendant points out that the Claimant's allegation that the interview was carried out in the language he did not fully understand was not made within the original representations to the Defendant (17 October 2012) nor is it made in the original grounds of challenge. It should therefore be rather regarded with circumspection. The

complete record of the interview shows that there was a coherent exchange and this is a contemporaneous document made on 14 October 2012. The immigration officer Mr Ahmad has confirmed by e-mail dated 15.7.13 that the interview was conducted in Hindi and that he is a qualified interpreter at the Home Office. This is not a signed statement, but the Defendant contends that even if the court is not satisfied that the interview was conducted in Hindi contemporaneous questions and answers make clear that there was understanding between interviewer and interviewee.

35. In any event the observation by an immigration officer, it is submitted, of the individual working in breach and in uniform is sufficient to satisfy the guidance and no further evidence is necessary. In this case the officer's observations were attached to the summary grounds of defence. The Claimant was standing behind the bar in full uniform with a name badge and in the restaurant during its hours of operation.

36. The Defendant submits that the immigration officer conducted a "caution+2" interview with the Claimant. The Claimant was cautioned. He was told that he was not under arrest and was free to leave at any time. The interviewer was a Home Office trained interpreter speaking a language which the Claimant understood. Thus the guidance (requiring an interpreter) was inapplicable in circumstances which are identical to those in which an English speaking officer was interviewing an English speaking interviewee. Again the Defendant relies upon the perfectly coherent nature of the interview.

37. In light of the evidence available to her at the time there was no need it is submitted for the Defendant to obtain any further evidence in the form of payslips, shift rotas or the like. The guidance does not require it and the evidence was sufficiently firm and recent.

Jurisdiction

38. Having set out to the facts and arguments for both sides in respect of the first issue I should deal initially with the question of jurisdiction. It seems to me that Michael Fordham QC correctly identified that if the Claimant establishes that there was a departure from the guidance, even if that involved consideration of disputed issues of fact, that would be a matter principally for judicial review. Further an objective view has to be taken of the Defendant's compliance with the criteria and that, too, is a matter for this court.

39. In the circumstances I find that the court has jurisdiction and should accept jurisdiction to deal with the matters of alleged non-compliance that are set out in paragraphs 24 and 25 above. This does not involve the court in re-making the decision. It involves the court considering the process by which the decision was taken and deciding whether or not there were breaches of the guidance and whether or not those breaches caused the decision to be unlawful, unreasonable or irrational. In this respect therefore the decisions in Lim and Zahid are of limited assistance. Lim makes it clear that there are "some material facts upon which the application of s.10 depends and which cannot be for an immigration officer, subject only to an out-of-country right of appeal to decide" and that the court should "continue to regard every question arising under s.10 as in principle both appealable and reviewable but to calibrate the use of judicial review through the exercise of judicial discretion to the nature of the issue or issues". The Claimant has nailed his colours firmly to the mast and does not ask me to consider

whether or not he was working in breach but to consider whether or not the Defendant's decision was made in breach of her own guidance.

Decision on the first issue

40. I accept the Defendant's argument that in considering the decision-making process I should only consider the evidence available to the Defendant at the time that the decision was made. It clearly is the Claimant's case that had the guidance been followed and/or had further enquiries been made the evidence before the Defendant might have been different. However that does not concern me at this stage. I accept that it is not for the Court to determine as a matter of fact whether the Claimant was working in the Pakwaan restaurant on 13.10.12. I am concerned with the basis upon which the decision was made.

41. The Defendant's guidance is just that, guidance. Even if the Claimant establishes that there were breaches of the guidance it will not automatically follow that the decision to issue removal directions was unlawful. It is important to consider the nature and gravity of the breach or breaches and whether or not they were so serious as to make the decision unlawful.

42. Chapter 50.6 as set out above identifies that the Defendant must have firm and recent evidence of working in breach including one of the four items set out therein. It is not challenged by the Claimant that he was standing behind the bar at the restaurant during its operating hours wearing a name badge. He was seen by immigration officers. The contemporaneous note confirms that and also says that he was in full uniform. The Claimant does dispute that he was wearing uniform but acknowledges that he was wearing a dark shirt and trousers and a suit jacket. Whilst the guidance says that this should "generally be backed up by other evidence" that cannot and does not in my view amount to a requirement. This sight by the immigration officer was sufficient to comply with Chapter 50.6. There was no breach of the guidance. I should add that it seems to me to be entirely reasonable to conclude that the Claimant was in uniform given that he was wearing the clothes described and a name badge. As I have said I reach my conclusions on the basis of the evidence available to the Defendant at the time and not upon the later evidence. In any event the Claimant's explanation is that albeit at the instigation of another member of staff he put on the jacket and the name badge in order to look as if he were a member of staff.

43. If I am wrong that there was no requirement for any other evidence then I find the Defendant did have other evidence, namely the Claimant's admission. In so far as is necessary for me to do so I find that that admission was in fact made. It is recorded in the CID (casework integrated database) document which merges together the information which has been obtained. It summarises the notes of the interview set out in the witness statement of Mr Ahmad. I accept the notes as accurate. I accept that the interview was carried out in Hindi. It seems to me that in reaching decisions about the factual disputes in relation to the interview I should follow the usual procedure in judicial review cases where there has been no oral evidence and resolve such factual disputes in favour of the Defendant (R (on the application of Al Sweady) v Secretary of State for the Home Office [2009] EWHC 2387.

44. If I am wrong about that and I should make some finding of fact having considered the evidence then I accept that the notes are accurate, that the admission was made and that

the interview was conducted in Hindi. As to the latter point it seems to me incredible that if the Claimant's case all along was that he did not fully understand what he was being asked on such an important topic, the subject of this claim, that he would not have mentioned earlier that the interview was conducted in English and that he did not understand. The Claimant says that the note in the CID form is nonsensical where it refers to him working three days as a waiter and seven days a week as a cleaner. However the statement with the question and answer format says that in answer to a question the Claimant said "three days a week I help in the restaurant and I clean the restaurant every day". The summary reflects that answer and is not nonsensical. The summary and the contemporaneous question-and-answer record refer to the owner of the restaurant as Mr Rajesh Kumar. That is the name at the end of the statement identified as being the witness statement of the restaurant owner Rajesh Chohan. This suggests to me that the record of interview is accurate given the unlikelihood of what would otherwise be pure fluke.

45. Even if I am wrong to conclude on the basis of the e-mail that the interview was conducted in Hindi I find on the basis of the interview record and the summary that the interview was conducted in a language which the Claimant understood sufficiently. The question and answers are coherent.

46. It is not challenged by the Defendant, and I accept that the Claimant was not given an opportunity to sign the record of interview. It is also right that the documents do not say anywhere on their face that the interview was conducted in Hindi. Neither do they say that it was conducted in English. It is right that chapter 37.2.7 says that where an individual does not speak any English or only appears to have a limited understanding of English officers "should make every attempt to use language line and conduct a status check. As a result of the checks an officer may wish to arrest the individual and take them to a police station for an interview under PACE where they can have access to a solicitor and interpreter. A caution +2 interview would not be appropriate under such circumstances".

47. It does not seem to me that it was necessary where the interviewing officer spoke a language which the Claimant fully understood for this guidance to be followed. The wording of this section does not in any event indicate that it is a requirement. As I have found, the statement of the interviewing officer does set out the interview in the question and answer format referred to in the guidance.

48. In conclusion therefore I find that there was no breach of the guidance or none that would be so serious as to render the decision unlawful, irrational or unreasonable. There is an appropriate record of the interview. It was properly conducted. The Claimant was appropriately cautioned. He had an opportunity to give his answers. The questions and answers are coherent. The lack of opportunity to sign the record and the fact that the record does not refer to the language in which the interview was conducted do not amount in the circumstances to a breach of the guidance and even if they do, do not amount, taken with the rest of the evidence, to a breach or breaches of a sufficiently serious nature to undermine the decision.

49. In any event even if the evidence of the admission were to be excluded as I have found the evidence of the sighting of the Claimant would be sufficient to found the decision and in the circumstances of this case would satisfy the test of firm and recent evidence.

50. In the circumstances I find the first issue against the Claimant.

Decision on the second issue

51. When he gave the Claimant permission Michael Fordham QC said that it could be convincingly argued that Chapter 50.6 polices the line between section 10 and curtailment and that the Claimant had an arguable case that if the section 10 decision departed from those important criteria (Chapter 50.6) then it would be unlawful to exercise s.10 and the Defendant should instead have considered curtailment. In the skeleton argument submitted on his behalf the Claimant contends that because the Claimant was not interviewed with the assistance of an interpreter, the manager of the restaurant was not interviewed and the restaurant's records were not investigated to check whether the Claimant was recorded as being an employee, the Defendant carried out no or no adequate assessment of the gravity of the alleged breach such as to consider whether removal under s.10 was proportionate. Having found that there was firm evidence that the Claimant was working in breach it follows that I do not find that the Defendant acted unlawfully and/or unreasonably in seeking to remove him from the UK instead of considering curtailment.

52. As set out above Chapter 50.6 requires the breach to be of sufficient gravity to warrant removal. The Claimant in reliance on Mirza Muhammed Fiaz v Secretary of State for the Home Department [2012] UKUT 00057 (IAC) submits that there may be circumstances where it would be unfair to exercise the power of cancellation where the power of curtailment is more appropriate to the circumstances at the relevant time. However, this depends upon the Claimant's argument that it has not been clearly established that there was "a total collapse of the purpose for which the leave had been given". The Claimant's argument was that I should consider the question of whether the evidence of breach stood up to scrutiny sufficiently to justify the drastic option of removal.

53. The Defendant points out that on the basis of the decision which I have found to have been properly reached there was a total collapse of the purpose for which leave had been granted. The Claimant was not a victim of a change in circumstances, but was deliberately flouting the conditions of his leave. These factors are sufficient to justify a cancellation of leave rather than curtailment.

54. There can be no doubt that the breach is of sufficient gravity in this case. Although "venial" the significantly lesser breach was considered to be sufficient in Lim. It is clear that working outside the scope of leave is a very serious matter and the threshold for removal is reached. The Defendant here has not been conspicuously unfair. There are no additional special or exceptional factors (see Lim at paragraph 24) relied on by the Claimant other than the breach of guidance which issue I have resolved. The Claimant was properly found to have been working at the restaurant in breach of the terms of his visa which allowed him to work as a domestic worker only.

Conclusion

55. The Claimant's claim for judicial review is refused. He has an out-of-country right of appeal which is an effective remedy and which as per Sedley LJ in Lim "for better or worse" is the prescribed remedy.