

Case Law Update – April 2018

Deportation involving EU nationals

EEA nationals who have resided in the host Member State for more than ten years enjoy the most enhanced level of protection against expulsion: they can be removed only if there are *imperative* grounds of public security involved.

In [B and Franco Vomero](#) [2018] EUECJ C-316/16 & C-424/16) the CJEU gave guidance on this type of protection. They ruled that it would only be enjoyed by those EEA nationals who have obtained permanent residence. This means those who have actively exercised Treaty Rights for five years, for example by working, not merely those who have resided in the UK for a decade.

Most of those facing expulsion having resided in the UK for a long time will do so because of serious criminal offending. And of course, that is likely to have involved a hefty prison sentence. So the question arises as to whether that period of imprisonment has broken their continuity of residence in the UK. The CJEU says this will depend on the facts of the case: the strength of their pre-imprisonment family and other ties here, the circumstances surrounding the offence, and the person's conduct during their sentence.

In [SA](#) [2018] ScotCS CSIH_28 the Court of Session (Inner House) looked at a case where the First-tier Tribunal had found that a recent vandalism conviction, taken with some more serious offending, justified the expulsion of an EEA national on the grounds that they presented "a genuine, present and sufficiently serious threat" to "one of the fundamental interests of society". The Court disagreed, finding that the offence of causing property damage did not suggest any propensity to commit violence against a person. Indeed, it was irrational to equate a recent vandalism conviction with more serious historic offences committed abroad.

Non-EU Deportation

One of the grounds on which a foreign national offender can be made liable to some of the harsher presumptions in the Immigration Rules which limit the circumstances in which their expulsion will normally be found proportionate is where their offending history is such that they can be said to be a "persistent offender who shows a particular disregard for the law." In [SC \(Zimbabwe\)](#) [2018] EWCA Civ 929 the Court of Appeal approved the Upper Tribunal in [Chege](#) which had found that this definition required a fact-sensitive evaluation of the person's offending history, and that the test required something more than mere repeat offending. Nevertheless, the status was not necessarily a permanent one and could be lost via a significant period of non-offending.

Judges must give great weight to the public interest in deporting foreign criminals in deportation proceedings. In [DW \(Jamaica\)](#) [2018] EWCA Civ 797 the Court of Appeal looks at the various dimensions of the public interest. These are important, because Tribunal judges need to distinctly evaluate each dimension.

The relevance of reoffending and deterrence is always recognised as important. But following [Hesham Ali](#), the role of another aspect, "*revulsion*", was widely thought to have been discredited. But in [DW](#) the Court seems to think it lives on, notwithstanding the criticisms made in the Supreme Court, because those criticisms were not clearly part of the majority judgments. We have probably not heard the last of this issue. For now, Tribunal judges should be aware of the possible need to address "revulsion" – though the notion it implies may be better addressed as the danger of the public having a "*lack of confidence in the immigration system*" if the criminal avoids deportation.

In [Barry](#) [2018] EWCA Civ 790 the Court of Appeal looked at a deportation appeal which had been brought under the pre-2014 amendments to the deportation process. So this was a case where the section 117C presumptions were not in force. The Court noted that under this earlier regime, when the public interest was balanced against the private rights in play, neither side of the balancing exercise was to receive "primacy". When the public interest was considered, the strong public interest in deporting foreign criminals was of course relevant: but it was not a paramount consideration.

This is an important point to consider where appeals with a pre-28 July 2014 deportation decision are progressing through the higher courts. Given the slow rate of progress of deportation appeals generally, and their potential to be litigated via onwards appeals, practitioners may still come across such appeals.

In [Yussuf](#) [2018] UKUT 117 (IAC) the UT looked at the situation of a Somali refugee who had been convicted and sentenced to two years' imprisonment following an incident of wounding with a knife. The Home Office decided to revoke his indefinite leave to remain, given he was a person liable to deportation who could not be deported for legal reasons (ie the risks of serious harm he would face in Somalia). The Secretary of State had not specifically made any decision by which it deemed his deportation to be conducive to the public good, and so he argued that he was not "liable to deportation" within the meaning of section 76 of the 2002 Act.

The Upper Tribunal rejected this argument, emphasising that the UK Borders Act 2007 now deemed the deportation of foreign criminals to be conducive to the public good. This represented a general statement at Parliamentary level: there was no requirement for a case specific statement as well.

Private and family life claims

In [Parveen](#) [2018] EWCA Civ 932 the Court of Appeal looked at the test within the Rules for private life. Subject to certain exceptions for 20 years residence, young adults who have lived half their life in the UK, and children, there is a rather high hurdle to surmount: an applicant has to show that they face "very significant obstacles to integration".

The Court emphasised that there was a heavy burden on an applicant under this route. One could not simply hope to get anywhere by asserting one had lost touch with family members.

Applicants needed to show that how it was that they had lost all connections abroad, via a close account of the life they originally had in their country of origin and precisely what family and friends they originally had there. It would then be necessary to explain how it was they had lost touch with all such links, having regard to the likelihood that modern means of communication would be available to stay in contact with one's past circle of acquaintance.

In [AJ \(Nigeria\)](#) [2018] UKUT 115 (IAC) the Upper Tribunal looked at the present state of the law regarding human rights claims certified under section 94B of the Nationality Immigration and Asylum Act 2002. Those certificates deem there to be no obstacle to the hearing of an appeal with the Appellant abroad: they do not, of course, state that the appeals are unarguable. The Upper Tribunal identify four questions which the First-tier Tribunal should look at when confronted with an appeal where the Appellant was abroad.

- (1) Has the appellant's removal pursuant to a section 94B certificate deprived them of the ability to secure legal representation and/or to give instructions and receive advice from United Kingdom lawyers?
- (2) If not, is the appellant's absence from the United Kingdom likely materially to impair the production of expert and other professional evidence which they wish to rely on?
- (3) If not, is it necessary to hear live evidence from the appellant (they suggest that the less facts are disputed, the less will be the need for oral evidence – though it should be recalled that Lord Wilson in [Hesham Ali](#) wrote: "By definition, he has a bad criminal record. One of his contentions will surely have to be that he is a reformed character. To that contention the tribunal will bring a healthy scepticism to bear. He needs to surmount it. I have grave doubts as to whether he can ordinarily do so without giving oral evidence to the tribunal.")
- (4) If so, can such evidence, in all the circumstances, be given in a satisfactory manner by means of video-link?

The Upper Tribunal gives a guide to the direction in which those questions will usually be answered. They emphasise that the First-tier Tribunal should not *lightly* conclude that the hearing will be fair. They note that the burden of proof is on the Home Office, who must accordingly put forward relevant evidence on each of the issues in play. They also give a useful summary of the usual potential obstacles to a hearing's fairness:

- (a) The availability of legal representation
- (b) Whether the Appellant's presence abroad will damage their relationship with the Probation Service, for example because their file will be closed following their departure from the UK?
- (c) The need for oral evidence bearing in mind the availability and adequacy of any video link: this was a fact-specific question, to be determined on the basis of objective evidence.

Points Based System

Under Tier 2 General, organisations sponsoring migrant workers must assign them Certificates of Sponsorship before applications are made to extend their immigration leave. The validity of the CoS is all important. In [Talpada](#) [2018] EWCA Civ 841 the Court of Appeal analyses a case where a Tier 2 Sponsor had attempted to re-use a CoS. The Home Office Guidance (and the Immigration Rules) make it very clear that this will invalidate a CoS.

It was unclear quite what had gone wrong, but it seemed that a Home Office caseworker had failed to mark the CoS in question as previously used. The Sponsor rang the public enquiry line and was told to make a Sponsorship note on the CoS. She was not advised of the absolute bar on re-using CoSs, and thus formed impression that she had received the green light to re-use this one. Nevertheless the application was refused.

The Court found that the Sponsor had not received any unambiguous representation that the Immigration Rules would be waived for her employee. Accordingly she had no legitimate expectation that she could re-use the CoS. What had happened might seem rather harsh, but Sponsors had to be aware of the Rules themselves, and could not complain about unfairness unless they had followed clearly evidenced, and unequivocal, advice from the Home Office that the normal procedures would be waived in their particular case.

Singh LJ waxes lyrical about the nature of unfairness in public law. There are two kinds, procedural and substantive. Procedural unfairness requires the opportunity to make representations on relevant matters before a decision is made. Substantive unfairness is a rarer and developing concept, but it requires a clear case of abuse of power. The mere fact that a statutory scheme, like the PBS, may be complicated and have harsh consequences for the unwary, does not amount to substantive unfairness.

International Protection

Article 14 of the Convention against Torture requires that States who sign it ensure that torture victims obtain redress including an enforceable right to compensation and as full a rehabilitation as is possible. Drawing on that inspiration, the CJEU in [MP](#) [2018] EUECJ C-353/16 finds that where a torture victim still suffering the effects of torture is returning to a country where the national authorities do not meet these obligations and where their health problems would be significantly aggravated, they may have a viable claim for humanitarian protection.

This is an important decision. Generally speaking asylum seekers have to show a present need for international protection, whether their application is for refugee status or humanitarian protection. A person who is no longer in danger of persecution or serious harm against which their government will not protect them does not in general have a viable claim. However, where national authorities fail to meet the international standards relevant to their care on return may be able to sustain a humanitarian protection claim. This possibility exists even though there may be no threat of further torture.

Right of Admission in EU law

Generally speaking an EEA national and their family members must be admitted to the UK where they have the appropriate residence documentation. The provisions are found in Regulation 11 of The Immigration (European Economic Area) Regulations 2006.

In the case of [Ryanair](#) [2018] EWCA Civ 899 the Court of Appeal examined the precise terms of the Citizens Directive, on which those Regulations are based, in the context of that well known budget airline's attempt to avoid a fine under the Carriers Liability legislation. The Court found that a

residence card was valid only if it actually bore the words “Residence card of a family member or a Union citizen” (in any language).

The Court noted that the Directive and the EEA Regulations 2016 both permit a person without such documentation to prove their right of admission “by other means” if they lack the relevant documents. Here, the Court of Appeal said it was unrealistic to think that was feasible where the person travelling was making only a very brief visit to the UK. So Ryanair had to pay up.

Judicial review

The making of last minute and unmeritorious applications to prevent removals receives regular attention from the Courts. The latest round of decision making makes it very clear that their patience has reached breaking point. In [Sathivel](#) [2018] EWHC 913 (Admin), the judges emphasise that a practitioner’s paramount duty is to the court, even in the context of fearlessly putting their client’s case.

- (a) Judicial review grounds which are not professionally drafted are unacceptable: there has been a tendency for too long for long templates of irrelevant case law to be cut and pasted into grounds, without paying proper attention to the parameters of judicial review or to the facts of the case at hand;
- (b) Practitioners must be absolutely confident in the truth of the case they are putting. If they have not had the opportunity to verify aspects of their client’s case (in particular, their immigration history and the past decision making by the Home Office and Tribunals), they must make this clear to the court. If this weakens the case, then that must be recognised as the inevitable result of the situation that the client has managed to get themselves into.

In [Talpada](#) [2018] EWCA Civ 841 the Court of Appeal notes that it will be rare for judicial review proceedings to require live oral evidence to be received by the court. In theory, it should be relatively rare for public law challenges to involve factual disputes, and when they arise, they can usually be resolved on the papers.

The judges also emphasised the importance of procedural regularity in public law proceedings, by which they mean orderly pleadings: arguments must be clearly expressed in grounds of appeal, and then the advocacy should closely follow the tramlines of those grounds.

Applications for further witness statement evidence to be admitted should be made only exceptionally in onwards appeals from first instance judicial review decisions.