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Case Law Update – December 2018

General Immigration

English language fraud

In Khan [2018] EWCA Civ 1684, the Court of Appeal gives guidance on the appropriate disposal of the many outstanding judicial review challenges arising from the long-running allegations of fraud in English language (TOEIC) testing made against many migrants. In the earlier decision of Ahsan the Court had identified the need for oral evidence to be given in a case where a person's honesty was fundamentally challenged by the SSHD. It added that the best way to achieve this would be for the SSHD to recognise that these cases, presuming the migrant had sufficiently strong ties in the UK to represent private/family life, amounted to human rights claims. Thus their refusal would generate a right of appeal, which would provide the opportunity to give oral evidence.

In Khan the Court noted that in practice this would require that outstanding TOIEC refusal cases, whatever the date of decision, should receive an updated refusal carrying the right of appeal. The SSHD had now made it clear that his view was that this was the appropriate outcome in most cases.

That left the question of costs. Essentially, the parties were mutually recognising a pragmatic solution in those cases where JR proceedings had already begun. Accordingly it was likely that "no order for costs" would be the appropriate costs order, at least up until the point in proceedings when an applicant had sought a right of appeal on human rights grounds.

Domestic Violence settlement applications

In FA (Sudan) [2018] EWHC 3475 (Admin) the Court looked at the availability of the Domestic Violence Concession which aims to make it easier for destitute applicants to access the Immigration Rules giving settlement to domestic violence victims. The Court emphasised that an applicant had to enter the UK via the appropriate immigration route under the Rules to qualify for such an application. Entering by asserting EU law residence rights as a spouse would not qualify.

Points Based System

Innocent overstaying

In Prathipati [2018] UKUT 427 (IAC) the UT looked the question of fairness in PBS refusals. The applicant had applied for further leave to remain. She believed that she had not overstayed her leave, as she had an appeal against the earlier refusal of an extension of leave as a student making its way from the FTT to the UT. She sought to withdraw that appeal, in order to clear the way for a further application for leave, as the unmarried partner of a Tier 2 Migrant.

However in reality, her application for permission to appeal to the UT against the dismissal of her appeal to the FTT had by this time been refused. But the decision had been sent to the wrong address. Her new solicitors had attempted to alert the FTT of the change of address but had used the wrong fax number. So whilst she had perceived herself as having a window within which to apply for further leave, she had in fact been an overstayer for a significant period, since the FTT permission refusal. Accordingly one reason given for the refusal of her latest application was that she had overstayed for more than 28 days. Her administrative review application having been refused, Ms Prathipati brought judicial review proceedings. The SSHD defended the action, his argument including the fact that no explanation for overstaying had been provided alongside the application. This, of course, was inevitable, as Ms Prathipati was in blissful ignorance of the very problem that required explanation.

The Judge noted that the SSHD had a discretion to grant leave, notwithstanding overstaying, where there were "exceptional circumstances": the examples given in the Guidance could not be an exhaustive list, and it would be a question of fact and degree whether such circumstances were

present in an individual case. The letter seeking to withdraw her appeal, held on the SSHD's file, had to be recognised as *potential* evidence of exceptional circumstances. After all, it showed the applicant was under a misapprehension as to her possession of leave. Her attempts to notify the change of address had not been helped by the "bewildering array" of contact numbers provided by the FTT by which an appellant might update their own contact details.

The Court concluded that was procedurally unfair of the SSHD to fail to alert the applicant to the FTT's decision once the SSHD became aware of it. Whilst it was strictly speaking true to say that Ms Prathipati had not put forward any explanation with her application, the information was within the knowledge of the SSHD. The guidance had to be applied fairly and without rigidity; thus it should not be read to rule out an explanation where the applicant had been ignorant of the need to provide exceptional circumstances.

The Judge also noted that administrative review was a circumscribed remedy that could only look at certain material. Here the decision maker had failed to rectify the errors. It was necessary to go through the administrative review process before bringing judicial review proceedings, in anything other than exceptional circumstances.

Missing documents

In Singh [2018] EWCA Civ 2861 the Court of Appeal examined another case where a PBS applicant's application had been refused because the SSHD considered that essential documents specified by the Immigration Rules were missing. The applicant maintained that those documents had been supplied with the application.

The Court found that the general position in judicial review proceedings was that the evidence of the government respondent would be accepted. The exceptions were where the relevant individuals responsible for contested evidence were summoned for cross examination, or where the documents before the court showed that the facts asserted by the respondent were simply untenable. Here, no such application for cross examination had been made. Further, none of the supporting material that might be expected to accompany a credible allegation that relevant documents had been truly supplied on the application, for example witness statements from those who had helped with its finalisation, had been supplied.

International Protection

Protection from armed conflict – risk of harm in country of origin sufficient

Asylum seekers can obtain international protection either via a successful refugee status claim or a Humanitarian Protection application. The latter situation may arise where individuals are fleeing armed conflict, in which case they can obtain protection via the provisions in Immigration Rule 339C(iv). In Abunar [2018] UKUT 387 (IAC) the UT looked at how this provision might operate where the asylum seeker was facing return to a third country (Egypt) rather than to their country of origin (Syria).

The UT noted that the Qualification Directive provision which Rule 339C(iv) is supposed to reflect states that protection should be granted where the individual would face serious harm in their *country of origin*. However, Rule 339C(iv) references the *country of return*. The UT observed that this represented a failure to correctly transpose the relevant provision. Accordingly the fact that the asylum seeker faced return to a country other than her own did not bar her claim to Humanitarian Protection.

Checking documents in the country of origin

Asylum seekers sometimes produce documents that corroborate their asylum claims. The traditional approach in English law to such material is set out in the decision of Tanveer Ahmed. Essentially the burden of proof is on the person producing such a document to establish its reliability. However, sometimes there will be some feature of the document which demands special attention. In HKK ([2018] UKUT 386 (IAC) the UT noted that where a Judge is satisfied of a document's reliability, the

SSHD may be unable to resist the conclusion that the asylum seeker is at risk, absent conducting his own enquiries into that document.

In PA [2018] UKUT 337 (IAC) the UT looked at the relevant duties on the SSHD when making enquiries in relation to an asylum claim in the asylum seeker's country of origin. Here the Appellant was a citizen of Bangladesh who claimed to have been active in the BNP; the supporting documents were First Information Reports and charge sheets from a police station, said to corroborate his fears of persecution.

The UT drew attention to Article 22(b) of the Procedures Directive which provides that any information sought in the country of origin needed to ensure that the alleged persecutors were not directly informed of the making of any asylum claim such as to jeopardise the asylum seeker's family's safety. So long as this risk did not arise, there was no requirement to obtain the person's consent before making such enquiries.

The SSHD explained that present practice when investigating such documents would be for a FCO official to request to see the relevant register without giving any reference number, so that there would be less chance of the asylum seeker being linked to the enquiry. Previously the reference number had been provided, which as noted by the UT would raise the possibility, if the charge was genuine, of alerting the authorities to the fact of the international protection claim. The UT confined itself to observing that confirmation of the document's authenticity would very significantly strengthen the asylum claim in question.

Rule 35 reports relevant to substantive asylum decision making

Rule 35 reports are obtained in detention centres with a view to determine whether the detainee is vulnerable due to health problems or the possibility of being a torture victim. Such individuals may be unsuitable for detention. In ROO (Nigeria) [2018] EWHC 1295 (Admin), the Court struck down a refusal of an asylum claim which had certified the claim as raised unjustifiably late under section 96 of the NIA 2002. The SSHD had acted unfairly in making a decision on the asylum claim prematurely. Had a Rule 35 report been obtained before the asylum interview, it should have become apparent that this asylum seeker was vulnerable and could not reasonably be expected to raise all relevant factors in her case during a rather confrontational interview process.

Detained Fast Track – Ongoing litigation

TN (Vietnam) [2018] EWCA Civ 2838 is the latest instalment in the protracted litigation regarding the fall-out from the Detained Fast Track (DFT) process, which was identified as unfair some years ago. Claimants argued that the systemic unfairness in that system meant that all appeals determined under the process had necessarily been decided unfairly. And, being unfairly decided, any dismissal of the appeals should be treated as void.

The Court of Appeal rejected this argument: unfairness still had to be demonstrated, by evidence, in individual appeal determinations, before they were treated as void. It would be relevant to bear in mind factors including the importance of a high degree of fairness in asylum proceedings generally, and the significant risk of unfairness under the DFT, balanced against the need for finality in litigation and the speed with which further evidence not previously available was produced.

A pragmatic solution to these cases had been identified, via the use of the "set aside" power found in Rule 32 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. This worked well for appeals brought since the introduction of those Rules. However, the FTT had ruled that it could not set aside decisions made under those Rules' predecessors (ie the 2005 appeals procedure rules). In the associated case of TN (Vietnam) [2018] EWHC 3546 (Admin), the Court agreed with the FTT. There was indeed no such jurisdiction in these cases.

The implication of this decision is that the appropriate route to challenge historic dismissals of appeals under the pre-2014 Rules governing the DFT will be by making "further representations", explaining (and *evidencing*) the unfairness that originally arose and highlighting any further evidence that would have been available had a fair procedure been adopted.

European Union free movement law

EEA appeals and new matters

The right of appeal for people refused EEA residence cards have for many years arisen from the Immigration (European Economic Area) Regulations, presently from the 2016 Regulations. Those Regulations cross-reference various parts of the principal immigration appeals system, ie that found in the NIA 2002, so making those provisions applicable in EEA appeals. One feature of the NIA 2002 system is the notion of "new matters": these can only be raised on appeal with the consent of the SSHD.

Oksuzoglu [2018] UKUT 385 (IAC) looked at this situation in practice in the EEA context. The UT notes that the 2016 Regs apply for all decisions made from 1 February 2017. Here the original residence card application had been wholly based on a *Surinder Singh* argument, ie that the EEA Sponsor (who was a dual British/Cypriot citizen) had worked on an enduring and genuine basis in another EU Member State before returning to the UK. However, on appeal the Appellant sought to raise the argument that the Sponsor was exercising Treaty rights in the UK and that this was another route by which residence could be recognised.

The UT found that this different case represented a "new matter", given it had not been raised in the original application nor considered in the refusal letter. Accordingly it could be raised only with the consent of the Home Office. Such consent had to be given expressly, and could not be deemed simply from the fact that no objection had been made to the alternative case when it was raised in oral submissions.

Retained rights of residence

One important route to obtaining EEA residence is the retained right of residence which is available to divorced third country national spouses of EEA nationals.

Reg 10(5) of the EEA Regs 2016 permits such a person to retain their residence rights where they cease to be a family member on a divorce so long as they were residing in the UK in line with the EEA Regs at the marriage's termination. These provisions require that the marriage be proved to have lasted for three years including one year in the UK, but also that the EEA national remains a "qualified person" (ie exercising Treaty Rights) at the relevant time.

What, however, is the relevant time? It has often been thought that the focus is the date of divorce. However, the SSHD accepted in Baigazieva [2018] EWCA Civ 1088 that the relevant date was in fact that at which divorce proceedings were "initiated". This should be a simple question of fact to be determined on a case by case basis.

Operation Nexus – Legitimate Information Gathering, not Systemic Verification

Operation Nexus is an operational and intelligence partnership for immigration enforcement set up between the Home Office and the Metropolitan Police. It is likely to involve police officers questioning EU nationals who are suspected of criminality; the line of enquiry may extend to the basis of their residence in the UK.

In The Centre for Advice on Individual Rights In Europe [2018] EWCA Civ 2837, the Court of Appeal considered a challenge which maintained that this approach amounted to "systematic verification" of whether EU Treaty rights were truly being exercised, which was thus inconsistent with the general prohibition of such measures in EU law generally. The Court found that essentially the police were involved in legitimate "information gathering" rather than verification, and that working with the immigration service was a legitimate police purpose.

Private and family life

Parental contact with children

In SR [2018] UKUT 334 (IAC) the UT looks at the legal regime relevant to the entitlement of a migrant parent to join or remain with a UK-resident child. These provisions all require a certain degree of contact and involvement with the child.

The UT notes that there are two very different tests specified inside and outside the Rules. Appendix FM addresses *Parents* within their own sub-route; there the question is put as to whether the applicant has an ongoing "*active role in a child's upbringing*". However, once a case is assessed outside the Rules, then section 117B(6) of the NIAA 2002 focusses on whether there is a "*genuine and subsisting parental relationship*."

The test under the Rules does not necessarily require direct contact between the children; as the UT noted in *JA (India)*, to so interpret it would render it the entry clearance route a dead letter. However, it will presumably involve some element of involvement in the decision making. The intention to take on a role in the child's life alone were not enough. Pure "access rights" without more did not necessarily establish sufficiently close involvement as to satisfy the Rule. Relevant considerations would include the age, wishes and feelings of the child, the nature and extent of direct and indirect contact, its duration, whether the parent has "parental responsibility", and the nature and extent of the parent's role in decision making.

On the other hand, the test posed by section 117B(6) outside the Rules focussed on the existence of a "*genuine and subsisting parental relationship*." It could readily be imagined that such a relationship might exist notwithstanding the absence of involvement in a child's upbringing, particularly where contact had only recently resumed on a limited basis. Its essence was having some genuine subsisting relationship of a parental nature. Accordingly the UT accepted that contact limited to three hours a fortnight, during which time the father provided direct parental care to his child, was sufficient.

Reasonableness of a child's relocation abroad – a hypothetical question

The UT in SR also considered another vexed question in Article 8 child cases, of broader application than to the parent route alone. Section 117B(6) states that the public interest does not require the removal of a person with a genuine parental relationship with a child where it would not be reasonable to expect the child to leave the country.

The Home Office Guidance (eg *Family Migration: Appendix FM Section 1.0b*, *Family Life (as a Partner or Parent) and Private Life: 10-year Routes*) suggests that the question of whether it is reasonable to expect the child to leave the UK will not arise where the evidence suggests the child would in fact remain here, for example with their other parent.

However, the UT disagrees: as it puts it, section 117B(6) "addresses the normative and straightforward question – should the child be 'expected to leave' the UK?"

When the public interest balance is considered under the proportionality limb of Article 8 ECHR, some individuals seek to rely on the contribution they have made to the community. In Thakrar [2018] UKUT 336 (IAC) the UT looks at how to approach this kind of activity. President Lane rules that a Judge should only attribute weight to community contributions where they are "very significant" – in practice, this is likely to arise only where the matter is one over which there can be no real disagreement. Judges should exercise restraint in making judgments of this nature.

Appeals to the Upper Tribunal

Permission grants should not be restricted; and may be given on public interest grounds

Applications for permission to appeal to the UT often raise various grounds of appeal. Generally Judges granting permission do so on all the grounds pleaded; it has long been recognised that attempts to shut out particular grounds may be more trouble than they are worth.

The latest consideration of the issue comes in Safi [2018] UKUT 388 (IAC). The UT emphasised that limitations on permission grants were generally undesirable: it would be preferable to identify that a particular ground did not appear to be the best point, rather than barring it altogether. If a Judge truly considered it essential to shut out a particular ground, then that had to be made very clear. This would

require an express statement to such effect in the standard form's section containing the *Decision* itself – not simply via comments made in the *Reasons for the decision*. Only very exceptionally could the UT be expected to interpret a permission decision as restricting the scope of argument absent the limitation appearing in the Decision rather than the Reasons.

The UT also notes the possibility that permission to appeal may be granted even absent an arguably material error of law, where the legal issue arising is of sufficient importance that the UT should have the opportunity to consider the matter. This is because the foundation of the UT's jurisdiction on appeal is Section 11(1) of the Territory Courts and Enforcement Act 2007, which gives a right of appeal "on any point of law arising from a decision".

Judicial review and removal windows

There was a time when the Home Office's intention to remove individuals from the UK was signified by the receipt of removal directions. More recently the concept of the removal window has been introduced, by which an individual is given notice that they are removable within a time-frame, beginning in a few days and then lasting for 3 months. The Home Office policy which governs the system, Chapter 60 of the Enforcement Instructions, has been amended since its introduction: it now recognises the need to ensure the removee has had some opportunity to access legal advice in detention, including via the Legal Aid Agency surgeries there.

The Applicant in FB [2018] UKUT 428 (IAC) argued that a person who faced imminent removal within a removal window had insufficient notice of the precise time of removal. The UT accepted the SSHD's arguments that notice of entering the window was sufficient, once one had had an opportunity to challenge the last adverse decision that had made one susceptible to removal directions. There was no right to anything more than a reasonable opportunity to access a lawyer of average competence. Any further representations that were submitted within the removal window could be addressed and rejected very speedily.

The UT emphasised that all representatives should understand that this meant that a client was liable to removal from the moment they entered a removal window and should act accordingly. The Chapter 60 policy was unclear in one respect, in that it was essential that the terms of any deferral of a removal window were made clear. There was also a need to cater for failed asylum seekers who were able to be returned to a safe part of the country. In such cases it was essential that they be informed of the part of the country to which they were being returned, in the removal window notice (form RED.0001) as well as in the finalised removal directions.