UPPER TRIBUNAL DECISIONS (I)

July 2020 Goldsmith Chambers

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KEEPING UP WITH DEVELOPMENTS

Here you will find the first of three Case Law Updates on recent Upper Tribunal (IAC) determinations. These decisions are grouped by theme and focus on the head note from the decisions.

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ABANDONMENT

1. ***MSU (S.104(4b) notices)* [2019] UKUT 412**

Where s.104(4A) applies to an appeal, neither the First-tier Tribunal nor the Upper Tribunal has any jurisdiction unless and until a notice is given in accordance with s.104(4B).

If such a notice is given, it has the effect of retrospectively causing the appeal to have been pending throughout, and validating any act by either Tribunal that was done without jurisdiction for the reason in (1) above.

As the matter stands at present, there are no 'relevant practice directions' governing the s.104(4B) notice in either Tribunal.

The Upper Tribunal has power to extend time for a s.104(4B) notice. Despite the provisions of Upper Tribunal rule 17A(4), such a power can be derived from s.25 of the Tribunals, Courts and Enforcement Act 2007.

Comment: Notwithstanding that there is a grant of leave, an appellant may wish to pursue a more extensive residence status, which may have been granted as the result of a pending protection claim. As such the appellant should be made aware of that and a. notice must be given in accordance with s104(4B). There are also timelines to comply with, as noted:

> *"17. … in the First-tier Tribunal the notice has to be received within 28 days of the date the grant of leave was sent and in the Upper Tribunal it has to be received within 30 days of the date the grant of leave was sent (unless it was delivered personally or sent electronically, in which case the period is again 28 days)."*

2. ***Aziz (NIAA 2002 s 104(4A): abandonment)* [2020] UKUT 84**

Where a person brings an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and is then given leave to remain in the United Kingdom, the effect of section 104(4A) is to cause the appeal to be treated as abandoned (subject to section 104(4B)), whether or not the appeal was pending on the date of the grant of leave.

Comment*:* The Upper tribunal decided that:

> *"26. … in the present case the respondent has granted the appellant two years' leave to remain in the United Kingdom. That is an event which section 104(4A) says, in terms, will cause the appeal to be treated as abandoned. The fact that the appellant's appeal had ceased to be pending at the point when leave was granted does not mean that, at the moment when the appeal again fell to be treated as pending, following the High Court's quashing decision, section 104(4A) had to be disregarded. On the contrary, at the very moment when the appeal again became pending, it fell to be treated as abandoned."*

There were also no protection grounds, as was the case in *MSU (S.104(4b) notices) Bangladesh* [2019] UKUT 412 (IAC), which would allow an individual to rely on the application of section 104(4B) so that their appeal could continue.

3. Ammari (EEA appeals – abandonment) [2020] UKUT 124

Under the 2000 and 2006 EEA Regulations there was provision for appeals brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002 to be treated as abandoned where an appellant was issued with documentation confirming a right to reside in the United Kingdom under EU law. Following the changes to the 2002 Act brought about by the Immigration Act 2014 that abandonment provision was revoked and never replaced.

There has never been provision under any of the EEA Regulations for an appeal against an EEA decision brought under those Regulations to be treated as abandoned following a grant of leave to remain or the issuance of specified documentation confirming a right to reside in the United Kingdom under EU law.

It follows that a grant of leave to remain following an application under the EU Settlement Scheme does not result in an appeal against an EEA decision brought under the 2016 EEA Regulations being treated as abandoned.

Comment: This effectively enables appellants to continue to claim EU law rights at the tribunal, notwithstanding that the Home Office has granted them *"settled status"* under the EU Settlement Scheme, in direct contrast to the position described above in ***Aziz*** and appeals brought under section 82 of the Nationality, Immigration and Asylum Act 2002. Appellants may wish to pursue their claims as a grant of a permanent residence card, as opposed to a *"settled status"*, can support future applications for citizenships.

Alexis Slatter, of the immigration team, represented the Appellant in these proceedings

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4. *Niaz (NIAA 2002 s. 104: pending appeal)* [2019] UKUT 399

Section 104(2) of the Nationality, Immigration and Asylum Act 2002 contains an exhaustive list of the circumstances in which an appeal under section 82(1) is not finally determined.

Although section 104(2) is describing situations in which an appeal is not to be regarded as finally determined, the corollary is that, where none of the situations described in sub-paragraphs (a) to (c) apply (and the appeal has not lapsed or been withdrawn or abandoned), the appeal in question must be treated as having been finally determined.

An appeal which has ceased to be pending within the meaning of section 104 becomes pending again if the Upper Tribunal's decision refusing permission to appeal from the First-tier Tribunal is quashed on judicial review.

Comment: The Tribunal deemed the decision of the Upper Tribunal refusing permission to appeal, as *"finally determined"*, but resurrected and becomes *"pending"* again upon quashing of the Upper Tribunal's decision.

> *"30. The fact that the refusal of permission to appeal was quashed, as a result of the proceedings in the Court of Appeal after the appellant had been removed, means the appellant's appeal must, from that point, be treated as again pending. There is nothing inherently problematic with the fact that an appeal may, under the statutory scheme, become pending after a period during which, compatibly with that scheme, the appeal has been treated as finally determined."*

The Appellant's enforced removal from the UK, as opposed to voluntary departure, does not render his appeal as having been abandoned by the Appellant.

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APPEALS – PROCEDURE

5. *WA (Role and duties of judge)* [2020] UKUT 127

During the taking of evidence a judge's role is merely supervisory.

If something happens during a hearing that disrupts the normal course of taking evidence it is essential that the judge records what happened and why; who said what; and what decision the judge made and on what basis.

Comment: The Upper tribunal found the decision taken to adjourn, in the circumstances of this case, to be unreasoned and unjustified. It is always advisable to make a full note of reasons and submissions made and to invite tribunals to do the same in their record of proceedings, if any such application is made.

> *"8. In this case we have no basis for saying that the judge acted properly in taking the extraordinary step of granting, possibly of his own motion, an adjournment to allow the claimant to supplement his evidence during the course of a cross-examination challenging his credibility. Without an explanation or justification, his action has to be seen as an error of law in breaching procedural expectations and inducing a sense of unfairness. To that extent, it appears to us that his decision was affected by error of law."*

6. *MH (review; slip rule; church witnesses)* [2020] UKUT 125

Part 4 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 contains a 'toolkit' of powers, the proper use of which saves time and expense and furthers the overriding objective.

A judge of the FtT who is minded to grant permission to appeal on the basis of a seemingly obvious error of law should consider whether, instead, to review the decision under appeal pursuant to rule 35.

A decision which contains a clerical mistake or other accidental slip or omission may be corrected by the FtT under rule 31 (the 'slip rule'). Where a decision concludes by stating an outcome which is clearly at odds with the intention of the judge, the FtT may correct such an error under rule 31, if necessary by invoking rule 36 so as to treat an application for permission to appeal as an application under rule 31. Insofar as Katsonga [2016] UKUT 228 (IAC) held otherwise, it should no longer be followed.

Written and oral evidence given by 'church witnesses' is potentially significant in cases of Christian conversion (see TF & MA v SSHD [2018] CSIH 58). Such evidence is not aptly characterised as expert evidence, nor is it necessarily deserving of particular weight, and the weight to be attached to such evidence is for the judicial fact-finder.

Comment: Rule 31 of the First-tier Tribunal Procedure Rules says that the tribunal *"may at any time correct any clerical mistake or other accidental slip or omission in a decision…".*

This is substantiated by the Court of Appeal in *Devani* [2020] EWCA Civ 612 which confirms the Upper Tribunal's decision in MH that Katsonga was wrongly decided:

> *"23. In my view Katsonga was wrongly decided … it appears from the UT's actual decision that it understood it to mean that the slip rule could not be used in a case where the correction would produce a decision with the opposite effect to that promulgated. With all respect, that is simply wrong. In the case of a simple failure of expression – most obviously a straightforward slip of the pen – the error can and should be corrected even if it alters the outcome."*

Bronwen Jones, of the immigration team, represented the Appellant in these proceedings.

7. *Nimo (appeals: duty of disclosure)* [2020] UKUT 88

In an immigration appeal, the Secretary of State's duty of disclosure is not knowingly to mislead: CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 0059, citing R v SSHD ex parte Kerrouche No 1 [1997] Imm AR 610.

The Upper Tribunal was wrong to hold in Miah (interviewer's comments; disclosure; fairness) [2014] UKUT 515 that, in every appeal involving an alleged marriage of convenience, the interviewer's comments in the Secretary of State's form ICD.4605 must be disclosed to the appellant and the Tribunal. No such general requirement is imposed by the respondent's duty of disclosure or by rule 24 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

Comment: There is a distinction in the application of duty of candour between judicial reviews and statutory appeals.

> *"23. As can be seen from paragraphs 10 and 21 of its decision, the Upper Tribunal in Miah appears to have equated judicial review proceedings with those of a statutory immigration appeal. However, these two types of litigation are distinct. There is no legitimate reason to import into immigration appeals the duty of candour, which exists in judicial review."*

This is because *"The First-tier Tribunal judge was not undertaking a review of the respondent's decision, with all the attendant restrictions that flow the judicial review process."*

Whilst the Upper Tribunal held that there is no obligation in marriage of convenience cases for the Secretary of State to disclose the interviewer's comments, the Tribunal states that it was wrong to hold in *Miah* in relation to *"every appeal"* involving an alleged marriage of convenience. The Tribunal also states that *"there is no justification for a rigid requirement on the respondent to file and serve from ICD.4605 in marriage of convenience cases."*

In most cases the interview records should be sufficient in any event but despite this decision, it does remain arguable that in some circumstances it is appropriate for the comments to be disclosed as well. Such as for instance: *"where there is something in it that could materially assist the appellant, but which is not mentioned in the respondent's decision or in the records of interview. If, for example, the interviewing officer comments that the appellant or spouse appeared to be seriously unwell during the interview, and that this might account for the unsatisfactory answers given, then the respondent is under a duty to disclose." [35]*

Also, in this case, the Upper Tribunal noted that, *"(t)here is nothing to indicate that the appellant, his solicitors or counsel who attended the First-tier Tribunal hearing asked the respondent for a copy of ICD.4605. Nor was anything said about this document at the hearing."* If a copy of ICD.4605 is relevant, this should be requested at the earliest opportunity, preferably in advance of the appeal hearing.

8. *OK (PTA; alternative findings)* [2020] UKUT 44

Permission should not be granted on the grounds as pleaded if there is, quite apart from the grounds, a reason why the appeal would fail.

Comment: The relevant passages by the Upper tribunal are as follows:

> *"14. … We observe that there was no challenge to the Judge's finding in the alternative at [86] that even if the appellant was subject to a prosecution for draft evasion, it is very unlikely that as a single parent of three young children she would be subjected to a custodial sentence. Noting the problem that faced her as to the express failure to challenge the finding of fact at [86] Ms. Panagiotopoulou submitted that there was an 'implicit' challenge to this paragraph of the decision …"*
>
> *"15. … the appellant has not challenged the alternative finding at [86] establishing that she does not possess a well-founded fear of persecution on her return to Ukraine and therefore this appeal must fail.*
>
> *16. We observe that when considering applications for permission to appeal to this Tribunal, judges must give careful consideration to whether there is any, or any meritorious, challenge to an alternative basis for refusing or allowing an appeal as the absence of such challenge will normally be determinative as to the prospect of success."*

9. *R (on the application of MW) v SSHD (Fast track appeal: Devaseelan guidelines)* [2019] UKUT 411

The fact that an appeal was decided pursuant to the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 does not mean that the weight to be attached to the decision necessarily falls to be materially reduced, when applying the Guidelines in Devaseelan v Secretary of State for the Home Department [2002] UKAIT 702.

Under those Guidelines, the first judicial decision is "the starting point" for the subsequent judicial fact-finder. The "starting point" principle is not a legal straitjacket. It permits subsequent judicial fact-finders to depart from the earlier judicial decision on a principled and properly-reasoned basis.

Comment: Despite the fact that the Detained Fast Track appeal system was found to be inherently unfair in *Lord Chancellor v Detention Action* [2015] EWCA Civ 840, this ruling has arguably been eroded and we are back to a position that is somewhat similar to the DFT. Whilst the courts recognised that there is a risk of unfairness in the rules, that did not mean that all Fast Track decisions are necessarily unfair and unlawful. Each case will be determined in accordance with individual facts and circumstances. In our view, the end result does not on the face of it appear procedurally fair and it will be interesting to watch this space for further challenges, especially given the impact on claims for unlawful detention.

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PROCEDURE

10. ***Abbasi (rule 43; para 322(5): accountants' evidence)* [2020] UKUT 27**

(1) The Upper Tribunal can apply rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 of its own motion.

(2) The use of fraud before the Upper Tribunal constitutes an abuse of process such as to amount to a "procedural irregularity" for the purposes of rule 43(2)(d).

(3) In a case involving a decision under paragraph 322(5) of the immigration rules, where an individual relies upon an accountant's letter admitting fault in the submission of incorrect tax returns to Her Majesty's Revenue and Customs, the First-tier or Upper Tribunal is unlikely to place any material weight on that letter if the accountant does not attend the hearing to give evidence, by reference to a Statement of Truth, that explains in detail the circumstances in which the error came to be made; the basis and nature of any compensation; and whether the firm's insurers and/or any relevant regulatory body have been informed. This is particularly so where the letter is clearly perfunctory in nature.

Comment: The appellant was granted indefinite leave to remain, which effectively meant that the appeal proceedings had terminated. Whilst the Upper tribunal no longer had any jurisdiction to apply rule 43(1), the Secretary of State can revoke the grant of indefinite leave to remain in the light of new evidence that has come to light since.

> *"61. The effect of section 104(4A) is to terminate the jurisdiction of the Upper Tribunal. Since the appeal of the appellant against the respondent's decision to refuse his human rights claim*

has been abandoned, the Upper Tribunal cannot invoke rule 43(1) in order to re-make the decision in that appeal.

62. The upshot is that it will be for the respondent to decide, what, if any, investigations to make and, in the light thereof, whether she considers grounds exist for revoking the appellant's indefinite leave to remain in the United Kingdom."

But on a practical note, if evidence arises which is unreliable then the Tribunal can use its power under rule 43, to set aside its own decision.

11. ***R (on the application of Bajracharya) v SSHD (para. 34 – variation – validity)*** **[2019] UKUT 417**

Paragraph 34 [A-F] of the Immigration Rules is to be construed by the application of the ordinary principles of statutory construction, which start from the natural meaning of the words in their context.

Paragraph 34 requires applicants to make an application for leave to remain in accordance with the provisions of 34.

If a second application is submitted when the first application is outstanding, the second application will be treated as a variation of the first application [34BB(2)].

If the variation does not comply with the requirements in paragraph 34 "the variation will be invalid and will not be considered" (paragraph 34E). Invalidity does not extend to the original application.

Comment: From a clear reading of the requirements of the rules, it is *"the variation"* application that is rendered *"invalid" and "will not be considered",* as opposed to the initial application, which remains untainted and, yet to be decided, as found:

> *"It is apparent from the wording of section 3C(4) & (5) Immigration Act that there the statutory regime makes a conceptual distinction between the two… From a plain reading of paragraph 34E I do not see how the distinction can be collapsed in the way Ms Ayres [for the Home Office] sought to do, given the wording of paragraph 34E. If the variation does not comply with the requirements in paragraph 34 "the variation will be invalid and will not be considered" (paragraph 34E). Invalidity does not extend to the original application. (Paragraphs 32 and 33)"*

Mr Bajracharya succeeded in his application for judicial review and his initial application under private and family life remains outstanding to be decided by the Home Office, which left him in the lucky position of having continuing section 3c leave.

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CART Judicial Reviews

12. *Ejiogu (Cart cases)* [2019] UKUT 395

An addition to the grounds of appeal requires the permission of the Upper Tribunal. That is so even if the case has been granted permission following a Cart Judicial Review under CPR 54.7A.

In deciding whether to grant permission to rely upon additional grounds, the Tribunal will follow the same procedure as in relation to any other procedural default, in particular considering the length of the delay (beginning with the date on which time for appeal to the Upper Tribunal expired).

It is becoming increasingly clear that a substantial number of Cart Judicial Review claims are succeeding in circumstances where it is difficult to imagine that the Full Court that decided Cart [2011] UKSC 28 intended that the litigation should be prolonged in this way.

Comment: As is the Cart procedure in England and Wales, in the absence of either party having sought a hearing, the decision of Judge Kekic was quashed by the Order of a Master following the grant of permission in the High Court. As there is no procedural and a substantive hearing following the grant of permission, there are limited safeguards in place.

This case also reminds practitioners of the importance of the *"duty of candour"*.

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