UPPER TRIBUNAL DECISIONS

July 2020 Goldsmith Chambers

CASE CATEGORIES

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KEEPING UP WITH DEVELOPMENTS

Here you will find the second in our series of 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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CHILDREN

1. ***Imran (Section 117C(5); children, unduly harsh)* [2020] UKUT 83**

To bring a case within Exception 2 in s.117C(5) of the Nationality, Immigration and Asylum Act 2002, the 'unduly harsh' test will not be satisfied, in a case where a child has two parents, by either or both of the following, without more: (i) evidence of the particular importance of one parent in the lives of the children; and (ii) evidence of the emotional dependence of the children on that parent and of the emotional harm that would be likely to flow from separation.

Consideration as to what constitutes 'without more' is a fact sensitive assessment.

Comment:

The Upper Tribunal appears to have considered and followed the restrictive approach taken in the two cases of *SSHD v PG (Jamaica)* [2019] EWCA Civ 1213 and *SSHD v KF (Nigeria)* [2019] EWCA Civ 2051:

> *PG (Jamaica),* Holroyde LJ held at [43] that more was required to meet the 'unduly harsh' test. The fact that the evidence showed *"the necessary and expected consequences of deportation",* was insufficient what was required was evidence to show "*harshness going beyond that level*".
>
> In KF (Nigeria),Baker LJ held at [30]
>
> > *"... as interpreted by the Supreme Court, it is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances.'"*

The Upper Tribunal touched upon the extent of evidence required to establish the level of harshness that would meet the test. Whilst the Upper Tribunal accepted in this case that "*there was a firmer evidential basis than in PG for the conclusion that emotional harm was likely to be suffered, the harm in question was not in our view qualitatively different from that in PG. There was, for example, no evidence that it would rise to the level of causing any diagnosable psychiatric injury*."

The Upper Tribunal concluded at [31] that, "*in the light of the approach taken by the Court of Appeal in PG and KF - this is one of the rare cases where, despite the careful reasons given by the judge, it was not rationally open to him to conclude that the 'unduly harsh' test was met. His decision that it was met was, therefore, a material error of law.*"

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2. *SD (British citizen children – entry clearance)* [2020] UKUT 43

British citizenship is a relevant factor when assessing the best interests of the child.

British citizenship includes the opportunities for children to live in the UK, receive free education, have full access to healthcare and welfare provision and participate in the life of their local community as they grow up.

There is no equivalent to s.117B(6) of the Nationality, Immigration and Asylum Act 2002 in any provision of law or policy relating to entry clearance applicants.

In assessing whether refusal to grant a parent entry clearance to join a partner has unjustifiably harsh consequences, the fact that such a parent has a child living with him or her who has British citizenship is a relevant factor. However, the weight to be accorded to such a factor will depend heavily on the particular circumstances and is not necessarily a powerful factor.

When assessing the significance to be attached to a parent's child having British citizenship, it will also be relevant to consider whether that child possesses dual nationality and what rights and benefits attach to that other nationality.

Comment:

The Upper Tribunal justified its decision by relying on the fact that, *"neither the legislation nor the Rules nor any current Home Office policy expressly identifies the fact that an entry clearance applicant has children with British citizenship as a factor of any particular weight. There is no entry clearance equivalent of EX.1 or s.117B(6)… "* [87]

The fact that a child was a British citizen, did not necessarily add more, but remained a relevant factor to be considered. The Upper Tribunal found in respect of the child,

> *"90. Applicants who have a British citizen child will be able to require the respondent to have regard to that fact … An entry clearance applicant with a British citizen child is entitled to have that factor considered as relevant in a way that an applicant with a purely foreign national child is not. However, beyond this we are not permitted to go … the degree of weight to be attached to nationality will always depend on the particular circumstances and the individual facts and that it is not regarded as a necessarily weighty matter."*

In respect of the Sponsor, the Upper Tribunal was "*not satisfied that for him to go and live in Sri Lanka with his family would pose insurmountable obstacles or result in unjustifiably harsh consequences."* At [94], the Tribunal applied the test of "insurmountable obstacles" as applied in *R (on the application of Agyarko) v SSHD* [2017] UKSC, where the Supreme Court had held at [45] that:

> *"leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship."*

The Upper Tribunal recognised the adverse impact upon children in a one-parent family and the significance of having both parents in their lives:

"the unanimous decision of the Supreme Court in MM (Lebanon) observed at [80] that the Minimum Income Requirement (MIR):

> *"the most obvious impact on the children's best interests currently is that they do not have a father in their life. That is not in their best interests. We noted earlier the report to which the Supreme Court made reference in MM (Lebanon) identifying the problems that can be attendant on separated family including adverse behavioural effects on children: see above paragraph 61. Whilst we lack full evidence, we think it highly likely that the children's welfare is diminished by not having their father living with them and that prolonged separation of the family will have negative effects on them. Their best interests are to live with both their parents…"* [99]

Evidence of how the child's welfare had been adversely impacted by the absence of one parent was seen as relevant. Other credible evidence, such as ongoing medical treatment requiring monitoring and stable employment which would mean loss of livelihood were all relevant factors which would go towards supporting the test of serious hardship for a parent to move out of the UK in order to maintain that family life.

Whilst *Zambrano* was applicable to children who live outside the UK, this would not constitute an *"automatic basis"* [128] for parents of British citizen children living abroad to be admitted under EU law. This case and the guidance contained therein is also to be contrasted with the recent UT case of *Imran* (included above) which sets out very different considerations and much higher hurdles, now almost the norm in deportation cases.

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3. *Younas (section 117B (6) (b); Chikwamba; Zambrano)* [2020] UKUT 129

An appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") including section 117B(1), which stipulates that "the maintenance of effective immigration controls is in the public interest". Reliance on Chikwamba v SSHD [2008] UKHL 40 does not obviate the need to do this.

Section 117B(6)(b) of the 2002 Act requires a court or tribunal to assume that the child in question will leave the UK: Secretary of State for the Home Department v AB (Jamaica) & Anor [2019] EWCA Civ 661 and JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC). However, once that assumption has been made, the court or tribunal must move from the hypothetical to the real: paragraph 19 of KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53. The length of time a child is likely to be outside the UK is part of the real world factual circumstances in which a child will find herself and is relevant to deciding, for

the purpose of section 117B(6)(b), whether it would be unreasonable to expect the child to leave the UK.

The assessment of whether a child, as a result of being compelled to leave the territory of the European Union, will be a deprived of his or her genuine enjoyment of the rights conferred by Article 20 TFEU in accordance with Ruiz Zambrano v Office national de l'emploi (Case C-34/09) falls to be assessed by considering the actual facts (including how long a child is likely to be outside the territory of the Union), rather than theoretical possibilities.

Comment:

At first blush, it may be thought that *Chikwamba* no longer has any application, however, we think there will still be a number of cases based on a particular set of factual circumstances that should succeed. The Upper Tribunal in providing guidance highlighted that the likelihood of success in an entry clearance application, did not enable an Appellant to circumvent public interest considerations:

> *"90. … an appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the 2002 Act including section 117B(1), which stipulates that "the maintenance of effective immigration controls is in the public interest". Reliance on Chikwamba does not obviate the need to do this."*

It was further re-iterated:

> "*It is not sufficient, in order to satisfy the requirements of Appendix FM, that a partner of a UK citizen is able to show that there would be "insurmountable obstacles" to the relationship continuing outside the UK. It is also necessary to satisfy certain of the eligibility requirements specified in paragraph E - LTRP, including that the applicant must not be in the UK as a visitor (E-LTRP.2.1). The appellant had leave as a visitor when she submitted the 2016 application and that leave continued - and continues - by operation of section 3C of the Immigration Act 1971."* [72]

Therefore, had the Appellant been an overstayer she may well have succeeded with reference to EX.1

It was also recognised that the *"conduct and immigration history of the child's parent(s), however, is not relevant. See KO at paras. 16 - 18."* The Upper Tribunal took it into consideration the following circumstances:

> *"98. We have found that the appellant (a) entered the UK as a visitor even though her real intention was to remain in the UK with her partner; and (b) remained in the UK despite stating in the 2016 application that she would leave after 6 months. We agree with Mr Lindsay that, in the light of this immigration history, the public interest in the appellant's removal from the UK is strong …"*

In a "*real world*" scenario, the Upper Tribunal set out the following:

"111. … The "real world" context includes consideration of everything relating to the child, both in the UK and country of return, such as whether he or she will be leaving the UK with both or just one parent; how removal will affect his or her education, health, and relationships with family and friends; and the conditions in the country of return.

112. … it is the "real world" circumstances in the country of return may be significantly different if a child will be outside the UK only temporarily rather than indefinitely."

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HUMAN RIGHTS CLAIM AND DISPOSAL

4. *MY (refusal of human rights claim)* [2020] UKUT 89

(1) The Secretary of State's assessment of whether a claim by C constitutes a human rights claim, as defined by section 113 of the Nationality, Immigration and Asylum Act 2002, is not legally determinative. The Secretary of State's Guidance is, however, broadly compatible with what the High Court in R (Alighanbari) v Secretary of State for the Home Department [2013] EWHC 1818 (Admin) has found to be the minimum elements of a human rights claim.

(2) The fact that C has made a human rights claim does not mean that any reaction to it by the Secretary of State, which is not an acceptance of C's claim, acknowledged by the grant of leave, is to be treated as the refusal of a human rights claim under section 82(1)(b) of the 2002 Act, generating a right of appeal to the First-tier Tribunal. The Secretary of State is legally entitled to adopt the position that she may require human rights claims to be made in a particular way, if they are to be substantively considered by her so that, if refused, there will be a right of appeal.

(3) There is, accordingly, no justification for construing section 82(1)(b) otherwise than according to its ordinary meaning, which is that the Secretary of State decides to refuse a human rights claim if she:

(i) engages with the claim; and

(ii) reaches a decision that neither C nor anyone else who may be affected has a human right which is of such a kind as to entitle C to remain in the United Kingdom (or to be given entry to it) by reason of that right.

Comment:

This case amounts to an unfortunate restriction to the remedies available to victims of domestic violence, who since 2012 and the advent of the 'new' rules do not, as matter of course, have a statutory appeal right. They may however additionally claim a breach of their Article 8 rights. In this case, a claim was made for leave to remain on a SET(DV) form, and the Upper Tribunal upheld the view that the Respondent had a legal entitlement to expect human rights claims to be made in a specific format, rejecting on the facts of this case that a human rights claim had been made. The appropriate remedy for any challenge to decisions of this type will be by way of judicial review.

> *"81 (e) (e) the respondent is legally entitled to adopt the position that she may require human rights claims to be made in a particular way, if they are to be substantively considered by her so that, if refused, there will be a right of appeal."*

The UT's reasoning included *"the respondent's need to maintain orderly decision making by requiring separate applications in the case of certain human rights claims"* [83]:

> *"84. In any event, any challenge to this system (or to any specific refusal to engage with a human rights claim) has to be by judicial review…"*

MY relied on *R(AT)* [2017] EWHC 2589 (Admin). FTTJ Kelly held that there were two elements required in order to satisfy section 82(1)(b) of the 2002 Act for there to be a right of appeal:

(a) the Home Office must accept the application in question as constituting a human rights claim within the meaning of section 113, and

(b) then refuse it.

If, however, the decision-maker refuses to treat the application as being a human rights claim, then the remedy is to seek judicial review.

The Upper Tribunal stated that the starting point was the statutory wording. Given that there is a lack of a statutory definition of what constitutes a refusal of a human rights claim, section 82(1)(b) will need to be interpreted in accordance with the usual principles.

The Upper Tribunal set out a process to determine whether a human rights claim has been refused:

> *"85. … The starting point will be whether the decision says it is the refusal of a human rights claim and what, if anything, the decision and reasons say about a right of appeal. The reasons for a refusal of a human rights claim will necessarily involve a consideration of the human rights of the applicant or other relevant person. Even if the decision is made by reference to a provision of the Immigration Rules which of its nature involves human rights matters, there should be a consideration of the position outside the Rules, compatibly with Hesham Ali (see paragraph 75 above).*
>
> *86. If the reasons for the decision reveal no such consideration by the respondent, the caseworker or duty judge will need to look to see what the explanation might be. If, as in the present case, the reasons state in terms that "any submissions you may have made relating to your human rights have not been considered", then, barring something extremely unusual, that statement should be accepted at face value. No purpose will be served by asking to see the application and covering letter since, even if these disclose the making of a human rights claim, the respondent has not decided to refuse it."*

This rather draconian requirement of having to make a separate claim incurs additional cost and is protracted in terms of time. Judicial review remedy is discretionary and is likely to incur prohibitive costs for many. We do not anticipate this being the end of the debate when it comes to domestic violence victims.

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5. *R (on the application of Mujahid) v First-tier Tribunal (Immigration and Asylum Chamber) and the SSHD (refusal of human rights claim)* [2020] UKUT 85

A person (C) in the United Kingdom who makes a human rights claim is asserting that C (or someone connected with C) has, for whatever reason, a right recognised by the ECHR, which is of such a kind that removing C from, or requiring C to leave, would be a violation of that right.

The refusal of a human rights claim under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 involves the Secretary of State taking the stance that she is not obliged by section 6 of the Human Rights Act 1998 to respond to the claim by granting C leave.

Accordingly, the Secretary of State does not decide to refuse a human rights claim when, in response to it, she grants C limited leave by reference to C's family life with a particular family member, even though C had sought indefinite leave by reference to long residence in the United Kingdom.

Comment:

Another interesting decision which restricts remedies available where an individual has been granted the wrong type/form of leave. The decision to refuse indefinite leave to remain which, instead, was followed by a grant of limited leave to remain, was not seen to constitute a refusal of a human rights claim in accordance with Section 82 of the 2002 Act. As such, the Appellant was not entitled to a right of appeal and the remedy was seen to be by way of judicial review only.

The Upper Tribunal, however, noted an exception as follows:

> *"27. The emphasis placed by Underhill LJ, at paragraph 98 of the judgment in Balajigari, on the procedural requirements for making a human rights claim is important. Citing Shrestha, the court noted that section 50 of the Immigration, Asylum and Nationality Act 2006 enables the Secretary of State to require a particular procedure to be followed; and that paragraph 34 of the Immigration Rules sets out mandatory requirements for an application for leave to remain, which includes an application made on human rights grounds. Where an application fails to comply with those requirements, there is "no 'human rights claim' refusal of which will give rise to a right of appeal". The only circumstances in which that would not be so are those recorded by Higginbottom LJ in paragraphs 31 to 32 of Shrestha; namely, where actual removal of the person concerned from the United Kingdom is close or imminent."*

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6. *KF and others (entry clearance, relatives of refugees)* [2019] UKUT 413

In applications for entry clearance, the starting and significant point in applications for entry clearance is the Article 8 rights of the sponsor or others in the UK. A fact sensitive analysis is essential.

There is no blanket prohibition on the relatives of refugees other than a spouse and/or children.

As was made clear in Agyarko [2017] UKSC 11 the purpose of the Immigration Rules is to enable decision makers to understand and apply the appropriate weight to be given to the public interest. That the appellants in an application for entry clearance do not meet the Immigration Rules is an adverse factor.

It is Mathieson v Secretary of State for Work and Pensions [2011] UKSC 4 rather than AT and AHI v Entry Clearance Officer Abu Dhabi [2016] UKUT 00227 (IAC) which should guide the Tribunal in relation to the role of international treaties which have not been incorporated into domestic law, so that it may be material that an outcome is in harmony with such international instruments rather than that they should be accorded substantial weight.

Comment:

The Tribunal again highlights a fact-sensitive exercise. At the date of applications by the refugee sponsor's family for family reunion, the Appellant had just turned 18. This followed a delay in reaching a decision in his asylum claim. The delay in dealing with the sponsor's application, meant that section 55 was no longer applicable to him. The Upper Tribunal took this delay into account.

> *"Had the application been dealt with expeditiously, the sponsor would have been in a position to apply earlier for the Appellants to join him … the SSHD would have been obliged in those circumstances to consider his best interests in accordance with s.55 of the 2009 Act… we have no doubt that it would have been plain that his best interests would have been for him to be reunited with his family. Of course, the sponsor's best interest would not then necessarily have then been determinative, but they would have been a primary consideration. To that extent the sponsor (and, indirectly, the Appellants) have been prejudiced by the delay… On its own, this factor would not have had a significant impact, but it is nevertheless a matter we have factored into our decision."* [20(g)]

The Tribunal held that evidence which renders the circumstances *"exceptional or compelling"* is required for leave to be granted outside the rules (paragraph 20(k)):

> *"… there does have to be something exceptional or compelling about the circumstances of the present case to make the denial of entry clearance, which would otherwise be consistent with the Immigration Rules, a disproportionate interference with the sponsor's family or private life. In our view, though, there are such circumstances in this case…*

When undertaking the balancing act, it is worth noting that the Upper Tribunal pay regard, in particular, to the following circumstances at [20]

> *"(b) It is not unusual for those who have fled war and persecution to be traumatised, but this sponsor's mental ill health is striking even by such standards. The medical evidence relied upon is particularly detailed, comprehensive and up to date…. The sponsor suffers severe PTSD. He suffers severe depressive disorder."*
>
> *"(i) … if the sponsor does not have the support of his family which Dr Datta considers to be essential for his mental health to recover, he will be a cost to the taxpayer, whereas if he were to recover, Mr Conway's views suggest that he could be a flourishing member of society. While s.117B(3) means that the Tribunal must be alive to the impact of its decisions*

on the taxpayer, it would be invidious if the Article 8 balance was seen as no more than a book keeping exercise."

Consistent and reliable evidence and where available, expert evidence, would be key to enable the necessary test to be met.

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7. *R (on the application of MBT) v SSHD (restricted leave; ILR; disability discrimination)* [2019] UKUT 414

(i) A decision of the Secretary of State not to grant indefinite leave to remain to a person subject to the restricted leave policy ("the RL policy") does not normally engage Article 8 of the European Convention on Human Rights. However, Article 8 may be engaged by a decision to refuse to grant indefinite leave to remain where, for example, the poor state of an individual's mental and physical health is such that regular, repeated grants of restricted leave are capable of having a distinct and acute impact on the health of the individual concerned.

(ii) Once Article 8 is engaged by a decision to refuse indefinite leave to remain under the RL policy, the import of Article 8 will be inherently fact-specific, and must be considered in light of the criteria set out in MS (India) and MT (Tunisia) v Secretary of State for the Home Department [2017] EWCA Civ 1190. The views of the Secretary of State attract weight, given her institutional competence on matters relating to the public interest and the United Kingdom's reputation as a guardian of the international rule of law.

(iii) To obtain indefinite leave to remain under the Immigration Rules on the basis of long (partially unlawful) residence in cases involving no suitability concerns, paragraph 276ADE(1)(iii), taken with paragraph 276DE, requires a total of 30 years' residence. A person who satisfies paragraph 276ADE(1)(iii) following 20 years' residence is merely entitled to 30 months' limited leave to remain on the ten year route to settlement.

(iv) Paragraph 16 of Schedule 3 to the Equality Act 2010 disapplies the prohibition against disability discrimination contained in section 29 of the Act in relation to a decision to grant restricted leave that is taken in connection with a decision to refuse an application for a more beneficial category of leave in the circumstances set out in paragraph 16(3).

(v) To the extent that paragraph 16 of Schedule 3 to the Equality Act 2010 disapplies the prohibition against discrimination on grounds of disability, there is a corresponding modification to the public sector equality duty imposed on the Secretary of State by section 149 of the Act.

Comment:

The Upper Tribunal held:

> *"79. It is likely that, in most cases, a decision as to whether a person under the RL policy is entitled to indefinite leave to remain does not engage Article 8. Any interferences arising from the refusal of indefinite leave to remain would be likely to be minimal, and thus not*

engage Article 8. But that is not to say that there will not be case-specific scenarios where, due to the particular circumstances of the individual concerned, Article 8 is engaged by the decision to refuse to grant indefinite leave to remain, and to maintain the application of the RL policy."

In respect of Article 8, the Upper Tribunal considered the following factors:

Medical

> *"We consider that the poor state of MBT's mental and physical health, and the distinct and acute impact that the regular and repeated grants of restricted leave are having upon him, has the effect of engaging Article 8 in relation to the decision to refuse to grant him indefinite leave to remain."* [83]

The Upper Tribunal distinguished this Appellant's case in terms of a previous decision as follows:

> *"MBT's health was not an issue before the Upper Tribunal previously, or the Court of Appeal in MS (India). It is a new issue, with new implications.* [83]

Length of residence

The Appellant's lengthy period of residence spanning 20 years was also a factor relevant in engaging Article 8.

> *"At [93], the Upper Tribunal noted at [116] of MS (India), that "the starting point must be the terms of the policy." The effect of the policy is that ILR should only be granted in exceptional circumstances: see [40] and [41] of MS. Only where there are "compelling reasons for a departure from the general rule" will it be appropriate for an individual to be granted ILR. The "essential question" concerning the ILR issue is, "whether in the case in question the Secretary of State should have found that such compelling reasons were present" (per Underhill LJ, also at [116])."*"
>
> *(…)*
>
> *"98. Taken together, paragraphs 276ADE(1)(iii), BE(1) and DE mean that a person seeking indefinite leave to remain on the basis of long (initially unlawful) residence will need a total of 30 years' residence; the first 20 years lead to a grant of leave under paragraph 276ADE(1)(iii) for a duration of 30 months. Four successive grants of leave in that capacity, giving a total of 120 months, or ten years, are required before a person becomes eligible for indefinite leave to remain."*
>
> *(…)*
>
> *"102. … taken in isolation, the length of the applicant's residence is incapable of amounting to a "compelling reason" to depart from the normal rule. It is necessary, of course, to view the reasons advanced on behalf of the applicant in the round, before reaching a considered view. A considerably longer period would be required, in light of the public interest, public protection and safe haven objectives of the RL policy."*

Gravity of Offence

The Upper Tribunal proceeded to consider the gravity of the Appellant's offences which, in particular, entailed not only the seriousness of the offence which was reflected by the length of the sentence of five years and the fact that the offences had a cross-border element.

Conduct after Offence

In terms of the Appellant's conduct after offending, the fact that there was an absence of evidence of rehabilitative conduct meant that this was not a factor which counted in the applicant's favour. It was also recognised that the respondent was not saying that this counted against him. It was the applicant's French conviction which counted against him.

The Upper Tribunal ultimately decided:

> *"140. … it is nevertheless important for us to take into account the respondent's views … Rather it is to ascribe the weight that is appropriate to the Secretary of State's views concerning the public interest reflected in the objectives of the RL policy…"*
>
> *(…)*
>
> *"157. … We have accepted that the refusal was necessary for the "public good", pursuant to the now well-established objectives of the RL policy's approach to applications for ILR. Paragraph 16(3)(b) of Schedule 3 is engaged in relation to such a decision "to refuse leave to enter or remain in the United Kingdom.*
>
> *(…)*
>
> *158. Having refused to grant the applicant ILR, in light of the present barriers to his removability, it was necessary for some form of status to be conferred upon him, and for the respondent to adopt a range of conditions to achieve the objectives of the RL policy…"*

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8. *Buci (Part 5A: "partner") [2020] UKUT 87*

(1) The word "partner" is not defined in Part 5A of the Nationality, Immigration and Asylum Act 2002. The definition of "partner" in GEN 1.2 of Appendix FM to the Immigration Rules does not govern the way in which "partner" is to be interpreted in Part 5A.

(2) A person who satisfies the definition in GEN 1.2 should, as a general matter, be regarded as being a partner for the purposes of Part 5A, Where, however, a person does not fall within that definition, the judge will need to undertake a broad evaluative assessment of the relationship, bearing in mind that a "partner" is a person to whom one has a genuine emotional attachment, of the same basic kind as one sees between spouses and civil partners, albeit not necessarily characterised by present cohabitation. A "partner" is not the same as a friend; nor is an adolescent's or other young person's boyfriend or girlfriend necessarily a "partner".

(3) The fact that, in the absence of a statutory definition, judges may reach different conclusions as to whether an individual has been shown to be another person's partner is unlikely to pose significant difficulties, since the fundamental question in section 117C(5) is the effect of deportation on the partner. A relationship which is categorised as that of partners, where the parties have only

recently met and are not cohabiting is, in general, far less likely to generate unduly harsh consequences for the remaining partner, if the foreign criminal is deported, compared with where a relationship is longstanding and there has been significant co-habitation.

(4) Where, conversely, a relationship is not categorised as that of partners, it will still be necessary to consider the effect of deportation on the other person, by reference to section 117C(6). In the light of NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662, it is the substance of the relationship that needs to be examined and, in this type of case, it will be productive of error to draw too bright a line between section 117C(5) and (6).

Comment:

As highlighted above, when considering a claim in the context of Part 5A of the 2002 Act, it is the substance of the relationship that really matters when considering a relationship with someone claiming to be a partner and/or the nature of a relationship between a parent and child. The Upper Tribunal found that Paragraph GEN 1.2 contained in Appendix FM of the Immigration Rules was a useful starting point but not the end-point, holding that:

> *"19. A person who satisfies the definition in GEN 1.2 should, as a general matter, be regarded as being a partner for the purposes of Part 5A. Where a person does not fall within this definition, the judge will need to undertake a broad evaluative assessment of the relationship, having regard to the factors we have described."*

The Upper Tribunal elaborated on what the term "partner" means and what would not amount to one:

- *"18. The expression "partner" means a person to whom one has a genuine emotional commitment, of the same basic kind as one sees between spouses and civil partners, albeit not necessarily characterised by present cohabitation.*

- *A "partner" is not the same as a friend, however strong the friendship may be. Nor is an adolescent's or other young person's boyfriend or girlfriend necessarily a "partner". The position may, however, change if the relationship becomes sufficiently serious and committed."*

- *"26. … where a relationship is not considered to be one of partners, it will still be necessary to consider whether the effect of deportation on the other person would be so serious as to amount to a disproportionate interference with Article 8 rights."*

This case is useful for those applications and appeals which fall to be considered outside of the Immigration Rules under Article 8 ECHR, in the event that an applicant's/appellant's relationship does not meet the stricter definitions contained in GEN1.2. However, strong supporting evidence of the relationship will usually be the key.

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PRECARIOUSNESS

9. *Birch (Precariousness and mistake; new matters)* [2020] UKUT 86

The observations about a person's misapprehension, found in paragraph [53] of Agyarko are, despite their context in a discussion of precariousness, capable of being applicable also to a person who has no leave.

The prohibition on considering new matters in s 85 of the 2002 Act does not apply to proceedings in the Upper Tribunal.

Comment:

The Upper Tribunal held as follows:

(a) "reasonable misapprehension" of immigration status

"18. … The Judge should have treated the period during which the appellant thought she had leave differently from the periods in which she knew she had no leave. Given the extent of the former, and the relationships and the conduct of her private life during it, it is impossible to say that the result in general, and in the application of s 117B, would or should have been the same if this factor had been taken into account. The Judge's decision must be set aside."

(b) "New matter"

The SSHD maintained that the *"appellant's current position as a person who had spent twenty years in the United Kingdom was a "new matter",* which the Tribunal was not entitled to consider unless he gave us permission to do so. Section 85(4)-(6) of the 2002 Act was relied upon:

> *"(4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.*
>
> *(5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so."*

However, the Upper Tribunal found that *"the Tribunal"* is in reference to the First-tier Tribunal, as opposed to the Upper Tribunal which is a *"superior court of record".*

> *"22. … in s 81 of the 2002 Act the phrase "the Tribunal" is defined for the purpose of the ensuing Part (including s 85) as meaning the First-tier Tribunal. The phrase specifically does not apply to the Upper Tribunal … The provisions of s 84(4) are not needed to enable the Upper Tribunal, a superior court of record, to take relevant matters into account, so it cannot be said that without acceding to the restriction in subsection (5) this Tribunal could not take anything into account at all."*

This means that the Upper Tribunal is not shackled by the constraints under section 85(5) in the same way that the First-tier Tribunal is. Importantly, the Upper Tribunal does not require consent from the SSHD to consider "new matters".

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OTHER

10. ***R (on the application of Mansoor) v SSHD* [2020] UKUT 126**

The process required by the Court of Appeal in Balajigari may be carried out by the Tribunal in effect applying that guidance, such that the Secretary of State's failure to do so is rendered immaterial.

Comment:

What is the approach where there has been dishonesty applied by an applicant?

The Upper Tribunal found the approach by the SSHD to be *"legally flawed"*, principally, for the following reasons:

> Having found that the discrepancies in the applicant's accounts were as a result of dishonesty, the SSHD did not undertake the following approach:
>
> (a) She did not give the applicant an opportunity to address the discrepancies by way of explanation;
>
> (b) Consider whether:
>
> (i) the dishonesty in question renders the presence of the applicant in the UK undesirable; or
>
> (ii) whether there are other factors which outweigh the presumption in favour of removal; or
>
> (c) Give the applicant the opportunity to raise any matters relevant to those questions.

Whilst such cases are likely to be exceptional, the SSHD should not omit these steps. This need for an explanation is, in essence, no different from the usual approach where there are discrepancies in an applicant's evidence. An accompanying explanation assists a Tribunal to determine the credibility of a claim.

"The availability of administrative review is not an answer, not least because the applicant is not normally allowed to produce evidence that was not produced before the original decision."

The Upper Tribunal sets out what future approach was expected of the SSHD

(i) Firstly, to adopt a "minded to" procedure, which consists of the following:

- *"informs applicants of his concerns and*
- *gives them the opportunity to show cause why ILR should not be refused by offering an innocent explanation of the discrepancies (which will need to be particularised and documented so far as possible) and/or drawing attention to matters relevant to the "undesirability" or "discretion" issues."*

(ii) "Secondly, those defects need not lead to a paragraph 322 (5) refusal being quashed if the UT is satisfied that they are immaterial – that is, that the result would have been the same even if the applicants had been given an opportunity to explain the discrepancies …"

The Upper Tribunal found at [33] that the approach in *Balajigari* [2019] EWCA Civ 673 was followed. The applicant's reasons were not found credible and dishonesty was established. The SSHD was, thus, entitled to grant limited leave on Article 8 grounds, as opposed to indefinite leave to remain. This was in accordance with the approach in *Balajigari* as Underhill LJ's comments at paragraph 39 was noted in this case at [15]:

> *"There will, though no doubt only exceptionally, be cases where the interests of children or others, or serious problems about removal to their country of origin, mean that it would be wrong to refuse leave to remain (though not necessarily indefinite leave to remain) to migrants whose presence is undesirable."*

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