IMMIGRATION LAW CASEBOOK

IMPORTANT CASES from 2020 – 2021. *2022 instalment to follow..*

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KEEPING UP WITH DEVELOPMENTS

In our efforts to ensure that you haven't missed some of the more important cases during the pandemic, we have compiled some of these in our long overdue catch-up newsletter. Disclaimer: Please do ensure that you read these cases against any further developments, which we are yet to report on.

2023 will kick-start the return of our newsletters... So watch this space, where we will attempt to bring up to date with our 2022 catch-up!

KEEPING IN TOUCH

Remember to sign up to receive our newsletters, if you have not already done so please e-mail our Senior Clerk, Neil Dinsdale at:

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You may also be interested in our past webinar series and you can find these recordings on our Goldsmith Chambers YouTube Channel together with the supporting materials to each previous webinar on our Events page.

1. PRIVATE AND FAMILY LIFE

R (on the application of AM) v Secretary of State for the Home Department (legal "limbo") [2021] UKUT 00062 (IAC)

AM had a lengthy immigration history, with a failed asylum claim, fresh claims, immigration detention and grants of bail, spanning over two decades. All the while, he remained in immigration *'limbo'* in this country. AM's identity also remained unverifiable by the Belarusian authorities.

Where a person whose removal from the United Kingdom has become impossible, the Court recognised, as in *RA (Iraq) v SSHD* [2019] EWCA Civ 850 that *"... in principle, there can exist a state of affairs, in respect of a person who is liable to be deported, where the prospects of that person ever being able safely to return, voluntarily or compulsorily, to his country of origin are so remote, that to keep him in that state of 'limbo' (i.e. stasis) would amount to a breach of his Article 8 rights."*

The Upper Tribunal found that a failure to grant him legal status would be an infringement of his Article 8 rights. The Tribunal noted the exceptional nature of the case, and that:

- *"Whilst ... not at present street homeless, it must be asked whether the public interest would be served by perpetuating, in all likelihood indefinitely, his present unstable and fragile existence."*
- *"an individual who is subject to immigration bail may still succeed in a human rights challenge, based on ending his state of legal "limbo" in the United Kingdom, where the case is of a truly exceptional nature."*

R (on the application of Waleed Ahmad Khattak) v Secretary of State for the Home Department ("eligible to apply"- LTR - "partner") [2021] UKUT 00063 (IAC)

The fact that an applicant has a new partner does not exclude that person from relying on the parent route. The Tribunal concluded that an applicant can apply using the parent route, if:

- he is in a relationship with someone who does not meet the *"autonomous definition of 'partner' in GEN.1.2. of Appendix FM"*, and
- that partner is not the relevant child's other parent.

The Tribunal found that, *"it would ... offend common sense to expect an applicant who is contemplating making an application under the parent route and who is reading the relevant Immigration Rules, and in particular paragraph GEN.1.2. and paragraph E-LTRPT.2.3., to conclude that a different meaning to that in GEN.1.2. applies to the word "partner" in E-LTRPT.2.3(b)(iii), or to expect such an applicant to able to ascertain what that different meaning is."*

The Respondent considered that there were "exceptional circumstances" in the applicant's case, referencing GEN.3.2. of Appendix FM, which would render a refusal of leave to remain, a breach of Article 8 ECHR. The Respondent accepted that the Applicant held a genuine relationship with both his British citizen partner and child and that the Applicant's removal would amount to a breach of Article 8. The Respondent's application of GEN. 3.2 in this case can be applied in similar factual circumstances and, where applicable, argued that deviation from this approach would render the Respondent's decision inconsistent and disproportionate under Article 8.

2. LONG RESIDENCE

R (Mujahid) v First-tier Tribunal [2021] EWCA Civ 449

The Appellant had made an application for indefinite leave to remain on the basis of 10 years' long residence under paragraph 276B of the Immigration Rules. It was agreed by all parties that his application amounted to a human rights

claim within the meaning of s82 and 113 of the 2002 Act. The application was refused on the basis of his character/conduct (due to an allegation that there were discrepancies between his earnings reported to HM Revenue and Customs and his earnings claimed in previous applications, of the kind considered in *Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 763). Nonetheless, he was granted limited leave to remain on human rights grounds because of his relationship with his daughter. The issue in the claim for judicial review was whether this decision was a refusal of a human rights claim within the meaning of s82, such that a right of appeal arose. The Upper Tribunal held that no such right of appeal arose and dismissed the claim. The Appellant appealed to the Court of Appeal.

The appeal was dismissed. The Upper Tribunal had not erred in law in holding that the appellant had no right of appeal. Where an applicant has been granted limited leave to remain, so that the refusal of indefinite leave to remain did not require him to leave the UK, the refusal of indefinite leave to remain did not constitute a *"refusal of a human rights claim"* within the meaning of s82.

Two days after the UT's decision in *R (Mujahid),* the UT delivered a similar decision in *MY (refusal of human rights claim: Pakistan)* [2020] UKUT 89 (IAC) where the UT held that even if a person had made a *"human rights claim"* within the meaning of s113 of the 2002 Act as part of their application for leave, this did not mean that any reaction to it by the Secretary of State was to be regarded as an appealable refusal of a human rights claim within the meaning of s82. The Secretary of State was entitled to require human rights claims to be made in a particular way (see *Shrestha v Secretary of State for the Home Department* [2018] EWCA Civ 2810). A decision was not a refusal of a human rights claim unless the Secretary of State had engaged with the claim and reached a decision that neither the claimant nor anyone else who may be affected has a human right. Such a human right also needs to be one that would entitle the claimant to remain in the United Kingdom (or to be given entry to it), by reason of that right.

In *Yerokun (Refusal of claim; Mujahid) Nigeria* [2020] UKUT 377 (IAC) the Vice-President of the Upper Tribunal made two further observations following the UT's decision in *R (Mujahid)*. Firstly, that if a person's human rights claim is refused and they appeal, a grant of leave brings their appeal to an end under s104(4A) of the 2002 Act. This confirms that it would have been unlikely for there to have been a right of appeal in cases, where a grant of leave was made before the appeal could be launched. Secondly, that there is a distinction between an "application" and a "claim" and that the refusal of one does not necessarily imply the refusal of the other.

Now back to the Court of Appeal in *R (Mujahid)* – the Court upheld the reasoning of the UT and rejected the six strands of argument put forward on behalf of the appellant. In seeking to draw a line under the UT's reasoning, the Court has not provided a satisfactory solution for those applicants, who wish to make an application for further leave in a non-human-rights-related category under the Rules but also wish to advance a human rights claim, in the alternative, within the same application. It would appear, that individuals applying in time for further leave on non-human-rights grounds, are not able to also and at the same time make a human rights claim in the alternative. Instead, they may potentially have to overstay their leave in order to make a fresh application on a separate form, should their non-human rights application be unsuccessful. This potentially involved committing a criminal offence, exposes them further to the hostile environment, simply in order to have a human rights claim considered.

Chang (paragraph 276A(a)(v); 18 months?) [2021] UKUT 00065 (IAC)

This case involved an application under the ten-year lawful residence rule under Paragraphs 276A-B of the Immigration Rules. Effectively, under this rule, a person's continuous residence can be broken if they have spent a total of period amounting to a total of 18 months outside of the UK in the relevant 10-year period. The issue that arose was whether the SSHD had calculated the periods of absence correctly.

The SSHD had applied her own rule, contained in relevant guidance, that a month contains 30 days so 18 months amounted to a total of 540 days (18 x 30) as the upper limit on absences from the UK. The Appellant had spent a total of 543 days absent from the UK – having come to the UK as a child student and returned home for most, if not all of the school holidays.

As part of the hearing, it was thankfully accepted by all parties that a month should be a calendar month rather than a lunar month and that the length of each month varies between 28 days to 31 days. Following this analysis, the Upper Tribunal applying *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33 agreed that it was not lawful for the SSHD to set guidance on the length of a month in general and to apply this when considering mandatory and substantive aspects of an application under the Immigration Rules.

So how are we to calculate whether a person falls foul of the 18 months absence rule? The Upper Tribunal answer this as follows:

In everyday usage, 18 months means a year and a half, rather than a collection of months selected at random. Any year has either 365 or 366 days. Similarly, any half-year has either 182.5 or 183 days. As leap-years cannot follow each other, then a year and a half is either 547.5, 548 or 548.5 days… a common-sense interpretation of 18 months would be 548 days reached by rounding 547.5 up or 548.5 down.

3. ***PROCEDURAL MATTERS***

***QC (verification of documents; Mibanga duty) China* [2021] UKUT 33 (IAC)**

The Appellant appealed against the refusal of his protection claim and his appeal was dismissed by a judge who found that he had not been involved in Tibetan Buddhism. Thus, that an arrest warrant submitted in support of his claimed involvement of a Tibetan separatist political movement was evidentially neutral. In addition, the judge gave reasons why the Appellant's account of having been involved in a land dispute with the Chinese authorities was not credible.

The Appellant's appeal to the Upper Tribunal raised two related issues. The first, about the circumstances in which the Secretary of State may have an obligation to make enquiries in order to verify the authenticity and reliability of a document, and the consequences of her not doing so. The second issue, was about the nature of the obligation on judicial fact-finders to consider the evidence before them *"in the round"*.

The Appellant could derive no assistance from judgments like *PJ (Sri Lanka)* [2014] EWCA Civ 1011 or *AR* [2017] CSIH 52 regarding the Respondent's verification obligations in light of the *"egregiously late production"* of a translated copy of the arrest warrant on the very day of the hearing. This was also a relevant issue in deciding whether the duty arises on the facts of the case. The arrest warrant documentation was considered to be very far from having the attributes described in para [37] of the decision.

The judge had treated the arrest warrant as neutral in its significance. This was held to be very different from the mischief the Inner House had sought to identify in *TF* [2018] CSIH 58, where the evidence was found to amount to a further example of the appellant manufacturing evidence in bad faith to support his appeal. Rather, this case concerned the veracity of the account, where this was so clear-cut and decisive, that the decision-maker was driven to reject the supporting documents.

The legal analysis of these two important and related issues is clearly set out, and accordingly, the case is likely to remain a 'go-to' authority for practitioners for some time to come.

***Ndwanyi (Permission to appeal; challenging decision on timeliness)* [2020] UKUT 00378 (IAC) [2020] UKUT 00378 (IAC)**

Another case in which the UT analyses the issue of timeliness and in considering the decision of *Boktor and Wanis* held:

If a decision of the First-tier Tribunal that an application for permission to appeal was in time represents the clear and settled intention of the judge then, as it is an 'excluded decision' (see the Appeals (Excluded Decisions) Order 2009 (SI 2009/275, as amended), it may only be challenged by way of judicial review; that remains so even if both parties agree that the decision is wrong in law. Only if the judge has overlooked the question of timeliness and any explanation for delay will the grant be conditional upon the Upper Tribunal exercising a discretion to extend time (see Boktor and Wanis (late application for permission) Egypt [2011] UKUT 00442 (IAC)).

Procedural Matters – Evidence and Appeals

***Secretary of State for the Home Department v Starkey* [2021] EWCA Civ 421**

The Court of Appeal found that ambiguous language in respect of a material piece of evidence, amounted to an error of law. The finding, that *"there was no satisfactory evidence"*, was said to be ambiguous:

"90. First, it was clear from the report of Dr Nimmagadda that … R's blood had to be monitored regularly. Professor Ashforth's report suggested … that there was doubt about whether that monitoring was available in the public health system. The FTT did not refer, in paragraph 63, or in paragraph 69, to this requirement for regular monitoring, or to that doubt. That was a material omission from an otherwise full and accurate summary of the relevant evidence.

91. The conclusions expressed in paragraphs 63 and 69 use the same formula, 'There is no satisfactory evidence …'. The formula is ambiguous. It could be a loose way of saying that there was no evidence, or it could mean that there was evidence, but that the FTT did not consider that it was satisfactory. If the formula has the first meaning it is a materially inaccurate account of the evidence. If it has the second meaning, it begs a question, which is why the FTT considered that the evidence was not satisfactory. In this context of anxious scrutiny, the FTT should have explained why it considered that the evidence was unsatisfactory …"

There was, in fact, expert evidence about mental health provisions in South Africa before the First-tier Tribunal, to which there was no reference. If the finding was as in (i) that there was no evidence, then that was factually incorrect and a material omission. If as in (ii) the evidence was not satisfactory, then reasons to substantiate must be provided.

The Upper Tribunal's misunderstanding of the evidence, which formed the basis of its reasoning, also constituted an error of law, as noted by the Court of Appeal.

"94. … the UT misunderstood the evidence about the severity of the R's illness when he was receiving the appropriate medication … That misunderstanding is an essential foundation of the UT's reasoning about what would happen to the R on his return. It means that the UT's conclusion that the demanding test in section 117C(6) was met cannot stand."

***SYR (PTA; electronic materials) Iraq* [2021] UKUT 00064 (IAC)**

Headnote: *As hard copy materials are increasingly replaced by electronic materials due to both the changes to filing procedure necessitated by the coronavirus pandemic and the increasing role of technology in court procedure, it is more important than ever that judges make sure their decisions are made on the basis of having all of the correct materials in front of them.*

The Upper Tribunal has given guidance on permission to appeal applications in this digital age. It was noted that in granting permission, the First Tier Tribunal Judge stated that the FTPA is digital, and the complete file was not available. The Upper Tribunal concluded that this could lead to *"'improper grants of permission'"* and in these circumstances, to the Judge basing their decision on incomplete digital files, could lead to "*waste of time and resources on the part of the parties and the Upper Tribunal."* The judgment in this case made clear that procedural accommodations must be made within the tribunal to account for the increasing role of electronic files so that such errors do not take place again.

DK and RK (Parliamentary privilege; evidence) [2021] UKUT 00061 (IAC)

The issue in this appeal was whether the report of the All-Party Parliamentary Group (APPG) on the Test of English for International Communication (TOEIC) was admissible before the Tribunal. The Upper Tribunal had to decide whether reliance on the document would infringe parliamentary privilege.

The Upper Tribunal held that the APPG report was not itself a *"proceeding in Parliament"* within the meaning of Article 9 of the Bill of Rights 1689. However, insofar as the APPG report expressed views about the accuracy or otherwise of evidence given to the Public Accounts Committee and the Home Affairs Committee, to admit that material would draw the Tribunal into the *"forbidden area"* of parliamentary proceedings. The same applied to the APPG's comments on a

report by the National Audit Office, which attracted parliamentary privilege under the principle established in *Warsama & Gannon v Foreign & Commonwealth Office* [2020] EWCA Civ 142. In any case, the opinions expressed by the APPG were not relevant to the issue the Tribunal had to decide. However, the record of the evidence given by Professors Sommer and French and Dr Harrison before the APPG on 11 June 2019, was admissible and could be taken into account.

The Tribunal's decision to admit the evidence given by the experts before the APPG (as opposed to the opinions of the APPG) is welcome. It should also be noted that *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin) at [64] and *Kimathi v Foreign and Commonwealth Office* [2017] EWHC 3379 (QB) at [20] suggest that where a piece of evidence that would otherwise attract parliamentary privilege is uncontentious, it may be taken into account by the court. It may be, therefore, that this case does not establish an absolute bar to the admission of facts (as opposed to opinions) contained in a report that would otherwise attract parliamentary privilege, where those facts are uncontentious.

4. DEPORTATION AND DEPRIVATION OF CITIZENSHIP

Binaku (s.11 TCEA; s.117C NIAA; para. 399D) [2021] UKUT 00034 (IAC)

The Appellant had re-entered the United Kingdom in breach of a deportation order, and his presence was detected upon arrest some four years later, when he made representations for the revocation of the deportation order based on his parental relationship with two British citizen children. Following refusal of his human rights claim, he appealed to the First-tier Tribunal. Although the judge found that the Appellant met the family life exception in s117C(5) of the 2002 Act, she found that the appeal fell to be dismissed, because the appellant's re-entry was in breach of the deportation order. This meant that his ability to meet that family life exception was only one factor in the balancing exercise required by para 399D of the Immigration Rules, following the case of *SSHD v SU* [2017] EWCA Civ 1069.

On appeal to the Upper Tribunal, a further procedural issue arose but this ended up being 'academic' as a result of the parties' respective positions taken at the hearing. In relation to the substantive issue, the Respondent also conceded that there was an error of law in the judge treating the family life exception as simply one factor rather than determinative of the appeal. The Upper Tribunal agreed with these concessions and allowed the appeal on Article 8 ECHR grounds. The decision in *SU* had not addressed the interaction between the 2002 Act and the Rules.

This issue builds upon the decision in *CI (Nigeria)* [2019] EWCA Civ 2027, namely that the Immigration Rules relating to deportation play no additional part in the analysis, in a manner similar to the recent decision in *SC (paras A398-339D: 'foreign criminal': procedure) Albania* [2020] UKUT 00187 (IAC) to reject the approach in *Andell (foreign criminal - para 398)* [2018] UKUT 00198, in favour of that in *OLO and Others (para 398 - 'foreign criminal')* [2016] UKUT 00056.

Headnote

The procedural issue: appeals under section 11 of the TCEA 2007

(1) The appellate regime established by the Nationality, Immigration and Asylum Act 2002, as amended, is concerned with outcomes comprising the determination of available grounds of appeal;

(2) A party who has achieved the exact outcome(s) sought by way of an appeal to the First-tier Tribunal being allowed on all available grounds relied on (in respect of an individual) or because it has been dismissed on all grounds (in respect of the Secretary of State) cannot appeal to the Upper Tribunal under section 11(2) of the Tribunals, Courts and Enforcement Act 2007 against particular findings and/or reasons stated by the judge;

(3) Devani [2020] EWCA Civ 612; [2020] 1 WLR 2613 represents binding authority from the Court of Appeal to this effect.

The substantive issue: the relationship between Part 5A of the NIAA 2002 and the Immigration Rules

(4) By virtue of section 117A(1) of the 2002 Act, a tribunal is bound to apply the provisions of primary legislation, as set out in sections 117B and 117C, when determining an appeal concerning Article 8.

(5) In cases concerning the deportation of foreign criminals (as defined), it is clear from section 117A(2)(b) of the 2002 Act that the core legislative provisions are those set out in section 117C. It is now well-established that these provisions provide a structured approach to the application of Article 8 which will produce in all cases a final result compatible with protected rights.

(6) It is the structured approach set out in section 117C of the 2002 Act which governs the task to be undertaken by the tribunal, not the provisions of the Rules.

(7) A foreign criminal who has re-entered the United Kingdom in breach of an extant deportation order is subject to the same deportation regime as those who have yet to be removed or who have been removed and are seeking a revocation of a deportation order from abroad. The phrases "cases concerning the deportation of foreign criminals" in section 117A(2) and "a decision to deport a foreign criminal" in section 117C(7) are to be interpreted accordingly.

(8) Paragraph 399D of the Rules has no relevance to the application of the statutory criteria set out in section 117C(4), (5) and (6);

(9) It follows that the structured approach to be undertaken by a tribunal considering an Article 8 appeal in the context of deportation begins and ends with Part 5A of the 2002 Act.

Zulfiqar ('Foreign criminal'; British citizen) [2020] UKUT 00312 (IAC) – up to the Court of Appeal: *Zulfiqar v Secretary of State for the Home Department* [2022] EWCA Civ 492

This unprecedented case of a British Citizen (who also holds Pakistani citizenship), convicted of murder, has seen the Upper Tribunal attempt to grapple with inconsistent definitions of 'foreign criminal' across the 2002 Act and the UK Borders Act 2007.

A temporal link is established by s32(1) of the 2007 Act requiring the foreign offender not to be a British citizen at the date of conviction. In contrast, Part 5A of the 2002 Act establishes no such temporal link. Rather the relevant date for establishing whether an offender is a foreign criminal is the date of the Home Office decision on the human rights claim.

Mr. Zulfiqar had renounced his British citizenship on qualified terms, and subsequently the Secretary of State refused to fulfil these terms and served a deportation order on Mr. Zulfiqar. As such, this case can be seen as guidance on 'foreign criminal' deportation provisions, which may now apply to former British citizen criminals as well as foreign citizen criminals. The case considers whether deportation provisions can be seen to extend to people who were British when they committed an offence but who renounce their British citizenship for reasons that are unrelated to the relevant criminal conduct, even when the justifications for deportation are clearly met.

The effect of being considered a 'foreign criminal' under section 117C of the 2002 Act warrants even greater weight being applied to the public interest in deportation than what the First-tier Tribunal had actually applied when the appeal was dismissed.

Juba (s. 94B: access to lawyers) [2021] UKUT 0095 (IAC)

Head-note:

Nationality, Immigration and Asylum Act 2002, s. 94B: Access to lawyers

(1) In the light of Kiarie and Byndloss [2017] UKSC 42, the first question to be answered by the First-tier Tribunal in an appeal involving a claim that has been certified under section 94B of the Nationality, Immigration and Asylum Act 2002 is whether the appellant's removal from the United Kingdom pursuant to the certificate has deprived the appellant of the ability to secure legal representation and/or to give instructions and receive advice from United Kingdom lawyers (AJ (s.94B: Kiarie and Byndloss questions) [2018] UKUT 115 (IAC)).

(2) The task for the First-tier Tribunal in answering that question is fact and context-specific. The Tribunal must, in particular, determine whether the facts demonstrate the kind of inconvenience or difficulty that is inherent in the appellant being outside the United Kingdom; or whether there has been, or will be, an actual impediment in the taking of instructions and receiving of advice.

(3) There may be circumstances where, at some point before the hearing is due to take place, it will be evident that the appellant's legal adviser is simply not in a position to mount an effective case, owing to the appellant being outside the United Kingdom. In such circumstances, it would manifestly be wrong to undertake the hearing.

(4) The first question does not, however, necessarily have to be answered by the Tribunal before the start of any hearing of the appeal. Where the position is not clear cut, it will be a matter for the Tribunal to decide whether it addresses the first question after the hearing has taken place. Matters may arise during that hearing which show the question falls to be answered in favour of the appellant. In other cases, the answer may fall to be answered in the negative, once the hearing has occurred. For example, the oral evidence may disclose that an issue upon which it might have been thought the legal adviser was without relevant instructions is not, in fact, relevant to the outcome; or that what might otherwise have been thought to have been a "gap" in the adviser's instructions is not of such a nature.

Nationality, Immigration and Asylum Act 2002, s. 117C(4) and s. 117C(6)

(5) It is unnecessary to "read down" s. 117C(4) in order to avoid a breach of Article 14 of the ECHR because, inter alia, the case-specific factors said to support any discrimination are relevant to the s. 117C(6) exercise, which requires a more nuanced approach and a collective examination of all relevant matters.

(6) Adverse credibility findings and the fact that an individual was not born in the United Kingdom do not obviate the requirement to apply the key principle in Maslov v Austria [2009] INLR 47, as explained in CI (Nigeria) v SSHD [2019] EWCA Civ 2027

The Appellant had arrived in the UK when he was 1 year old and was deported following the 'certification' of his case under s.94B. This meant that, he could not bring an appeal against the decision until after his deportation and his appeal did not suspend his deportation. The Upper Tribunal reiterates that the reasons for the decision as to whether the appeal procedure has been fair will depend on the specific facts of each individual case. Further, the Upper Tribunal asserted that where the position is not 'clear cut', it will be for the Tribunal to decide and the timing of this consideration together with the factors to consider are summarised at (1)-(4) of the head-note (cited above).

At the same time as addressing the examples given at (4), the Upper Tribunal cautioned in its judgment against the idea that just because everything appeared to have gone smoothly at the hearing, this does not mean that instructions and advice have been given and received 'without impediment.'

The Upper Tribunal also concluded that the First-Tier Tribunal had erred in its consideration of the established principles in *Maslov v Austria* (application no. 1638/03), namely that, *"for a settled migrant who has lawfully spent all or the major part of his or her childhood or youth in the host country, very serious reasons are required to justify expulsion"*.

Specifically, the First-Tier Tribunal had found that the *Maslov* principles did not apply to the Appellant because he was not born in the UK and, also, because he had been found not credible by the Tribunal. The Upper Tribunal found that those factors did not render the *Maslov* principles inapplicable – see (6) of head-note.

On the s.94B issues, this case is bound not to be the end of the matter!

5. *MEDICAL EVIDENCE & VICTIMS OF TRAFFICKING*

***MN v Secretary of State for the Home Department* [2020] EWCA Civ 1746**

The Court found material errors by the Competent Authority in its approach to the expert evidence and the Court's assessment of credibility from victims of trafficking. The Court also gave guidance on the proper approach to be taken in respect of expert evidence from medical practitioners and re-iterated the *Mibanga* principles.

On expert evidence:

The Court found that the assessment of credibility by doctors should not simply be discounted. The doctors' opinion should still be considered in the assessment of credibility, as it formed part of the holistic approach required. Having taken it into account, the Tribunal was entitled to reject it thereafter, notwithstanding the opinion of the doctors.

"118. … In fact, the court held that there was an ample basis for the tribunal to reject the appellant's account notwithstanding the doctor's opinion; but the important point for our purposes is that Moses LJ held that it should have taken it into account."

"123. If there are qualifications to the value to be given to a particular piece of evidence, that is not a reason for excluding it altogether: if it has some weight it must go into the overall assessment."

The Court elaborated on the proper approach the Competent Authority failed to undertake:

"183. … What it needed to do was to identify, if only in summary form, the specific opinions expressed by the witnesses that were potentially supportive of the truth of MN's account, and to assess in relation to each the weight to be given to it – which of course involves identifying the points which qualified or undermined their value. The CA did not adopt such a structured approach but simply listed in relation to each witness a number of criticisms – some, it has to be said, of a rather formulaic nature - without any assessment of their specific relevance."

The Competent Authority's approach to the evidence from other non-medically qualified experts was also flawed:

"185. … Weight also had to be given to her (Ms Thullesen) evidence about the impact of trauma on a victim's ability to recount their experiences coherently and consistently…' Some at least of the inconsistencies on which the CA relied might quite readily have been explained on that basis…' The point made by Mibanga is not that the expert evidence and the issue of credibility must be considered in a particular order but that the former must be allowed to feed into the latter. That did not happen here."

The Court raised concerns about the inappropriate use of certain terminology in the Guidance on "*How to assess credibility when making a Reasonable Grounds or Conclusive Grounds decision",* which attracted adverse connotations. The description, for example, *"mitigating circumstances"* is reminiscent of its use in criminal courts.

When considering credibility or plausibility, the Court calls for a *"common sense decision-making"* approach. In respect of credibility, the Court states, *"in truth it connotes no more than whether the applicant's account is to be believed"*. In making that assessment the decision-maker will have to take account all factors that may bear on that question.

The Court states at [127], *"the term "plausibility" is not a term of art. To say that a particular account, or element in that account, is implausible is simply to say that it seems to the decision-maker to be inherently surprising, or the kind of thing that you would not normally expect to happen; and such an assessment will obviously feed in to the overall assessment of credibility, though the weight to be given to it will depend on the degree of unlikelihood and how confident the decision-maker can be about it."*

Victims of Trafficking

The Court re-iterated at [352]:

"Any decision-maker in such a case should as a matter of common sense when assessing the accounts given by a potential victim of trafficking take into account both their age at the time when their accounts were given and their age at the time of the events which they narrate."

The Court found that a claimed victim of trafficking was not entitled to enhanced support, subsequent to an interim *"initial grounds"* decision. This was, notwithstanding, a negative *"conclusive grounds"* decision, ultimately reached later on.

***EOG v Secretary of State for the Home Department* [2020] EWHC 3310 (Admin)**

Mr Justice Mostyn found the Home Secretary's failure to implement a policy, that provides victims within the NRM interim discretionary leave while they wait for a final decision, unlawful.

- *"there is an unlawful lacuna in the existing policy inasmuch as it fails to implement the obligation in Article 10.2 formally to protect persons in receipt of a positive reasonable grounds decision from removal from this country's national territory pending the conclusion of the process. Suffering such persons to remain as overstayers, or as illegal immigrants, does not fulfil the obligation. The defendant must formulate a policy that grants such persons interim discretionary leave on such terms and conditions as are appropriate both to their existing leave positions and to the likely delay that they will face." [48]*

- *"the terms and conditions must obviously be lawful and this would mean that someone in the position of the claimant, who has a time-limited right to work, should not have the arbitrary adverse consequence of a removal of that right meted out to her simply by virtue of the delays that she is likely to face."*

This case highlights the extreme delays inherent within the NRM process, and the prejudicial impact upon claimants where they have time-limited rights to work or leave to remain. The Court noted,

- *"36. … all referrals to the NRM appear to be beset by extreme delay and where those delays arguably have resulted in unacceptable treatment being meted out to this claimant."*

Immigration detainees, who have been referred to the NRM process may be subjected to lengthy detention periods, pending reasonable and conclusive grounds decisions, as a consequence of these delays. Attention should be drawn to the chronic delays within the NRM process, as observed by the Court in this case. These delays still persist to date and active consideration should be given to any delay cases in this context.

6. UNLAWFUL DETENTION

***MR (Pakistan) v Secretary of State for Justice & Others* [2021] EWCA Civ 541**

There is a lack of mechanism to ensure that vulnerable victims in prisons are identified and given appropriate attention in the same way as immigration detainees. Within the immigration detention context, we have in place: *Adults at risk* policy and Rule 35 provisions. These permit a level of scrutiny for those in detention and a focus on their welfare.

The Court of Appeal found this disparity to be irrational, as Lord Justice Dingemans said:

- *"111. In my judgment, in the cases of both MR and AO, it was irrational, and was therefore unlawful, not to have ensured by means of a Rule 35 report or equivalent, that medical information showing concerns about past torture for both AO and MR was obtained at the commencement of or at any later time during their immigration detention … It is known that many victims of torture will not volunteer the fact of torture for many good and varied reasons. …*

112. The failure in the system in HMP's, … no one was required to find out whether there were such medical concerns about torture, there was no attempt to find out whether there was such information, and the concerns were not discovered. Further, as appears from the detailed review of the factual background for both MR and AO, there was express reference to the absence of a Rule 35 report in detention reviews for both MR and AO. If Detention Review teams are going to refer to the absence of a Rule 35 report, it is only rational to have provided MR and AO with the opportunity of obtaining such a report or its equivalent.

113. … In my judgment it was not rational in the case of both MR and AO for the SSHD to have a policy which required information to be known about their vulnerability because of, among other matters, past torture, but not to obtain medical concerns about past torture …

115. In my judgment in these circumstances it will therefore be sufficient to declare that in the case of MR and AO there was an irrational failure to obtain medical concerns about past torture which was needed for the SSHD to operate her policy relating to the immigration detention of the vulnerable …"

In *Kambadzi v Secretary of State for the Home Department* [2011] UKSC 23], the Court held that the Respondent's unlawful failure to review the Appellant's detention, contrary to the policy, resulted in his detention being unlawful. The policy was sufficiently closely related to the authority to detain. The basis of the review was to ensure that the detention was lawful, as set out at [73] and [86]. It was found that the public law error bore directly on the decision to detain the Appellant. Kambadzi was considered in this case:

117. … if there is illegality in the exercise of the statutory power to detain, the detention may be unlawful. However it will not be unlawful unless the illegality "bore on and was relevant to the decision to detain", see Kambadzi v Secretary of State for the Home Department at paragraph 42.

The Court of Appeal in this case decided that:

"118. … This, however, did not in my judgment "bear upon" the decision to detain. This appears from the fact that both AO and MR were or became level 2 Adults at Risk for the purposes of the policy before medical concerns about past torture became known, and that if a Rule 35 report setting out medical concerns about past torture had been obtained, it would not have elevated their level from level 2 Adult at Risk. … In this sense the absence of a Rule 35 report "did not bear upon and was not relevant to" the decision to detain so as to render unlawful the immigration detention of MR and AO. I would therefore dismiss the claims for false imprisonment made by MR and AO."

The Court of Appeal reasoned that a Rule 35 report would not have made a material difference to this decision to detain. This is, notwithstanding the fact that a Rule 35 report generates regular reviews of the decision to detain and in *Kambadzi*, the Supreme Court found that a failure to review detention at regular intervals in accordance with published policy did bear on the decision to detain.

7. GENERAL GROUNDS OF REFUSAL

***Mahmood (paras. S-LTR.1.6. & S-LTR.4.2.; Scope)* Bangladesh [2020] UKUT 376 (IAC)**

Can an Appellant rely on documentation from the HMRC or employer, that shows he has worked in the UK illegally by using someone else's identity, to succeed in a long residence application?

In this case, the Upper Tribunal found as follows:

"*82. … consider it important that the P60 forms, genuinely issued but the product of dishonesty as to identity, were peripheral to the application for leave to remain on long residence grounds. Their purpose was to demonstrate long residence, but it was not a requirement of the relevant rule that the appellant provide P60s. They were relied upon by the appellant to establish his long residence, a task they were capable of satisfying, and not to establish that the appellant was the person named upon them …"*

In relation to the Suitability grounds, the Upper Tribunal clarified that

"75. … paragraph S-LTR.1.6., a mandatory ground of refusal, does not cover the use of false representations or a failure to disclose material facts in an application for leave to remain or in a previous application for immigration status.

76. Consequently, the Judge materially erred in law in finding that the respondent could refuse the appellant's application on suitability grounds under paragraph S-LTR.1.6. of Appendix FM."

In relation to paragraph S-LTR.4.2, the Upper Tribunal stated that the Secretary of State may exercise discretion to refuse an application for leave to remain on two separate basis as a result of:

(a) the use of false representations or a failure to disclose any material fact in a previous application and must relate to the underlying application.

(b) the use of false representations in order to obtain a document required to support such an application.

8. REFUGEE CONVENTION/COUNTRY GUIDANCE

***Mx M (gender identity – HJ (Iran) - terminology) El Salvador* [2020] UKUT 00313 (IAC)**

Headnote:

Decision makers should where possible apply the guidance in the Equal Treatment Bench Book and use gender terminology which respects the chosen identity of claimants before them.

The principles in HJ (Iran) are concerned with the protection of innate characteristics. As such they are to be applied in claims relating to gender identity.

The Upper Tribunal provided guidance on ensuring it respects the gender identity of claimants, applying where practicable the guidance in the Equal Treatment Bench Book.

The case concerned an appellant who is a national of El Salvador and identifies as non-binary since living in the UK, having formerly identified as a homosexual man upon arrival in the UK. The appellant had, due to the help of a specialist support in Liverpool, further explored their gender identity and made alterations to their appearance that made them fear that they would be perceived as a transgender woman in El Salvador. The appellant subsequently argued that due to their appearance, they would be understood as being gay or transgender in El Salvador and potentially face violent attacks by homophobic or transphobic gangs and individuals, who could not be held accountable by the police in El Salvador.

The Upper Tribunal considered that the principles of HJ (Iran) – namely of protection of innate characteristics – were particularly relevant here because the appellant would feel compelled to modify their appearance and behaviour on return to El Salvador for fear of persecution. These principles should be applied in relation to gender identity.

GW (FGM and FGMPOs) Sierra Leone CG [2021] UKUT 108 (IAC)

The head-note is lengthy and also covers detailed country guidance on Sierra Leone more generally and the practice of Female Genital Mutilation (FGM). It is best to access this in full, which you can do here.

The guidance also touches on cases where the Family Court has found that a person is at risk of FGM and makes a Female Genital Mutilation Protection Order (FGMPO), to protect against a domestic or extraterritorial threat of FGM. To our knowledge, this was the first case to directly consider the significance to be attached to FGMPOs in immigration proceedings.

The Upper Tribunal established that where a person (P) seeks international protection in reliance on a threat of FGM in a country to which they might otherwise be lawfully removed, the fact that an FGMPO is made to protect P against such a threat is likely to be a relevant consideration in the assessment of P's protection claim. That is particularly so when the FGMPO has extraterritorial effect in the proposed country of return.

Cases could also include an applicant's or an appellant's child and FGMPOs being made in respect of such a child. In this judgment, the Upper Tribunal reminds us that a Judge sitting in the Family jurisdiction cannot restrain or otherwise prohibit the SSHD from removing a person from the UK, in exercise of her immigration powers. This also applies in the context of FGMPOs and/or any other order of the Family Courts and so the SSHD, or a Tribunal/Court considering a person's protection claim, is not bound by such an order – see *SSHD v Suffolk County Council & Ors* [2020] EWCA Civ 731, in which our Charlotte Proudman acted. Neither does it provide a 'starting point' pursuant to *Devaseelan*. So how might such an order be relevant? This is summarised at (6) of the head-note:

> *"(6) An FGMPO made in favour of P is, instead, a potentially relevant matter in the assessment of P's claim for international protection. To determine the weight which should properly be given to the FGMPO, a judicial decision-maker should consider:*
>
> *(i) the extent to which the Family Court's assessment addresses ('maps over') the same or similar factual issues to those considered in the protection appeal;*
>
> *(ii)the extent and the cogency of any reasons given by the Family Court for making the order; and*
>
> *(iii) the similarity of the evidence before the Family Court and the judicial decision-maker in the protection appeal."*

The Upper Tribunal also usefully highlights that where a protection claim raising FGM/risk/threat of has been refused by the SSHD and subsequently, an FGMPO is made in the applicant's/appellant's favour, this will not amount to a new matter for the purpose of s85 of the 2002 Act.

As mentioned, the judgment also provides very useful and detailed country guidance on FGM and women in Sierra Leone, particularly focusing on the increased susceptibility of young single women to FGM if they are lacking in family support or a reliable ethnic or social network, regardless of whether she lives in an urban or rural setting. It is a must-read for any FGM claim and such claims involving potential removal to Sierra Leone.

9. NRPF & RIGHTS TO WORK

ST (a child, by his Litigation Friend VW) & VW v Secretary of State for the Home Department [2021] EWHC 1085 (Admin)

Elements of the 'no recourse to public funds' (NRPF) scheme have been exposed as failing to protect the rights of children in this case in the High Court. The case focused on the approach to NRPF that can be found in Appendix FM of the Immigration Rules, which is applicable to family members of either British citizens or those with long-term residence rights.

In this case, a South African mother to a British child living in the UK paid a fee application when applying for a visa renewal rather than delaying the application by submitting paperwork for a fee waiver application. This was considered by the Home Office as indicating that she was no longer destitute - (her destitution had been evidenced in her initial visa, which was granted without an NPRF condition).

The Home Office conceded that its decision to grant her leave with an NRPF condition was wrong and reversed this before the hearing, but the hearing considered the important issue argued by the claimants that the NRPF provisions in Appendix FM themselves contravened section s.55 of the Borders, Citizenship and Immigration Act 2009. The High Court Judges found that paragraph Gen 1.11A did not in fact refer to the best interests of a child and the paragraph instead imposes a more rigorous test than that set out in section 55, because it refers to *"particularly compelling reasons relating to the welfare of a child of a parent in receipt of a very low income."* This is in contrast with s.55, which imposes a duty on the SSHD to discharge her functions whilst having regard to the need to *"safeguard and promote"* the welfare of children, who are in the UK.

The High Court concluded that the relevant caseworker guidance to Appendix FM did not offer more clarity, as its approach was all in the context of whether to grant a visa, not in the context of exercising discretion on the NRPF condition. The caseworker guidance only duplicates the phrasing of Gen 1.11A, which sets out an incorrect test to begin with.

Lady Justice Laing and Mr Justice Lane concluded overall that *"the NRPF scheme does not comply with section 55 of the 2009 Act."* Both Appendix FM and the relevant caseworker guidance have now been amended.

This was the second case in less than a year to look at the NRPF regime with *(W, A Child By His Litigation Friend J) v Secretary of State for the Home Department* [2020] EWHC 1299 looking at the 'imminent destitution' test.

(a) relate to the underlying application.

(b) the use of false representations in order to obtain a document required to support such an application.

R (on the application of C6) v Secretary of State for the Home Department (asylum seekers' permission to work) [2021] UKUT 0094 (IAC)

Headnote: *Insofar as the Secretary of State's policy, 'Permission to work and volunteering for asylum seekers, version 8.0,' (29 May 2019), admits no exceptions, it has not been justified and so is unlawful.*

C6's recent successful challenge in the Upper Tribunal has demonstrated that the SSHD should be able to make exceptions to the rules that stop asylum seekers from working.

The fettering of discretion by the express terms of the Secretary of State's Work Policy (*Permission to work and volunteering for asylum seekers policy*, 22 May 2019) had resulted in her decision to refuse to allow C6 to work in a role not on the Shortage Occupation List. Jobs on the Shortage Occupation List are the only jobs available to asylum seekers pursuant to paragraph 360 of the Immigration Rules, which allow asylum seekers access to the labour market only if a) their claim as been under consideration for at least 12 months, provided b) the delay was not their fault.

This policy placed a notable limitation on the Secretary of State's ability to take into account relevant considerations when contemplating whether an asylum seeker should be able to take a job – in this case the applicant's meritorious

human rights claim and the manifest benefits to his mental health of being able to take a job. This decision is of particular importance because jobs on the Shortage Occupation List often require training and experience that many asylum seekers do not have, putting them at a disadvantage compared to other applicants.

Whilst the Home Secretary has a discretion to permit asylum-seekers to work outside the provisions of the policy, this is not evident from reading the policy itself. The Upper Tribunal found, that "*there is simply no provision anywhere in the policy for the Secretary of State's officials to consider exercising discretion… in exceptional, or any, circumstances.". Consequently, it found that "the Work Policy is a blanket policy, admitting of no possibility of exceptions, and is unlawful to that extent, and make a declaration to that effect."*

The current Home Office Guidance - *Permission to work and volunteering for asylum seekers* - has since been amended and now instructs decision makers to consider exercising discretion.

In the more recent challenge of *R (Cardona) v Secretary of State for the Home Department* [2021] EWHC 2656 (Admin), the High Court further considered the lawfulness of the policy with reference to the statutory duty under s55. The Court found the policy was unlawful as it failed to promote the best interests of children affected by a negative decision.

***R (on the application of OH) v Secretary of State for the Home Department (permission to work: asylum dependants)* [2022] UKUT 00299 (IAC)**

The Secretary of State's guidance, Permission to work and volunteering for asylum seekers (version 10.0), does not breach Articles 8 and 14 of the European Convention on Human Rights on account of the absence of any express reference to the Secretary of State's residual discretion to grant permission to work to the dependents of asylum seekers.

In light of recent calls for this area to be reviewed, this is unlikely to be the end of the matter!