

## **8-DAY PO INDUCTION COURSE**

### **Aim:**

To provide new POs with sufficient knowledge of asylum, human rights, deportation, EEA, PBS and managed migration cases, procedure rules and appeals legislation to begin their mentoring period.

### **Course structure:**

#### **Day one**

The role of the PO  
Types of cases presented by POs  
IAC  
Hierarchy of courts  
Immigration control  
DVD  
HC395 application  
Points Based System (PBS) overview

#### **Day two**

Burden of proof  
Standard of proof  
Relevant date / matters to be considered  
Bundles  
New issues  
Family visitors  
Visit visa exercise  
EEA

#### **Day three**

Asylum

#### **Day four**

Human Rights  
Deportation

#### **Day five**

Bail  
Appeals legislation  
Court procedure  
Court etiquette  
Structure of hearing (in brief)  
Preparation  
Preliminary issues  
Procedure Rules and Practice Directions

#### **Day 6**

Evidence in chief  
Cross-examination  
Re-examination

Witnesses  
Submissions  
Charging / costs

**Day 7**

Documents  
Expert reports  
Medical reports  
Record of Proceedings  
CID  
Error of law  
Case law  
Role play – Rex

**Day 8**

Role play – Ncube  
Role play – Gayle

## **Presenting Staff Professional Standards**

### **General**

You should establish a good level of knowledge of immigration law, case law, rules, policies, country information and effective advocacy skills and keep them up to date. You should regularly take part in training or other professional development activities to maintain and further develop your knowledge and skills.

### **Preparation for court**

You should establish an excellent level of knowledge of the case, by fully preparing for the appeal in advance of the hearing. You should also research relevant immigration law, case law, rules, policies and country information in advance of the hearing.

When preparing for the appeal you should review the decision, taking into consideration new evidence (if any), and decide whether the decision can be defended in court. This check will help to improve the Agency's success rate for those cases that go on to a substantive appeal. Ensure that decisions to concede or to withdraw a decision are made in advance of the hearing and a senior officer consulted. You should also consult the original decision maker. In the case of criminal deportations, approval must be sought directly from a Criminal Casework Directorate Senior Caseworker (SCW).

### **Behaviour in court**

You represent the Secretary of State and the Home Office when in Court. Therefore you must act with a high degree of professionalism and behave consistently in line with the Home Office values.

You should always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings.

You should attend court on time.

### **Presenting the case in court**

Represent the decision-maker in court in line with the law, the applicable Immigration Rules, the EEA Regulations and UK Border Agency policies where appropriate, including the best interests of the child.

Having previously established that the decision can be defended, ensure each case is fully argued in court, responding to new evidence and issues raised by the Immigration Judge and the appellant or their representative. Deliver a persuasive and cohesive argument, structuring cross-examination and submissions accordingly. Where appropriate, introduce additional arguments to those raised in the original decision.

Pursue all relevant and appropriate aspects of the appellant's case or claim. Where it is intended to introduce new or additional grounds in support of the original decision, notification should be given to the appellant and their representative at the earliest opportunity and preferably in good time before the hearing. The new issues should be in line with the law, the Immigration Rules, the EEA Regulations and UK Border Agency policy.

In court, robustly defend the decision under appeal but be mindful that you must disclose evidence and material that is relevant to the facts in issue, irrespective of which party to

the appeal this assists, in order to achieve a just determination of the case. You must not knowingly mislead the Immigration Judge or permit the Immigration Judge to be misled.

Test the evidence that has been given by the appellant (and any other witnesses) at earlier stages and at the hearing. Be sensitive to the circumstances of the appellant or witness who may (for example) be a child, a rape victim or a torture victim.

You should ensure cases are dealt with as efficiently and quickly as possible. Oppose unmeritorious adjournment requests and only apply for adjournments where it is absolutely necessary with, wherever possible, the approval of a senior officer.

#### Follow up

To help speed up appeals and reduce costs, where directions have been set by an Immigration Judge, ensure that they are complied with.

To help improve the quality of decisions, provide appropriate feedback to the decision maker within 2 working days.

To help improve the quality of management information - ensure that CID fields are updated and management returns are completed within 2 working days.

Ensure that post hearing minutes are accurate and completed within 2 working days.

## **IMMIGRATION CONTROL**

1. Pre-entry control

2. On entry control

3. After entry control

### **Powers of an Immigration Officer:**

Immigration Officers are given certain powers under the Immigration Act 1971, which aids them in identifying who qualifies for entry and those who do not. These include:

- The power to examine arriving passengers to determine if they require Leave to Enter and qualify for that leave.
- To require a person to submit to further examination.
- Require a passenger to produce a passport or other document.
- Power to search a passenger's baggage.
- Power to search for documents.
- To produce a completed landing card.
- Power to remove a person.
- Power to detain.

## Exercise - The Immigration Rules

Review the following scenarios. For each you should consider:

1. Would you grant or refuse the application and Why?
2. What further information would you request (if any)?

### Family visitor 1

Nelson is from Ghana and wants to come and visit his mother who is present and settled in the UK. He wishes to stay for one month. He has just finished a degree in his home country, and has not yet got a job. He is single and sees this as a good time to visit his mother who is willing to pay for his ticket, and has a spare room for him in her house. He does not have any money. In fact he has debt acquired from his studies, but his mother will pay for his food and travel while he is here.

Consider Nelson's application under paragraph 41 of HC395.

### Family visitor 2

Sara is from Bangladesh and intends to stay with her sick grandmother for 8 months. She will live with her grandmother in London, and visit places like Buckingham Palace and Madame Tussauds. Her grandmother will pay for everything, and at the end of the visit Sara intends to go and visit a friend in France.

Consider Sara's application under paragraph 41 of HC395.

### **Settlement for children**

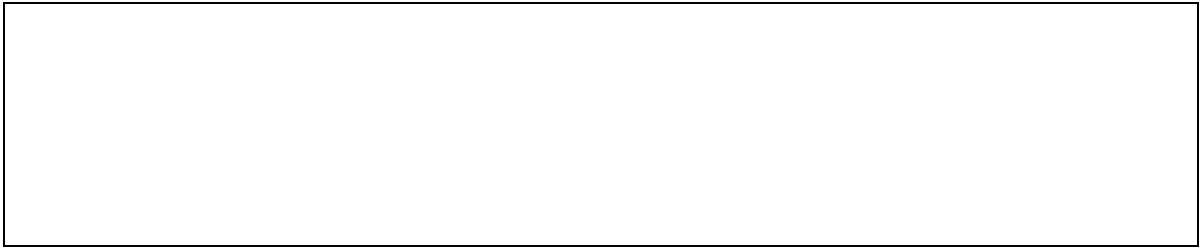
Christian is 17 years old and wishes to settle in the UK with his father, having spent all of his life in Nigeria. Unfortunately his mother died 6 months ago, and he has been living with his elderly grandmother since her death. However, Christian's father has been responsible for him since this time, and has been a great source of comfort over the last six months, visiting Nigeria twice and helping him choose a university. Christian's father has a flat with 2 bedrooms. At present he lives on his own. He is a barrister.

Consider Christian's application under paragraph 297 of HC395.

### **Spouse of a refugee**

Mohammed is from Somalia but has been living in Ethiopia since 1999. His Wife Saida came to the UK with their 2 children in 1992 and has been recognised as a refugee. They married in a religious ceremony in 1988 but have not seen each other since Saida came to the UK. They state however, that they are in regular telephone contact. Saida does not work, she receives disability, housing and child benefit, but states that she will also be able to support Mohammed.

Consider Mohammed's case under paragraph 352A of HC395.



## Immigration caselaw and definitions

Immigration caselaw is always changing. The following is for reference only, you should ensure that you refer to the most up to date position when preparing and presenting cases.

### TD (Yemen) [2006] UKAIT 000049

“What is apparent ...is the need to establish ‘responsibility’ for the child’s upbringing in the sense of decision-making, control and obligation to the child which must lie exclusively with the parent. Financial support, even exclusive financial support, will not necessarily mean that the person providing it has “sole responsibility” for the child. It is a factor but no more than that” (paragraph 27)

“In order to conclude that the UK-based parent had sole responsibility for the child, it would be necessary to show that the parent abroad had abdicated any responsibility for the child and was merely acting at the direction of the UK-based parent and was otherwise totally uninvolved in the child’s upbringing” (Paragraph 46)

“Wherever the parents are, if both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility” (paragraph 52(iv))

If the parent outside the UK has no involvement, it is important to look at others involved in their care: “...if the UK-based parent has allowed the carer abroad to make some ‘important decisions’ in the child’s upbringing, then it may readily be said that the responsibility for the child has become shared” (paragraph 50)

### **Paragraph 6 of HC395:**

**"must not be leading an independent life"** means that the applicant does not have a partner as defined in Appendix FM; is living with their parents (except where they are at boarding school as part of their full-time education); is not employed full-time or for a significant number of hours per week (unless aged 18 years or over); is wholly or mainly dependent upon their parents for financial support (unless aged 18 years or over); and is wholly or mainly dependent upon their parents for emotional support

### **Paragraph 6 of HC395:**

**"adequate' and 'adequately'** in relation to a maintenance and accommodation requirement shall mean that, after income tax, national insurance contributions and housing costs have been deducted, there must be available to the family the level of income that would be available to them if the family was in receipt of income support."

### KA and Others (adequacy of maintenance) Pakistan [2006] UKAIT00065

“The requirement of adequacy is objective. The level of income and other benefits that would be available if the family were drawing income support remains the yardstick”

“Although it may be said that there is an element of imprecision in the relevant Immigration Rules, the requirement that the maintenance be "adequate" cannot properly be ignored. To our mind the use of that word imposes an objective standard. It is not sufficient that maintenance and accommodation be available at a standard which the parties and their family are prepared to tolerate: the maintenance and accommodation must be at a level which can properly be called adequate” (paragraph 6)

“There is a good reason for using the levels of income support as a test. The reason is that income support is the level of income provided by the United Kingdom government to those who have no other source of income. It follows from that that the Respondent could not properly argue that a family who have as much as they would have on income support is not adequately maintained”. (paragraph 7)

### **Mahad (Ethiopia) v Entry Clearance Officer [2009] UKSC16**

RE: Rules 281, 297 and 317

#### On third party sponsorship:

“...generally speaking unenforceable third party promises are likely to be more precarious and less easily verifiable than a sponsor’s own legal entitlements, that will not invariably be so...it is always for the applicant to satisfy the ECO that any third party support relied upon is indeed assured. If he fails to do so, his application will fail” (paragraph 19)

“...I would in any event construe the existing rules as permitting of third party support...” (paragraph 31)

“The relevant rules (rules 281(v), 297 (v) – latterly 297(iv) and 317 (iv) should be interpreted as permitting third party support” (paragraph 51)

#### On joint sponsorship and conduits:

“...provided only that the relative abroad is getting funds on which he is wholly or mainly dependent and which he would not be getting save for his relative present and settled in the UK, that is sufficient. It is not necessary for the funds ever to have been part of the settled relative’s own personal resources...He understands himself to be dependent on his relative here and in my judgement he is right to do so” (paragraphs 35-36)

“On the construction to be placed on rule 317(iii)...Does that mean that the UK resident must be in a position to meet the dependency of his relative from his own resources or does it merely mean that the financial dependency exists? In my view, the latter interpretation is plainly to be preferred...Financial dependency for the purposes of the rule is established by the fact of payment by the resident relative. It is not displaced from the condition simply because the money for the payment comes from a different source” (paragraph 56)

### **Article 3 of The United Nations Convention on the Rights of Children (UNCRC) states**

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.”

### ***s55 Duty regarding the welfare of children***

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(1) The Secretary of State must make arrangements for ensuring that—

(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and

(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(2) The functions referred to in subsection (1) are—

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

(c) any general customs function of the Secretary of State;

(d) any customs function conferred on a designated customs official.

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

(4) The Director of Border Revenue must make arrangements for ensuring that—

(a) the Director's functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and

(b) any services provided by another person pursuant to arrangements made by the Director in the discharge of such a function are provided having regard to that need.

(5) A person exercising a function of the Director of Border Revenue must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (4).

(6) In this section—

- “children” means persons who are under the age of 18;
- “customs function”, “designated customs official” and “general customs function” have the meanings given by Part 1.

(7) A reference in an enactment (other than this Act) to the Immigration Acts includes a reference to this section.

(8) Section 21 of the UK Borders Act 2007 (c. 30) (children) ceases to have effect.

#### **ZH (Tanzania) [2011] UKSC 4**

Lead domestic case on the best interests of children when conducting a balancing exercise under Article 8. UKBA wanted to remove a mother of two British citizen children to Tanzania because of her appalling immigration history, but the consequence of the removal would have been that the children would also have to leave the UK.

Significant findings:

- Importance of British citizenship.
- Best interests of children must be a primary consideration.

#### **CB (validity of marriage: proxy marriage) Brazil [2008] UKAIT00080**

“Capacity to marry is regulated by domicile but there is no suggestion here that the appellant and his wife lacked capacity to marry. It is equally clear that the validity of the marriage is governed by the lex loci celebrationis which is Brazilian law and it is common ground that Brazilian law recognises proxy marriages” (paragraph 21)

#### **ZN (Afghanistan) & Ors v ECO (Karachi) [2010] UKSC 21**

Applications from appellants who were refugees but have since been granted British Citizenship will still come under paragraph 352A (and for child applications 552D).

“The court regards the construction advanced on behalf of the appellants as the more natural meaning of the words used. The grant of asylum is a specific event. This is underlined by the words of sub-para (i) of para 352A, which simply says that the applicant must be married to “a person granted asylum” and thus naturally refers to a particular historic event and not to an existing condition” (paragraph 28)

## **The Points Based System**

There are 5 tiers in which people can apply to enter or remain in the UK to work, study or train; many of these tiers are sub-divided further. The applications come under Part 6A of the Immigration rules:

### **Tier 1 – High value migrants**

Exceptional Talent: This route is for applicants who are internationally recognised as world leaders in science, engineering, humanities or the arts and wish to bring their skills to the UK. There is a limit of 1000 visas per year under this route.

General: This route is for migrants who wish to find highly-skilled employment or self-employment in the UK. This route closed for out-of country applicants on 23 December 2010. It also closed for in-country applicants on 6 April 2011 except for extensions for those who are already in the route or one of the predecessor routes. These are: Highly Skilled Migrant Programme; Self-Employed Lawyers; Writers; Composers; Artists.

Entrepreneurs: This route is for those investing in the UK by setting up or taking over or being actively involved in the running of a business.

Investors: This route is for high net-worth individuals making a substantial financial investment in the UK.

Post-Study Work: This route is for the most able international graduates who have studied in the UK. Sponsorship is not required under this route. It provides a bridge to other routes under Tier 1 or Tier 2. This route closed to new applicants on 6 April 2012.

Graduate Entrepreneurs: This route is for graduates who have been identified by Higher Education Institutions in the UK as having developed innovative business ideas to stay on in the UK after graduation to develop their businesses.

### **Tier 2 – Sponsored skilled workers**

This tier allows UK employers to recruit workers from outside the EEA to fill a particular vacancy that employers cannot fill with British or EEA workers.

To be eligible under Tier 2 the applicant must have a skilled job offer and a Certificate of Sponsorship (CoS) from an organisation that is a licensed sponsor in the UK.

General: This route is for Shortage Occupations and jobs where sponsors have carried out a Resident Labour Market Test and found no suitable resident workers are available. Tier 2 General is subject to an annual limit of 20,700 a year.

Intra-Company Transfer: This route is for employees of multinational companies who are being transferred by their overseas employer to a UK branch of the organisation, either on a long-term basis or for frequent short visits. The four sub-categories under this route are as follows: Long-term staff; Short-term staff; Graduate Trainee; Skills Transfer.

Ministers of Religion: This category is for people who want to take up employment or posts or roles within their faith communities in the UK as: ministers of religion undertaking preaching and pastoral work; missionaries; or members of religious orders.

Sportspeople: This route is for elite sportspeople and coaches who are internationally established at the highest level, and will make a significant contribution to the development of their sport.

The Intra-Company Transfer, Ministers of Religion and Sportspeople routes are not subject to any cap

### **Tier 3 – Low-skilled workers**

This tier has never been opened and there are no plans to do so, as the Government considers that all low-skilled jobs can be filled from the UK and EEA workforce.

### **Tier 4 – Students**

General: This route is for adult students to enter or remain in the UK for the purpose of post-16 education. Those applying under this route must have both a sponsor and a Confirmation of Acceptance for Studies (CAS).

Children: This route is for children between the ages of 4 and 17. If they are between 4 and 15 years old, their education in the UK must be at a fee-paying school. Children aged 16 or 17 may need to apply under Tier 4 (General), not Tier 4 (Child).

### **Tier 5 – Youth mobility and temporary work**

Youth Mobility Scheme: This route is for young people from participating countries who would like to experience life in the United Kingdom. Sponsored young people from participating countries will be allowed to come to the United Kingdom for up to two years, while young United Kingdom nationals enjoy similar opportunities in participating countries. These young people will be free to do whatever work they like during their stay in the United Kingdom, except for setting up their own business, playing professional sport or working as a doctor in training. Entry Clearance will not be granted unless an applicant has sponsorship. They must also be a citizen of one of the following countries/territories:

Australia; Canada; Japan; New Zealand; Monaco; Taiwan; South Korea

Temporary Worker: This route is for those who wish to enter the UK to work for a limited period of time. The sub-sections under which a person may apply under this category are as follows:

Creative and Sporting; Charity Worker; Religious Worker; Government Authorised Exchange; International Agreement.

### **Caselaw**

#### **Miah & Ors v Secretary of State for the Home Department [2012] EWCA Civ 261**

definitively rejected the principle that cases should succeed on “near miss” grounds. The court stated: “A rule is a rule. The considerations to which Lord Bingham referred in *Huang* require rules to be treated as such. Moreover, once an apparently bright-line rule is regarded as subject to a Near-Miss penumbra, and a decision is made in favour of a near-miss applicant on that basis, another applicant will appear claiming to be a near miss to that near miss. There would be a steep slope away from predictable rules, the efficacy and utility of which would be undermined.

For these reasons, I would dismiss the appeal in relation to the Near-Miss argument. In my judgment, there is no Near-Miss principle applicable to the Immigration Rules.”

### **Pankina [Secretary of State for the Home Department v Pankina (2010) EWCA Civ 719]**

Prior to 23<sup>rd</sup> July 2010 the Immigration Rules only specified that the applicant must hold the required level of funds at the date of application, however, our own Tier 1 policy guidance stated that it should be held in the account for three months prior to the date of application. The Court of Appeal in Pankina found that an applicant only needs to demonstrate that they hold the required level of funds (for the entire family) at the closing balance on any one day during one month period prior to the date of application. As a result of the changes to the Immigration Rules UKBA can now insist that a Tier 1 applicant hold the required levels of maintenance for a minimum of 3 months. The same principle applies to other PBS Tiers where the maintenance requirement may be different i.e. 28 days under Tier 4.

Pankina is not only applicable to PBS but has a more general impact. Broadly speaking the SoS cannot place specific requirements to be met in guidance which are not also contained in the immigration rules. This does not, however, mean that every minor detail must be contained in the immigration rules. Subsequent cases have sought to expand the ruling in Pankina.

### **Alvi [2012] UKSC 33**

In July 2012, the Supreme Court allowed the appeal of Mr Alvi (2012 UKSC 33). Mr Alvi had appealed after he was refused leave to remain in the UK (as an assistant physiotherapist; he was not on UKBA’s approved list of skilled professions). He challenged the decision on the basis that the relevant policy had not been laid before Parliament as required by section 3(2) of the Immigration Act 1972 and was therefore unlawful. As a consequence of the Supreme Court allowing the appeal, any decision where a refusal is based on requirements contained in guidance and not in the Immigration Rules is no longer lawful and should not be argued.

### **Key documents and issues to consider when preparing for a PBS appeal:**

#### **Establish the following:**

- Which Tier and sub-category the appellant applied under
- The date the appellant’s application was considered
- Which rule and version the appellant’s application was considered under
- Why the appellant’s application was refused
- The appellant’s grounds of appeal
- What evidence the appellant submitted in support of his application
- Whether he has submitted new evidence since his application was refused and whether that evidence is admissible under s85A.
- Whether there is any relevant case law concerning the issues raised by the appellant’s case

#### **You must ensure you have the following documents:**

- The appellant’s application form

- the documentary evidence submitted by the appellant
- The refusal letter
- The appellant's grounds of appeal
- The version of the immigration rule the appellant's application was considered under
- UKBA guidance relevant to the appellant's case
- Case law relevant to the appellant's case

## **Case Study - PBS**

### **Case Study**

The applicant is a national of Turkey who has just completed a 3-year degree in Law at the University of Warwick. He would like to remain at The University of Warwick in order to complete their 1-year Legal Practice Course. the University of Warwick has Highly Trusted Sponsor status. The applicant has a Confirmation of Acceptance of Study from the university. The course fees are £9,900 p.a. The applicant has provided bank statements which show a balance of £6500 as of the date of application. Those funds have been in the applicant's account for 26 days.

Q1. Which tier is the applicant applying under?

Q2. Which is the relevant rule?

Q3. Does the applicant have the requisite number of points?

## **General Grounds For Refusal**

In addition to being refused under the immigration rule that the application was made under, if there is a general ground that applies, the application may fail under that too;

Paragraph 320 entry clearance  
Paragraph 321 & 321A on entry  
Paragraph 322 after entry

A320. Paragraphs 320 (except subparagraph (3), (10) and (11)) and 322 do not apply to an application for entry clearance, leave to enter or leave to remain as a Family Member under Appendix FM, and Part 9 (except for paragraph 322(1)) does not apply to an application for leave to remain on the grounds of private life under paragraphs 276ADE-276DH.

## **Ozhogina and Tarasova (deception within para 320(7B) – nannies) Russia [2011] UKUT 00197 (IAC)**

Where the respondent relies on paragraph 320(7B) (d) to refuse an application for entry clearance because of a breach of the UK's immigration laws by using 'Deception in an application for entry clearance' it is necessary to show that a false statement was deliberately made for the purpose of securing an advantage in immigration terms.

## **Khaliq (entry clearance – para 321) Pakistan [2011] UKUT 00350(IAC)**

*A person who has entry clearance that, under the provisions of the Immigration (Leave to Enter and Remain) Order 2000, takes effect as leave to enter, does not on arrival in the United Kingdom "seek" leave to enter, and paragraph 321 therefore does not apply to him. Paragraph 321A does, but only if the circumstances set out in that paragraph can be shown to exist in his case.*

## **Burden & standard of proof**

### **JC (Part 9, HC395, burden of proof) China [2007] UKAIT 00027**

The burden of proof lies with UKBA where an application is refused under the general grounds for refusal eg under paragraph 320.

## **Relevant Date / matters to be considered**

### **In-country appeals**

#### **Section 85(4) of the 2002 Act**

“On an appeal under section 82(1), 83(2) or 83A(2) against a decision the Tribunal may consider evidence about any matter which thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.”

### **Relevant date – Entry clearance**

#### **Section 85(5) of the 2002 Act**

“But in relation to an appeal under section 82(1) against refusal of entry clearance or refusal of a certificate of entitlement under section 10 –

- (a) subsection (4) shall not apply
- (b) the adjudicator may consider only the circumstances appertaining at the time of the decision to refuse”

### **Relevant date – in-country PBS cases**

#### **85A of the 2002 Act**

Matters to be considered: new evidence: exceptions

(1) This section sets out the exceptions mentioned in section 85(5).

(2) Exception 1 is that in relation to an appeal under section 82(1) against an immigration decision of a kind specified in section 82(2)(b) or (c) the Tribunal may consider only the circumstances appertaining at the time of the decision.

(3) Exception 2 applies to an appeal under section 82(1) if—

(a) the appeal is against an immigration decision of a kind specified in section 82(2)(a) or (d),

(b) the immigration decision concerned an application of a kind identified in immigration rules as requiring to be considered under a “Points Based System”, and

(c) the appeal relies wholly or partly on grounds specified in section 84(1)(a), (e) or (f).

(4) Where Exception 2 applies the Tribunal may consider evidence adduced by the appellant only if it—

(a) was submitted in support of, and at the time of making, the application to which the immigration decision related,

(b) relates to the appeal in so far as it relies on grounds other than those specified in subsection (3)(c),

(c) is adduced to prove that a document is genuine or valid, or

(d) is adduced in connection with the Secretary of State's reliance on a discretion under immigration rules, or compliance with a requirement of immigration rules, to refuse an application on grounds not related to the acquisition of "points" under the "Points Based System".

#### **DR (Morocco) \* [2005] UKAIT 00038**

- Section 85(5) of the 2002 Act does not exclude all evidence after the date of decision – BUT the tribunal can only consider circumstances appertaining at the date of decision
- This can be demonstrated by subsequent actions / evidence that sheds light on the position at the date of decision
- Judges cannot consider evidence that shows the position has changed and that there is now an intention that was subsequently lacking
- Essentially the evidence needs to be considered only if it concerns a matter existing AT the date of decision but not a new matter arising after the date of decision

#### **AS (Somalia) (FC) and another (appellants) v SSHD**

In entry clearance cases, if human rights grounds are raised, the hearing will consider only the human rights circumstances as at the date of decision – not the date of hearing.

"In any event, I am not satisfied that the differential provision in s.85(5), unexplained though it is, does involve any necessary interference with Convention rights. The reason is the simple one founded upon by Ms Laing, that in s.85(5) cases any post-decision events which generate or enhance a human rights-based claim for entry clearance can be the subject of a fresh claim and, if necessary, a fresh appeal. While it may prolong matters (though the extent of prolongation in the present case is inexcusable), the procedure denies no access to Convention rights by comparison with s.85(4)" (paragraph 18)

#### **Bundles**

#### **MH (Respondent's bundle: documents not provided) Pakistan [2010] UKUT 168 (IAC)**

"The requirements of rule 13 are mandatory. Their intention is clear; it is to enable the Appellant to know the case he has to meet, and the Tribunal to have the material upon which the case can be judged. If there are documents relating to the detection of forgery which ought in the public interest not to be disclosed, the procedure under s108 ...is available...but it seems to us that, because the documents mentioned in subparagraph (a) are essentially the statement of the Respondent's case, ...the Tribunal is entitled to conclude that a document not furnished under Rule 13 is not a document upon which the Respondent relies; and that if there is reference to it in the Notice of, or Reasons for refusal, the Tribunal is entitled to conclude that that reference no longer forms part of the Respondent's case"

### **Cvetkovs (visa – no file produced – directions) Latvia [2011] UKUT 00212 (IAC)**

1. Where a visit visa application is refused because the Visa Officer is not satisfied of the appellant's intentions as a result of only limited documents being produced and translated; and the respondent breaches Procedure Rules by failing to send documentation to the Tribunal, directions can be given indicating that unless the respondent complies with the rules it may be that the Tribunal will assume that the appeal is unopposed.

2. Where the respondent breaches Procedure Rules by failing to send documentation to the Tribunal, and the First-tier Tribunal issues a reasoned decision, based on the material before it, allowing the appeal, a challenge by the respondent based on sufficiency of reason is unlikely to prosper on an application for permission to appeal to the Upper Tribunal.

### **New Issues**

#### **R v Immigration Appeal Tribunal ex parte Kwok on Tong (1981)**

"I would, however, say that if, as happened in this case, at either appeal stage, a matter is either raised by whoever is acting on behalf of the Home Office or is considered by the Tribunal or adjudicator, which is not in the notice of refusal, then steps must be taken to ensure that the applicant or appellant has a proper opportunity of dealing with this point"

#### **RM (Kwok on Tong: HC395 para 320) India [2006] UKAIT 00039**

"Kwok On Tong is still good law and an Immigration Judge cannot allow an appeal on the ground that the decision was not in accordance with the Immigration Rules unless satisfied that the requirements of the Immigration Rules were (or are, as appropriate) met. An appeal is not limited to the issues raised in the Notice of Refusal. In the particular case of paragraph 320, however, only the first seven subparagraphs prevent the claimant succeeding. An Immigration Judge is therefore entitled to allow an appeal even if he considers that one (or more) of the other subparagraphs apply to the case"

### **Limited right of appeal for visitors**

Previously, the appeal right for family visitors was provided by s90 of the 2002 Act and the Immigration Appeals (Family Visitor) Regulations 2003. These have been replaced (as of the 9<sup>th</sup> July 2012) by **s88A of the 2002 Act** and the **Immigration Appeals (Family Visitor) Regulations 2012**.

#### **88A. Entry clearance**

- 1) A person may not appeal under section 82(1) against refusal of an application for entry clearance unless the application was made for the purpose of-
  - a. Visiting a person of a class or description prescribed by regulations for the purpose of this subsection, or
  - b. Entering as the dependant of a person in circumstances prescribed by regulations for the purpose of this subsection.

**RK (“Purpose” of family visit) Bangladesh [2006] UKAIT 00045**

“In order to give rise to an appealable decision, the evidence must show that the purpose of a family visit was to visit a member of the applicant's family, as defined in the Immigration Appeals (Family Visitor) Regulations 2003. It cannot be assumed simply from the fact that a person falling within that definition lives in the United Kingdom that the purpose was to visit them”

**Ajakaiye (visitor appeals – right of appeal) Nigeria [2011] UKUT 00375 (IAC)**

In family visitor appeals, the question whether there is a right of appeal depends on whether the application “was made” for the purpose of visiting a relative to which the applicant is related in one of the ways described at paragraph 2 of the Immigration Appeals (Family Visitor) Regulations 2003.

Ascertaining the purpose of the visit is primarily achieved by examining what the applicant said in the visit visa application form, although, as presently drafted, the forms may not provide sufficient opportunity to identify all relevant matters.

In the event of ambiguity as to who is to be visited and whether they are a qualifying relative, regard may be had to extraneous evidence.

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## STATUTORY INSTRUMENTS

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**2012 No. 1532**

### **IMMIGRATION**

#### **Immigration Appeals (Family Visitor) Regulations 2012**

*Made* - - - - 13<sup>th</sup> June 2012

*Laid before Parliament* 18<sup>th</sup> June 2012

*Coming into force* - -  
9<sup>th</sup> July 2012

The Secretary of State, in exercise of the powers conferred by sections 88A(1)(a), 2(a) and (c) and 112(1) and (3) of the Nationality, Immigration and Asylum Act 2002<sup>(1)</sup>, makes the following Regulations:

#### **Citation and commencement**

1. These Regulations may be cited as the Immigration Appeals (Family Visitor) Regulations 2012 and shall come into force on 9 July 2012.

#### **Class or description of person to be visited**

2.—(1) A person (“P”) is of a class or description prescribed for the purposes of section 88A(1)(a) of the Nationality, Immigration and Asylum Act 2002 (entry clearance), if—

- (a) the applicant for entry clearance (“A”) is a member of the family of P; and
- (b) P’s circumstances match those specified in regulation 3.

(2) For the purposes of paragraph (1), A is a member of the family of P if A is the—

- (a) spouse, civil partner, father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother or sister;
- (b) father-in-law, mother-in-law, brother-in-law or sister-in-law;
- (c) son-in-law or daughter-in-law; or
- (d) stepfather, stepmother, stepson, stepdaughter, stepbrother or stepsister;

of P.

(3) For the purposes of paragraph (1), A is also a member of the family of P if A is the partner of P.

(4) In this regulation, A is the partner of P if—

- (a) A and P have been in a relationship that is akin to a marriage or civil partnership for at least the two years before the day on which A’s application for entry clearance was made; and

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<sup>(1)</sup> 2002 c. 41, section 88A was inserted by section 29 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) and substituted, together with sections 90 and 91, by a new section 88A inserted by section 4 of the Immigration, Asylum and Nationality Act 2006 (c.13) and section 112(3) was amended by article 5(1) and Schedule 1 of the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 (S.I. 2010/21).

(b) such relationship is genuine and subsisting.

(5) In this regulation—

- (a) “father-in-law of P” includes the father of P’s civil partner;
- (b) “mother-in-law of P” includes the mother of P’s civil partner;
- (c) “brother-in-law of P” includes the brother of P’s civil partner;
- (d) “sister-in-law of P” includes the sister of P’s civil partner;
- (e) “son-in-law of P” includes the son of P’s civil partner;
- (f) “daughter-in-law of P” includes the daughter of P’s civil partner;
- (g) “stepfather of P” includes the person who is the civil partner of A’s father (but is not A’s parent);
- (h) “stepmother of P” includes the person who is the civil partner of A’s mother (but is not A’s parent);
- (i) “stepson of P” includes the person who is the son of A’s civil partner (but is not A’s son);
- (j) “stepdaughter of P” includes the person who is the daughter of A’s civil partner (but is not A’s daughter);
- (k) “stepbrother of P” includes the person who is the son of the civil parent of A’s parent (but is not the son of either of A’s parents); and
- (l) “stepsister of P” includes the person who is the daughter of the civil partner of A’s parent (but is not the daughter of either of A’s parents).

### **Circumstances of the person to be visited**

3. The circumstances of P mentioned in regulation 2(1)(b) are that P—

- (a) is settled in the United Kingdom as defined in paragraph 6<sup>(2)</sup> of the immigration rules;
- (b) has been granted asylum in the United Kingdom under paragraph 334<sup>(3)</sup> of the immigration rules; or
- (c) has been granted humanitarian protection in the United Kingdom under paragraph 339C<sup>(4)</sup> of the immigration rules.

### **Transitional provision**

4. These Regulations apply only to an application for entry clearance made on or after the day on which they come into force.

Home Office  
13th June 2012

*Damian Green*  
Minister of State

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<sup>(2)</sup> Paragraph 6 was included in the immigration rules laid before Parliament on 23rd May 1994 (HC 395).

<sup>(3)</sup> Paragraph 334 was substituted by the statement of changes in immigration rules presented to Parliament in September 2006 (Cm 6918).

<sup>(4)</sup> Paragraph 339C was inserted by the statement of changes in immigration rules presented to Parliament in September 2006 (Cm 6918).

## **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations prescribe a class or description of person for the purposes of section 88A(1)(a) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). Under section 88A(1)(a), a person may not appeal under section 82(1) of the 2002 Act against refusal of an application for entry clearance unless the application is made for the purpose of visiting a person of a description or class prescribed by regulations.

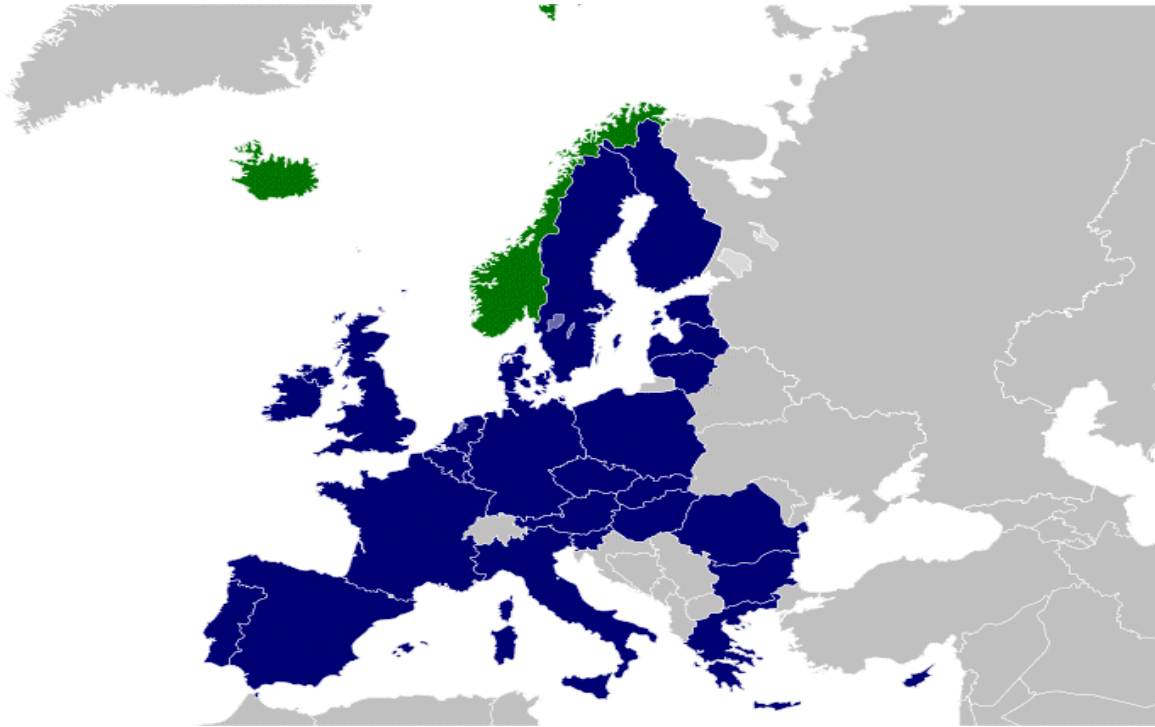
Regulation 2(a) makes provision by reference to whether the applicant is a member of the family (as specified in regulation 2) of the person he or she is visiting; regulation 2(b) makes provision by reference to the circumstances of the person he or she is visiting (as specified in regulation 3).

Regulation 4 makes transitional provision to provide that the Regulations apply only to an application for entry clearance made on or after the day on which the Regulations come into force.

A full impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.

## The Immigration (European Economic Area) Regulations 2006

### European Economic Area



### **EU Members**

Austria	Belgium	Bulgaria	Cyprus
Czech Republic	Denmark	Estonia	Finland
France	Germany	Greece	Hungary
Italy	Latvia	Lithuania	Luxembourg
Malta	Netherlands	Poland	Portugal
Rep of Ireland	Romania	Slovakia	Slovenia
Spain	Sweden	UK	Croatia

(Bulgaria & Romania joined January 2007)

### **EEA but not EU members:**

Iceland  
Liechtenstein  
Norway

### **Non EEA state but with Agreement:**

Switzerland

The following are case law summaries of key EEA cases. This is not an exhaustive list of EEA cases and you must refer to the research unit website for the most up to date cases.

### Job Seekers

#### AG & Ors (EEA-jobseeker - self-sufficient person – proof) Germany [2007] UKAIT 00075

A job-seeker for the purposes of the EEA regulations is someone who:

- Enters the UK to seek employment
- Can provide evidence that he is seeking employment
- Has a genuine chance of being engaged.

### Workers

The definition of a worker in the UK is contained in section 230 (3) of the Employment Rights Act 1996 as:

an individual who has entered into or works under a contract of employment or any other contract... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual

#### Case 53/81 Levin v Staatsecretaris van Justitie

Someone undertaking part time work can be considered a worker providing that the work is genuine and effective and not purely marginal and ancillary

#### Case 139/85 Kempf

Even part time work, whilst providing less than required for subsistence, may constitute, for many, an effective means of improving their living conditions. It is not the reason for taking employment that is relevant, but whether it is genuine economic activity.

Furthermore supplementing income from the public purse does not stop a person being a worker.

### Self-Employed

#### A. J. M. van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen. [1986] EUECJ R-300/84 (23 October 1986)

Self-employment is genuine and effective economic activity carried out outside of a relationship of subordination.

#### Jia (Free movement of persons) [2006] EUECJ C-1/05 (27 April 2006).

"Article 1(1)(d) of Directive 73/148 is to be interpreted to the effect that 'dependent on them' means that members of the family of a community national established in another Member State with the meaning of Article 43 EC need the **material support of that community national or his or her spouse in order to meet their essential needs in the state of origin of those family members or the state from which they have come at the time when they apply to join the Community national**...Proof of the need for material support may be adduced by any appropriate means, while a mere undertaking

from the community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members situation of real dependence” (paragraph 43)

#### **Pedro v SSWP [2009] EWCA Civ 135**

“Article 2(2) does not specify when the dependency has to have arisen. Neither does it require that the relative must be dependent in the country of origin. Article 3(2)(1), on the other hand, requires actual dependency at a particular time and place”. (paragraph 67).

#### **TR (Reg 8(3) EEA Regulations 2006) Sri Lanka [2008] UKAIT 00004**

For a relative to satisfy regulation 8(3) of the EEA Regs 2006 the "serious health grounds" need to be significantly beyond ordinary ill health and as a matter of practice will require detailed medical evidence in support of any claim. Personal care must be provided on a day to day basis and relate either or both to the physical and mental tasks and needs required for a person to function. "Strictly" is a restrictive or limiting requirement and imports a need for complete compliance or exact performance and reinforces the need for personal care to be provided on a day to day basis.

#### **YB (EEA Regulation 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062**

The AIT considered the guidance given in both the IDI's and the ECI's and concluded that the IDI's were too restrictive in their approach. They are a useful starting point when assessing durable relationships, however an extensive examination of all the circumstances would need to take place:

“...one can say it should take into account the family relationship with the EEA national...and ensure that the circumstances considered include (if applicable) their financial or physical dependence on the Union citizen. And in our view it would be wrong to make this a more exacting a requirement than it is...the essential need is a simple one necessitating an examination in the round of the appellant's circumstances” (para 30).

### **EEA Deportation**

#### **Public security**

#### **LG (Italy) v SSHD [2008] EWCA Civ 190**

“There is no reason to equate the term public security with that of national security...the words risk to the safety of the public or a section of the public seem to me reasonably consistent with the ordinary understanding of public security” [para 32]

#### **Imperative grounds of public security**

#### **Tsakouridis (European citizenship) [2010] EUECJ C-145/09 (23 November 2010)**

The court gave guidance on the application of ‘imperative grounds of public security’.

- The EEA national's degree of integration and absences from the UK.
- The nature of the offence and the sentence imposed.
- The risk posed to the public.
- The propensity to reoffend.
- Whether any measure short of deportation are sufficient.
- The effect that deportation would have on a person who has become integrated into UK society and in particular the potential risk to the future social rehabilitation of the offender.

### Accruing Ten years residence

#### LG & CC (EEA Regulations: residence; imprisonment; removal) Italy [2009] UKAIT 00024

The AIT found that the 10 years residence does not have to be in line with the regulations. Presence in the UK is sufficient to establish this.

### Time spent in prison

#### HR (Portugal) v SSHD EWCA Civ 371

Paragraph 13 onwards sets out the history of this issue, and at paragraph 17 onwards, the Court of Appeal sets out the relevant community law”

“...’residence’ is presence in this country in the exercise of the rights and freedoms conferred by the Treaty. An EEA national who, having been convicted of a crime, is detained for a significant period in prison or other penal institution, is not resident in this country for the purposes of Article 28.3” (para 23)

“This conclusion avoids perverse consequences of interpretation that the European Parliament and the Council could not have intended. An EEA national comes to this country for a short visit. He illegally imports a large quantity of Class A drugs. Having been here for 6 months, he is convicted and a sentence of imprisonment imposed as a result of which he is in custody for 10 years. By reason of his crime, on release he cannot be deported save on imperative grounds of public security...” (para 27)

## Case studies – trainers notes.

### CASE STUDY 1



Boris is a German national who has lived in London since 2010

He has been employed since his arrival in the UK at Happy Snaps on a permanent basis and works 30 hours per week.

#### **Q) Is Boris a Qualified Person?**

Boris then gets bored of his job and decides to reduce his hours to ten hours per week so that he can pursue his dream of learning to play tennis properly.

#### **Q) How does this affect his residence in the UK?**

Boris then finds he is unable to afford his rent due to his reduced earnings and decides to claim housing benefit.

#### **Q) Does this affect his residency in the UK?**

Boris then gets made redundant from Happy Snaps having worked there for over 12 months.

#### **Q) What is his position now?**

Bob, the twin of Boris, graduates in Germany with a degree in IT and comes to the UK to see if he can find work. He immediately registers with the local Job Centre Plus and states he is looking for work in a hospital as a Doctor.

#### **Q) Is Bob a qualified person?**

## CASE STUDY 2



Farah is an Iranian national. She is married to Klaus a German national who is exercising treaty rights in the UK as a self-employed person. Farah and Klaus have lived in the UK since 2009. Farah's mother Selena is reliant on remittances sent by her daughter. Selena would like to move to the UK to live with Farah and Klaus.

**Q) Can Selena reside in the UK under the EEA Regulations?**

## CASE STUDY 3



Doris was born in Sri Lanka but now has Dutch nationality. She moved to the UK 4 months ago, and is exercising treaty rights as a worker.

Prior to moving to the UK she lived with her brother Colin in Amsterdam. Colin is a Sri Lankan national and is residing in the Netherlands illegally.

Colin applies for an EEA family permit at the British Consulate General in Amsterdam. He is unemployed and has been financially dependent on Doris since his entry to the Netherlands 2 years ago.



**Q) Which regulation will Colin's case be considered under?**

**Q) Does Colin satisfy regulation 8(2)?**

#### **CASE STUDY 4**



Mr and Mrs Bemba came to the UK from the DRC in 2003 and claimed asylum on arrival. They were refused and had their appeals dismissed.

They disappeared and came to the attention of the Home Office in January 2006 when they submitted an application for their daughter to remain in the UK.

Their daughter is called Sindy and was born on the 31<sup>st</sup> December 2004 in Belfast. Sindy has Irish nationality and Mr Bemba claims that he is working in a restaurant which is the family's only source of income. Mr Bemba has not been given permission to work.

**Q) Is Sindy a qualified person?**

**Q) Are Sindy's parents qualified persons?**

**Q) Are Cindy's parents entitled to remain as the family members of an EEA national under regulation 7?**

### **CASE STUDY 5**

A French National, Jean-Jacques, is married to Isabelle who is a national of the Ivory Coast. They married in 2001. They have been residing in the UK since 2002 on the basis that Jean-Jacques is working at Shell.



They have two children aged 5 and 8 who are attending the local primary school.

They Divorce in 2005 and Jean-Jacques returns to France leaving Isabelle and the children in the UK. Isabelle and the children are self-sufficient as Jean-Jacques continues to support the family financially, and they have comprehensive sickness insurance cover.



Isabelle makes an application for her and the children to remain in the UK under the EEA regulations.

**Q) Can the children remain in the UK under the EEA Regulations?**

**Q) Can Isabelle reside in the UK under the EEA Regulations?**

## CASE STUDY 6

Mr Lettieri is an Italian national who has resided in the UK as a worker since 2008. He is convicted of fraud and sentenced to 24 months imprisonment.



Upon his release, he is served a decision notifying him of his liability to be deported from the UK.

**Q) Which regulations of the EEA Regulations govern the deportation of EEA nationals?**

**Q) Would we seek to deport Mr Lettieri on public policy; public security or public health grounds?**

## CASE STUDY 7

Miss Da Costa is a Portuguese national who has resided in the UK for the past 8 years as a worker although she has never obtained any EEA document from the Home Office.



She is convicted of actual bodily harm and is sentenced to 3 years in prison.



**Q) Does her length of residence have any bearing on the Secretary of State's ability to deport her?**

## **CASE STUDY 8**

Miss Wall is a Belgium citizen who has lived in the UK since 1983.

In 1999 she was convicted of belonging to a proscribed organisation and was sentenced to 9 years imprisonment. She is released in 2006 and notified of her liability to be deported on grounds of public security.

**Q) Does Miss Wall's length of residence have any bearing on the Secretary of State's ability to deport her?**

## The Refugee Convention

### Islam v SSHD, Immigration & Asylum Tribunal & anor, Ex-Parte shah, R v [1999] UKHL 20

Lord Hope of Craighead:

"I turn now to the phrase "particular social group." As a general rule it is desirable that international treaties should be interpreted by the courts of all the states parties uniformly. So, if it could be said that a uniform interpretation of this phrase was to be found in the authorities, I would regard it as appropriate that we should follow it. But, as my noble and learned friend Lord Steyn has demonstrated in his review of the United States, Australian and Canadian case law, no uniform interpretation of it has emerged. The only clear rule which can be said to have been generally recognised is that the persecution must exist independently of, and not be used to define, the social group...

In general terms a social group may be said to exist when a group of people with a particular characteristic is recognised as a distinct group by society. The concept of a group means that we dealing here with people who are grouped together because they share a characteristic not shared by others, not with individuals. The word "social" means that we are being asked to identify a group of people which is recognised as a particular group by society. As social customs and social attitudes differ from one country to another, the context for this inquiry is the country of the person's nationality. The phrase can thus accommodate particular social groups which may be recognisable as such in one country but not in others or which, in any given country, have not previously been recognised".

## **Internal Relocation**

### Robinson, R (on the application of) v Secretary Of State For Home Department & Anor [1997] EWCA Civ 2089 (11th July, 1997)

The CoA in the case of Robinson sanctioned the legal test of *unduly harsh*.

At para 19 they give examples of situations which might be considered unduly harsh:

Claimants should not have to:

- cross battle lines to reach a safe area.
- live in an isolated region of their country, like a cave in the mountains, a desert or jungle.

## **Sufficiency of protection**

### Horvath v SSHD [2000] UKHL 37

"I consider that the obligation to afford refugee status only arises if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals...in order to satisfy the fear test in a non-state agent case, the applicant for refugee status must show that the persecution which he fears consist of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection"

## **Draft evaders and Deserters**

### **Sepet [2003] UKHL 15**

There is nothing in law allowing for a right to conscientious objection. Paragraphs 167 – 174 of the convention were handbook to.

### **Senathirajah Ravichandran v SSHD**

“There remains the question as to what point of time should be the focus of a decision by...the IAT... (The legislation)...manifestly looks to the future at the date of appeal. It reflects article 33 of the 1951 convention”

### **Internal Relocation: Is it an option?**

1. Abdul claims that he is persecuted by the government in Iran because of his political opinion. He states that he has been detained once and that there is a warrant out for his arrest.
2. Barika is a divorced woman from Pakistan. She has been accused of adultery by her husband. She has 2 small children and no other family to support her. She has not been educated. Her claim has been accepted by UKBA.
3. Chinmay claimed asylum a week ago. He claims that he had a fight with his neighbour because of his political opinion. Before coming to the UK he lived with his family in Delhi, where he had a job running a restaurant and his children were at school.
4. Deva is from Sri Lanka. In his claim he states that the country is split by government and rebel forces. He is from the North of the country and left in fear as the rebel forces wanted him to fight for them. He has told them he does not want to and now fears for his life.
5. Easau is from Iraq. He has claimed asylum because of the problems he has had with locals in the North of the country. He is believed by them to be a man who had previously persecuted Kurds there. He states that he can't move elsewhere in Iraq as he has limited financial resources.
6. Fatima is from Turkey. She states that she has had trouble locally as she is a lesbian. The local Kurdish community has shunned her, She is not well educated and speaks a minority Kurdish dialect with hardly any knowledge of the Turkish language.
7. George is from Canada and is in fear from drugs barons he gave evidence against in the UK. They run an enormous drugs cartel which stretches across North & South

America and into Europe. George is known to be in England having given evidence under police protection at the Old Bailey.

## **Article 1 F – definitions**

### **Definition of Article 1F (a)**

#### **Annex V of the Refugee handbook**

- (a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

“Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”

### **Definition of Article 1F (b)**

Serious crime:

Regulation 7 (2) (a) of the 2006 Qualification Regulations defines this as:

the reference to serious non-political crime includes a particularly cruel action, even if it is committed with an allegedly political objective.

### **Non-political crime:**

**T v Secretary of State for the Home Department [1996] UKHL 8; [1996] A C 742; [1996] 2 All ER 865; [1996] 2 WLR 766; [1996] Imm AR 443 (22 May 1996)** defines this as:

“A crime is a political crime for the purposes of Article 1F(b) of the 1951 Convention if and only if:

- (1) it is committed for a political purpose, that is to say with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and
- (2) there is a sufficiently close and direct link between the crime and the alleged political purpose”

Outside the country of refuge:

Regulation 7 (2) (b) of the 2006 Qualification Regulations defines this as:

the reference to the crime being committed outside the country of refuge prior to his admission as a refugee shall be taken to mean the time up to and including the day on which a residence permit is issued.

Regulation 2 (Interpretation) defines “residence permit” as a document confirming that a person has leave to enter or remain in the UK whether limited or indefinite.

### **Definition of 1F (c)**

The principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations. Can be found on <http://www.un.org/aboutun/charter/index.html>

Article 1 of the Charter lists four purposes – namely to:

- Maintain international peace and security;
- Develop friendly and mutually respectful relations among nations;
- Achieve international co-operation in solving socio-economic and cultural problems, and in promoting respect for human rights; and
- Serve as a centre for harmonising actions directed to these ends.

### **JS (Sri Lanka), R (on the application of) v Secretary of State for the Home Department (Rev 1) [2010] UKSC 15**

“Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose.” This is a definition (loosely) based on the concept of joint criminal enterprise that is set out reasonably well in Article 25(3)d of the Rome Statute.[para 38]

### **Para 339C – Humanitarian Protection**

### **Elgafaji (Justice and Home Affairs) [2009] EUECJ C-465/07**

“Article 15(c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, in conjunction with Article 2(e) thereof, must be interpreted as meaning that:

the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence

that he is specifically targeted by reason of factors particular to his personal circumstances;

the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.”

**QD (Iraq) v Secretary of State for the Home Department [2009] EWCA Civ 620**

““Situations of international or internal armed conflict” in article 15(c) has an autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reaches the level described by the ECJ in *Elgafaji*.” [para 35]

## Section 8 – Personal Credibility

### SM (Section 8: Judge's process) Iran [2005] UKAIT 00116

“Even where **section 8** applies, an Immigration **Judge** should look at the evidence as a whole and decide which parts are more important and which less. **Section 8** does not require the behaviour to which it applies to be treated as the starting-point of the assessment of credibility”.

### Section 8 Scenarios

1. Abdul came to the UK on a false passport. It had a picture of someone else on it and he only claimed asylum after the Immigration Officer noticed he was trying to pass himself off as someone else. Once he was detained he claimed asylum.
2. Barika claimed in her statement that she had fled Pakistan because her husband had accused her of adultery. However, after some investigation it turns out that she came to the UK 3 months earlier on a visit visa with her husband and he is living with her and their children in the UK.
3. Chinmay recently arrived in the UK before claiming asylum but when he was asked about his journey to the UK he claimed he worked in the following countries for the following periods of time.  
Turkey – 3 months, Bulgaria - 1 month, Croatia – 1 month, Italy - 3 months, France - 2 weeks.
4. Deva claimed asylum after he received notification of intention to deport him from the UK after he had been convicted of smuggling class A drugs into the country and had served 3 years in prison.
5. Easau arrived in the UK 3 years ago but only claimed asylum in the last month. The situation in his country has not changed since he came to the UK.
6. Fatima did not mention a string of criminal offences when she was asked about her past in Turkey. She claimed she had never been arrested but Interpol have provided a report that demonstrates she spent the last 20 years in a Turkish jail having been convicted of fraud.
7. George claimed to have lost his passport when he claimed asylum, however, he was questioned by an Immigration officer when returning from a holiday from France and it emerged he has joint French and Canadian nationality.

## Core of the claim

### Chiver (Asylum; Discrimination; Employment; Persecution) (Romania) [1994] UKIAT 10758

“There are indeed inconsistencies but they are not inconsistencies which the adjudicator ignored. We agree with Mr. Kulscar that the structure of the determination reflects the adjudicator's approach in listing matters adverse to Mr. Chiver and then concluding that these do not affect the adjudicator's belief in the kernel of Mr. Chiver's story. It cannot be said that this approach is so inherently illogical as to render the determination flawed. **In effect it adopts precisely the approach which is urged upon adjudicators, i.e. to weigh up the evidence and to indicate that which is believed and that which is not.**

It is only when an adjudicator after stating that evidence is believed or disbelieved reaches a conclusion which has no foundation in the belief or disbelief that a determination cannot stand because of inherent inconsistencies. In this case this is patently not so for the adjudicator's findings on credibility adverse to Mr. Chiver go as the adjudicator said to the details of the story. **It is perfectly possible for an adjudicator to believe that a witness is not telling the truth about some matters, has exaggerated the story to make his case better, or is simply uncertain about matters, but still to be persuaded that the centre piece of the story stands.** This is particularly so where the critical criterion for an adjudicator is the reasonable likelihood of persecution occurring were a person to return to a particular country”.

## **Burden of Proof**

“He who asserts must prove”

## **Standard of Proof**

### Sivakumaran, R (On the application of) v SSHD [1987] UKHL1

“That an applicant's fear of persecution should be well-founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for “a convention reason” if returned to his own country”

## THE HUMAN RIGHTS ACT 1998

### S2 Interpretation of Convention rights

- (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
  - (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
  - (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
  - (d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

### Types of articles

There are 3 types of articles:

Absolute: No derogation is permissible

Limited: Some derogation is permissible

Qualified: a balancing between the rights of the state and the rights of the individual

### ARTICLE 2

**Bahaddar vs Netherlands** – for a breach of Article 2 there **has to be a near certainty of loss of life**.

### ARTICLE 3

#### **IRELAND V. UNITED KINGDOM - 5310/71 [1978] ECHR 1 (18 JANUARY 1978)**

“...ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.” (Para 162)

“The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3 (art. 3). The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.” (Para 167)

In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3 (art. 3), between this notion and that of inhuman or degrading treatment.

In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted. (Para 167)

The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 (art. 3) of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood. (Para 167)

#### **Soering v United Kingdom - 14038/88 [1989] ECHR 14 (7 July 1989)**

"It would hardly be compatible with...the preamble...were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture." [para 88]

"In sum, the decision by a contracting state to extradite a fugitive may give rise to an issue under article 3, and hence engage the responsibility of that state under the convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country." [para 91]

#### **STARRED KACAJ (ARTICLE 3, STANDARD OF PROOF, NON-STATE ACTORS) ALBANIA [2001] UKIAT 00018 (19 JULY 2001)**

"The link with the Refugee Convention is obvious. Persecution will normally involve the violation of a person's human rights and a finding that there is real risk of persecution would be likely to involve a finding that there is a real risk of a breach of the European Convention on Human Rights. It would therefore be strange if different standards of proof applied... Since the concern under each Convention is whether the risk of future ill-treatment will amount to a breach of an individual's human rights, a difference of approach would be surprising. If an adjudicator were persuaded that there was a well-founded fear of persecution but not for a reason which engaged the protection of the Refugee Convention, he would...be required to reject a human rights claim if he was not satisfied that the underlying facts had been proved beyond reasonable doubt. Apart from the undesirable result of such a difference of approach when the effect on the individual who resists return is the same and may involve inhuman treatment or torture or even death, an adjudicator and the tribunal would need to indulge in mental gymnastics." [Para 10]

#### **D. V. THE UNITED KINGDOM - 30240/96 [1997] ECHR 25 (2 MAY 1997)**

"It is true that this principle [Article 3] has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those non-state bodies in that country when the authorities there are unable to afford him appropriate protection... Given the fundamental importance

of Article 3...the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise...To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection." [para 49]

#### **N V The United Kingdom - 26565/05 [2008] ECHR 27 May 2008**

- D was the starting point of legal consideration
- The application of Article 3 protection is limited by the EctHR to "very exceptional circumstances"
- Aliens have no right under Art 3 to claim medical services that are not readily available in their home country
- A comparison of health benefits and assistance in the expelling / receiving state do not give rise to such entitlement
- The present medical condition in D was the only rationale that made the case truly exceptional

#### **Dealing with human rights at appeal**

#### **EX PARTE ULLAH [2004]UKHL26**

"While Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. [para 24]

"The correct approach in cases involving qualified rights such as those under articles 8 and 9 is in my opinion that indicated by the Immigration Appeal Tribunal (Mr C M G Ockelton, deputy president, Mr Allen and Mr Moulden) in *Devaseelan v Secretary of State for the Home Department* [2002] IAT 702, [2003] Imm AR 1, paragraph 111:

"The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case - where the right will be completely denied or nullified in the destination country - that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state".

#### **Devaseelan (starred Secretary of State for the Home Department v d (tamil) [2002] UKIAT 00702 (13 March 2002)**

The previous determination is the starting point for the immigration judge.

It is possible for one of the other articles to succeed without article 3, but a 'flagrant denial' would have to be shown.

#### **EM Lebanon [2008]UKHL 64**

"In our view, what the word 'flagrant' is intended to convey is a breach...so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article." [Para 3]

### **Bensaid v United Kingdom - 44599/98 [2001] ECHR 82 (6 February 2001)**

“Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity

“Private life” is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8...Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world... The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.”

### **R (On the application of RAZGAR) v SECRETARY OF STATE FOR THE HOME DEPARTMENT (2004) House of Lords.**

- (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
- (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
- (3) If so, is such interference in accordance with the law?
- (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
- (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

### **Appendix FM - Partners**

#### **Prohibited degree of relationship:**

This is defined in paragraph 6 of HC395:

*"prohibited degree of relationship" has the same meaning as in the Marriage Act 1949, the Marriage (Prohibited Degrees of Relationship) Act 1986 and the Civil Partnership Act 2004.*

In England and Wales, the [Marriage Act 1949](#) prohibits a marriage by a man and any of the persons mentioned in the first column, or between a woman and any of the persons mentioned in the second column, of the following table:

Mother	Father
Daughter	Son
Father's mother	Father's father
Mother's mother	Mother's father
Son's daughter	Son's son
Daughter's daughter	Daughter's son
Sister	Brother
Father's sister	Father's brother
Mother's sister	Mother's brother
Brother's daughter	Brother's son
Sister's daughter	Sister's son

The Marriage (Prohibited Degrees of Relationship) Act 1986 prohibits a marriage to the following, until both parties are aged 21 or over, and provided that the younger party has not at any time before attaining the age of 18 been a child of the family in relation to the other party:

Daughter of former wife	Son of former husband
Former wife of father	Former husband of mother
Former wife of father's father	Former husband of father's mother
Former wife of mother's father	Former husband of mother's mother
Daughter of son of former wife	Son of son of former husband
Daughter of daughter of former wife	Son of daughter of former husband

The Marriage (Prohibited Degrees of Relationship) Act 1986 also prohibits a marriage to the following:

Mother of former wife, until the death of both the former wife and the father of the former wife	Father of former husband, until after the death of both the former husband and the mother of the former husband
Former wife of son, until after the death of both his son and the mother of his son	Former husband of daughter, until after the death of both her daughter and the father of her daughter

[The couple has met](#)

**Meherban [1989] Imm AR 57**

“Whilst there is no requirement that a couple have met in the context of marriage they should at least have an appreciation of each other’s appearance and personality. It is not enough simply to have seen each other once.”

**Rewal Raj [1985] IMMAR 151**

“Implies a face to face meeting... a meeting when the parties are very young does not meet the requirement of the rule.”

**Genuine and subsisting**

*IDI Chapter 8 Appendix FM (family members) Annex FM 2.1*

**Factors which may be associated with a genuine and subsisting relationship:**

- (i) The couple are in a current, long-term relationship and are able to provide satisfactory evidence of this.
- (ii) The couple have been or are co-habiting and are able to provide satisfactory evidence of this.
- (iii) The couple have children together (biological, adopted or step-children) and shared responsibility for them.
- (iv) The couple share financial responsibilities, e.g. a joint mortgage/tenancy agreement, a joint bank account and/or joint savings, utility bills in both their names.
- (v) The partner and/or applicant have visited the other’s home country and family and are able to provide evidence of this. (The fact that an applicant has never visited the UK must not be regarded as a negative factor, but it is a requirement of the Immigration Rules that the couple have met in person).
- (vi) The couple, or their families acting on their behalf, have made definite plans concerning the practicalities of the couple living together in the UK. In the case of an arranged marriage, the couple both consent to the marriage and agree with the plans made by their families.

**Factors which may be associated with a relationship which is not genuine and subsisting :**

- (i) If the marriage or civil partnership took place in the UK, a report – of a suspected sham marriage or civil partnership - was made by the registration service under section 24 of the Immigration and Asylum Act 1999.
- (ii) The applicant or partner makes a public statement that their marriage is a sham. An application can be refused on the basis of such a public statement *alone*.

- (iii) The applicant or partner makes a public statement (not in confidence) that they have been forced into marriage. An application can be refused on the basis of such a public statement **alone**.
- (iv) A sibling of the partner or applicant has been forced into marriage.
- (v) The applicant, partner or an immediate family member of either is or has been the subject or respondent of a forced marriage protection order under the Forced Marriage (Civil Protection) Act 1997 or the Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 1999.

An application **can** be refused on the basis alone of a current order involving the applicant or partner.

- (vi) There is evidence from a **reliable third party** (e.g. the Forced Marriage Unit, police, social services, registration service or a minister of religion) which indicates that the marriage is or may be a sham marriage or a forced marriage. (It may not be possible for this information to be used in any refusal notice). The fact that a third party indicates that in their opinion a marriage, partnership or relationship is genuine must not be afforded any weight.
- (vii) The applicant or partner does not appear to have the capacity to consent to the marriage, partnership or relationship, e.g. owing to learning difficulties, and independent evidence, e.g. from a social services assessment, has not been provided to confirm that such capacity exists.
- (viii) There is evidence of unreasonable restrictions being placed on the applicant or partner, e.g. being kept at home by their family, being subject to unreasonable financial restrictions, attempts to prevent the police or other agencies having reasonable, unrestricted access to the applicant or partner.
- (ix) Failure by the applicant or partner to attend an interview, without reasonable explanation, where required to do so to discuss the application or their welfare, or seeking to undermine the ability of the UK Border Agency to arrange an interview, e.g. by unreasonable delaying tactics by the couple or a third party.
- (x) The couple are unable to provide any information about their intended living arrangements in the UK or about the practicalities of the applicant moving to the UK.
- (xi) The circumstances of the wedding ceremony or reception, e.g. no or few guests and/or no significant family members present.
- (xii) The couple are unable to provide accurate personal details about each other (e.g. name, age, nationality, employment, parent's names and place of residence), provide inconsistent evidence, or do not have a shared understanding of the core facts of their relationship, e.g. how and where they met for the first time.
- (xiii) The couple are unable to communicate with each other in a language understood by them both.

- (xiv) There is evidence of money having been exchanged for the marriage to be contracted (unless this is part of a dowry).
- (xv) There is a lack of appropriate contribution to the responsibilities of the marriage, partnership or relationship, e.g. a lack of shared financial or other domestic responsibilities.
- (xvi) Matrimonial co-habitation is not maintained (except where one party is working or studying away from home) or there is no evidence that they have ever co-habited since the marriage.
- (xvii) The applicant is a qualified medical practitioner or professional, or has worked as a nurse or carer, and the partner has a mental or physical impairment which currently requires medical assistance or personal care in their own accommodation.
- (xviii) The partner has previously sponsored another partner to come to or remain in the UK.
- (xix) The partner has previously been sponsored as a partner to come to or remain in the UK (i.e. the partner has obtained settlement on this basis) and that marriage, partnership or relationship ended shortly after the partner obtained settlement. This excludes circumstances where the partner is a bereaved partner, or where the partner obtained settlement on the basis of domestic violence perpetrated by their former partner.
- (xx) If the partner was married to or in a partnership with the applicant at an earlier date, married or formed a partnership with another person, and is now sponsoring the original partner to come to or remain in the UK.
- (xxi) The past history of the partner and/or the applicant contains evidence of a previous sham marriage or forced marriage, or of unlawful residence in the UK or elsewhere.
- (xxii) The applicant has applied for leave to enter or remain in the UK in another category and been refused.

### **Definition of valid marriage**

All marriages which take place in the United Kingdom must, **in order to be recognised as valid**, be monogamous and must be carried out in accordance with the requirements of the Marriage Act 1949, as amended by the Marriage Acts of 1970, 1983 and 1994, the Marriage Regulations of 1986 and other related Acts (e.g. the Children Act 1989).

### **Intention to live permanently with the other**

HC395 paragraph 6:

**"intention to live permanently with the other"** and intend to live together permanently means an intention to live together, evidenced by a clear commitment from both parties that they will live together permanently in the United Kingdom immediately following the outcome of the application in question or as soon as circumstances permit thereafter.

## Financial requirements

**In order to enter the UK the Applicant must demonstrate that they fulfill the Financial Requirement. This can be demonstrated by (see FM-SE):**

- Employment (sponsor only in EC applications – see para 1(c) of FM-SE)
- Savings
- Other non employment income (e.g. rent; investments, pension etc.)
- Combination of the above.
- Self-employment (sponsor only in EC applications). Note that savings cannot be combined with self employment (See 13(f) of FM-SE).

**The Applicant will be exempt from the Financial Threshold if their Partner is in receipt of (see E-ECP.3.3):**

- Disability Living Allowance (DLA)
- Severe Disablement Allowance (SDA)
- Industrial Injuries Disablement Allowance
- Attendance Allowance
- Carer's Allowance

However, they must still provide evidence that their partner is able to maintain and accommodate them without recourse to public funds.

## Exercises (partners)

1. **The applicant and partner have no income. What cash savings must they have?**
2. **The applicant and partner have an income of £18,000. What cash savings must they have?**
3. **The applicant and partner have an income of £15,423. What cash savings must they have?**
4. **The applicant and partner have an income of £15,000. What cash savings must they have?**

## Children

Paragraph 6 of HC395:

**"must not be leading an independent life"** means that the applicant does not have a partner as defined in Appendix FM; is living with their parents (except where they are at boarding school as part of their full-time education); is not employed full-time or for a significant number of hours per week (unless aged 18 years or over); is wholly or mainly

dependent upon their parents for financial support (unless aged 18 years or over); and is wholly or mainly dependent upon their parents for emotional support

### **Parent**

paragraph 6 of HC395:

"adequate' and 'adequately' in relation to a maintenance and accommodation requirement shall mean that, after income tax, national insurance contributions and housing costs have been deducted, there must be available to the family the level of income that would be available to them if the family was in receipt of income support."

### **Adult Dependent Relatives**

**There is an IDI available on Adult Dependent Relatives (Chapter 8 – Appendix FM (family members) Annex FM 6.0). This contains further guidance on some of the key terms used in this rule:**

#### ***“Require long-term personal care as a result of age, illness or disability”***

As the result of age, illness or disability, the appellant must be incapable of performing everyday tasks for themselves, e.g. washing, dressing and cooking. This may have been arrived at recently – such as the result of a serious accident resulting in long-term incapacity – or it could be the result of deterioration in the appellant’s condition over several years. This inability to function should be established through the provision of medical evidence (from a doctor or health professional).

Under paragraphs 36-39 of the Immigration Rules, the ECO has the power to refer the applicant for medical examination and to require that this be undertaken by a doctor or other health professional on a list approved by the British Embassy or High Commission.

#### ***“Unable to receive the required level of care in the country where they are living”***

It needs to be established that the appellant has no access to the required level of care in the country where they are living, even with the practical and financial help of the sponsor in the UK. This could be because it is not available and there is no person in that country who can reasonably provide it, or because it is not affordable. If possible, this should be evidenced through the relevant authorities (a central or local health authority, a local authority, or a doctor or other health professional).

#### ***“No person in the country who can reasonably provide care”***

It should be considered whether there is anyone in the country where the appellant is living who can reasonably provide the required level of care.

**This can be a close family member:**

- Son
- Daughter
- Brother

- Sister
- Parent
- Grandchild
- Grandparent

or another person who can provide care, e.g. a home-help, housekeeper, nurse, carer, or care or nursing home.

If an appellant has more than one close relative in the country where they are living, those relatives may be able to pool resources to provide the required care.

Any relevant cultural factors should be considered, such as in countries where women are unlikely to be able to provide support.

***“Adequately maintained, accommodated and cared for”***

These requirements differ from the “Financial requirements” specified elsewhere in Appendix FM. Instead of the formulaic approach taken in other parts of Appendix FM, the requirements to be met by ADRs follow the ‘maintenance and accommodation’ approach, which has historically been used in the Immigration Rules.

- The accommodation must be owned, or occupied exclusively, by the sponsor. The addition of the appellant to the accommodation must not contravene the UK statutory regulations on overcrowding or on public health.
- Adequate maintenance and the required level of care can and will be met by the sponsor in the UK without recourse to public funds.
- Maintenance may be provided by the sponsor, or by any combination of the funds available to the sponsor and the appellant. Promises of third party support will not be accepted as these are vulnerable to a change in another person’s circumstances or in the sponsor’s or the appellant’s relationship with them. Cash savings which have originated from a gift (not a loan) from a third party can count towards the required maintenance, but those cash savings must be in an account in the name of the sponsor or the appellant and under their control.

In addition to the usual documents, showing that maintenance and accommodation can be provided (e.g. bank statements, pay slips, utility bills, mortgage/tenancy agreement), evidence must be provided of the planned care arrangements for the applicant in the UK (which can involve other family members in the UK) and the cost of these (which must be met by the sponsor, without undertakings of third party support).

### **Adult dependent relative**

Seymour is 87 and has just become a widower. He is living alone in Zimbabwe and his 3 children are all grown up and living in the UK. He wishes to stay with his daughter Abigail and her young family. There is a spare room for Seymour, although he will have to share a bathroom and kitchen with the rest of the family. Abigail's husband is a Doctor and he earns enough to feed an extra mouth.

Consider Seymour's case under section EC-DR of appendix FM. Also consider the evidential requirements detailed in paragraphs 33-37 of appendix FM-SE.

1. Would you grant or refuse Seymour under the relevant rule?
2. Why?
3. Would you want more information? If so what?
4. Are there any questions you want to ask?

### **The Exception**

HC395: 326B. Where the Secretary of State is considering a claim for asylum or humanitarian protection under this Part, she will consider any Article 8 elements of that claim in line with the provisions of Appendix FM (family life) and paragraphs 276ADE to 276DH (private life) of these Rules.

...

400. Where a person claims that their removal under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971, section 10 of the Immigration and Asylum Act 1999 or section 47 of the Immigration, Asylum and Nationality Act 2006 would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, the Secretary of State may require an application under paragraph 276ADE (private life) or Appendix FM (family life) of these rules. Where an application is not required, in assessing that claim the Secretary of State or an immigration officer will, subject to paragraph 353, consider that claim against the requirements to be met under paragraph 276ADE or Appendix FM and if appropriate the removal decision will be cancelled.

### **The Exception in relation to parents**

Please see the IDI "Guidance on application of EX1 – consideration of a child's best interests" for further information on applying the Exception to parents.

### **The Exception in relation to partners**

### **IDI Chapter 8 – Appendix FM (family members) Annex FM 1.0:**

In determining whether there are "**insurmountable obstacles**", the decision maker should consider the seriousness of the difficulties which the applicant and their partner would face in continuing their family life outside the UK, and whether they entail something that could not (or could not reasonably be expected to) be overcome, even with a degree of hardship for one or more of the individuals concerned.

The decision maker should look at whether there is an inability to live in the country concerned. The focus should also be on the family life which would be enjoyed in the country to which the applicant would be returned, not a comparison to the life they would enjoy were they to remain in the UK.

Lack of knowledge of a language spoken in the country in which the couple would be required to live would not usually amount to an insurmountable obstacle. It is reasonable

to conclude that the couple must have been conversing in a commonly understood language whilst in the UK. Therefore, it is reasonable for that to continue outside of the UK, whether or not the partner seeks to learn a/the language commonly spoken. The factors which might be relevant to the consideration of whether an insurmountable obstacle applies include but are not limited to:

- (a) Ability of family to lawfully enter and stay in another country. The decision maker should consider the ability of the parties to lawfully enter and stay in the country concerned. However, the onus should be on the applicant to show that this is not possible in order for this to amount to an insurmountable obstacle. A mere wish/desire/preference to live in the UK would **not** amount to an insurmountable obstacle.
- (b) Cultural and religious barriers. This might be relevant in situations where the partner would be so disadvantaged as for it to be unreasonable to expect them to live in that country. The test is a high one. It must be a barrier which either cannot be overcome or is unreasonable to expect a person to overcome.
- (c) Certain mental or physical disabilities. The presence of a mental or physical disability in one or both parties should be considered. A move to another country may involve a normal period of hardship as the person adjusts to their new surroundings, but a physical or mental disability could in some circumstances mean that the degree of hardship which would be experienced by the person would be unreasonable to the extent that it amounts to an insurmountable obstacle.

#### **Variation of leave as a spouse**

David came from Jamaica to the UK legally as a visitor, and has spent 5 months staying with his sister. However, he has been engaged to his sister's flat mate for a year, and they married two weeks ago. As they are married, David does not want to separate from his new wife Claire. He has applied to switch his status from a visitor to a spouse. He has moved his things into Claire's room, and she is happy to support him until he can get work in the UK.

Consider David's claim under section R-LTRP of appendix FM. Also consider the evidential requirements detailed in appendix FM-SE.

1. Would you grant or refuse David under the relevant rule?
2. Why?
3. Would you want more information? If so what?
4. Are there any questions you want to ask?

## Private life – Rule 276ADE

### **Assessing whether there are no ties (including social, cultural or family) with the country of origin**

In determining whether the person has “no ties (including social, cultural or family)”, the decision maker should have regard to the entirety of the applicant’s background. If the applicant has a connection under any of the social, cultural and family headings this will be sufficient to demonstrate that ties exist. In making the assessment, relevant factors will include, but are not limited to, the following:

- (a) Language – consider whether the applicant speaks an official language of their country of origin, or a language that is commonly understood in parts of that country. For these purposes, fluency is not required – an ability to communicate competently with sympathetic interlocutors will suffice.
- (b) Cultural background – consider evidence of the applicant’s exposure to and level of understanding of the cultural norms in the country of origin. Where the person has spent their time in the UK living mainly amongst a diaspora community from their country of origin then it may be reasonable to conclude that they have cultural ties with that country even if they have never lived there, or have been absent from that country for a lengthy period.
- (c) Length of time spent in the country of origin – Where the applicant has spent a considerable period living in the country of origin, it will be difficult for them to demonstrate that they have no ties with that country.
- (d) Family, friends and social network – An applicant who has extended family in their country of origin should be able to turn to them for support to help them to integrate into society on return. These need not be close blood relatives if the applicant has friends and other contacts to whom they could turn for support. The decision maker should have regard to whether the applicant or their family have hosted visits in the UK by family and friends from their country of origin.

#### **Private life**

George, 47, a Gambian national, came to the UK in January 1991 on a student visa valid for 1 year. This was never extended. In November 1991 he was arrested and convicted for shoplifting. He applied in 2012 to remain in the UK on the basis of his long residency. He states that he left the UK in January 1998 to attend his fathers funeral, and returned via France in March 1998. He is married to Naomi and they have 1 child together. To support his family he works as a car park attendant and claims that he has never been a burden on the state.

Consider George’s claim under paragraph 276ADE.

1. Would you grant or refuse George under the relevant rule?
2. Why?
3. Would you want more information? If so what?
4. Are there any questions you want to ask?

## **HUMAN RIGHTS SCENARIO**

Using all the information contained within the scenario, decide whether or not you think this person's human rights may be breached should they be returned to their home country. You should consider:

1. Credibility of the claim: which areas might you want to test or explore further?
2. Human Rights Articles: which are engaged, and which immigration rules if any are applicable?
3. Anything else you might find through your own observation

There are no right or wrong answers. The aim is to get you thinking about the application of Human Rights Law and the relevant Articles seen in this jurisdiction.

### **Scenario - Patrick Oto**

My name is Patrick Oto and I came to the UK from Nigeria as a student in 2006. I applied for further leave to remain as a student in September 2009 but was refused. I then claimed asylum and was refused in January 2010.

I married my wife Elizabeth Obadji in October 2010 in the UK. She was granted ILR in October 2011. We then had our first child, Patience, in August 2010. Elizabeth came to the UK with her family in 1997 when she was 16 years old. She does not wish to return to Nigeria as she has spent all her adult life here and she wants our children to be brought up in the UK.

I began attending the local church in 2006 and I have strong connections with my brothers in Christ. I have made many friends in the community through church activities and I am a member of the choir, as well as helping out with the youth groups and teaching in the Sunday school.

Elizabeth's family are all over here in the UK. She has 2 brothers, Malcolm and Dennis, who we see every weekend, and we also visit her sick mother every other day. Her mother is suffering from dementia and needs regular supervision. Elizabeth's father died a year ago.

We are expecting our second child in 2 months time. We are very happy, and have just moved into a new house where we have spent a great deal of time painting the nursery for the new baby. I ask you most kindly that you will allow my family to stay in the UK, and not return to Nigeria where we have no place to live, and do not have any family or friends.

## Deportation

### Legislation

#### **Immigration Act 1971 (as was originally drafted) Part 1 Section 3 (5)**

A person who is not **patrial** (s2(6) patrial means right of abode. S2 explains who has a right of abode) shall be liable to deportation from the United Kingdom-

- (a) if, having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave; or
- (b) if the Secretary of State deems his deportation to be conducive to the public good; or
- (c) if another person to whose family he belongs is or has been ordered to be deported.

S3(6) Without prejudice to the operation of subsection (5) above, a person who is not patrial shall also be liable to deportation from the UK if, after he has attained the age of seventeen he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.

S5(1) Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force.

S(5)(2) A deportation order against a person may at any time be revoked by a further order of the Secretary of State, and shall cease to have effect if he becomes patrial.

S(5)(4) For purposes of deportation the following shall be those who are regarded as belonging to another person's family-

- a) where that other person is a man, his wife or civil partner, and his or her children under the age of eighteen; and
- b) where that other person is a woman, her husband or civil partner and her or his children under the age of eighteen.

#### **Immigration and Asylum Act 1999 (this Act removes the SoS's power to deport those falling within 1971 Act s3(5)(a) – detailed above – they are now administratively removed. The word patrial has also now been substituted for British Citizen)**

#### **10 Removal of certain persons unlawfully in the United Kingdom**

(1) A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if—

(a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;

(b) he has obtained leave to remain by deception; or

(c) directions ("the first directions") have been given for the removal, under this section, of a person ("the other person") to whose family he belongs.

## **HC395 (Immigration Rules)**

**For any decision dated 19<sup>th</sup> July 2006 or earlier, you will need to refer to the previous version of paragraph 364:**

Subject to paragraph 380, in considering whether deportation is the right course on the merits, the public interest will be balanced against any compassionate circumstances of the case. While each case will be considered in the light of the particular circumstances, the aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects. In the cases detailed in paragraph 363A, deportation will normally be the proper course where a person has failed to comply with, or has contravened a condition, or has remained without authority. Before a decision to deport is reached, the Secretary of State will take into account all relevant factors known to him including:

- (i) age;
- (ii) length of residence in the United Kingdom;
- (iii) strength of connections with the United Kingdom;
- (iv) personal history, including character, conduct and employment record;
- (v) domestic circumstances;
- (vi) previous criminal record and the nature of any offence of which the person has been convicted;
- (vii) compassionate circumstances;
- (viii) any representations received on the persons behalf.

**For decisions dated from 20<sup>th</sup> July 2006 – 8<sup>th</sup> July 2012, the newer version of paragraph 364 applies:**

Subject to paragraph 380, while each case will be considered on its merits, where a person is liable to deportation, the presumption shall be that the public interest requires deportation. The Secretary of State will consider all relevant factors in considering whether the presumption is outweighed in any particular case, although it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees to deport. The aim is an exercise of the power of deportation, which is consistent and fair as between one person and another in all material respects. In the cases detailed in paragraph 363A deportation will normally be the proper course where a person has failed to comply with, or has contravened a condition, or has remained without authority.

**For decisions dated from 9<sup>th</sup> July 2012, paragraphs 396 and 397 apply:**

396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human

Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

#### **EO (Turkey) [2007] UKAIT 00062**

- In determining an appeal against a deportation decision made on 'conducive grounds' on or after 20<sup>th</sup> July 2006, the Tribunal should first confirm that the appellant is liable to deportation (either because the sentencing Judge recommended deportation or because the SoS has deemed deportation to be conducive to the public good);
- If so, secondly consider whether deportation would breach the appellant's rights under the Refugee convention or the ECHR (including Article 8);
- If not thirdly consider paragraph 364. Paragraph 364 is only in issue if the appellant fails to establish a claim under either convention; and if an appeal is to be allowed under paragraph 364; the Tribunal must identify the reasons, state why they amount to exceptional circumstances, and state why they are so strong that the appellant is able to establish that his own circumstances displace the public interest.

#### **Revocation of a deportation order**

Paragraphs 390 – 392 of HC395 apply.

## **Automatic Deportation**

### **UK Borders Act 2007**

#### **32 Automatic deportation**

(1) In this section “foreign criminal” means a person—

- (a) who is not a British citizen,
- (b) who is convicted in the United Kingdom of an offence, and
- (c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that—

- (a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and
- (b) the person is sentenced to a period of imprisonment.

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).

(6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless—

- (a) he thinks that an exception under section 33 applies,
- (b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or
- (c) section 34(4) applies.

(7) Subsection (5) does not create a private right of action in respect of consequences of non-compliance by the Secretary of State.

#### **33 Exceptions**

(1) Section 32(4) and (5)—

(a) do not apply where an exception in this section applies (subject to subsection (7) below), and

(b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

- (a) a person's Convention rights, or
- (b) the United Kingdom's obligations under the Refugee Convention.

(3) Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction.

(4) Exception 3 is where the removal of the foreign criminal from the United Kingdom in pursuance of a deportation order would breach rights of the foreign criminal under the Community treaties.

(5) Exception 4 is where the foreign criminal—

- (a) is the subject of a certificate under section 2 or 70 of the Extradition Act 2003 (c. 41),
  - (b) is in custody pursuant to arrest under section 5 of that Act,
  - (c) is the subject of a provisional warrant under section 73 of that Act,
  - (d) is the subject of an authority to proceed under section 7 of the Extradition Act 1989 (c. 33) or an order under paragraph 4(2) of Schedule 1 to that Act, or
  - (e) is the subject of a provisional warrant under section 8 of that Act or of a warrant under paragraph 5(1)(b) of Schedule 1 to that Act.
- (6) Exception 5 is where any of the following has effect in respect of the foreign criminal—
- (a) a hospital order or guardianship order under section 37 of the Mental Health Act 1983 (c. 20),
  - (b) a hospital direction under section 45A of that Act,
  - (c) a transfer direction under section 47 of that Act,
  - (d) a compulsion order under section 57A of the Criminal Procedure (Scotland) Act 1995 (c. 46),
  - (e) a guardianship order under section 58 of that Act,
  - (f) a hospital direction under section 59A of that Act,
  - (g) a transfer for treatment direction under section 136 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13), or
  - (h) an order or direction under a provision which corresponds to a provision specified in paragraphs (a) to (g) and which has effect in relation to Northern Ireland.
- (7) The application of an exception—
- (a) does not prevent the making of a deportation order;
  - (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;
- but section 32(4) applies despite the application of Exception 1 or 4.

## Deportation and Article 8

As part of the new immigration rules on Article 8, added to HC395 on 9<sup>th</sup> July 2012, there is now clear guidance on how to deal with an applicant's claim that their deportation would result in a breach of Article 8. This guidance is contained within the rules themselves and begins at paragraph 396.

These paragraphs also apply to applications for a revocation of a deportation order (see paragraph 390A).

### **399(a)(ii)(b) there is no other family member who is able to care for the child in the UK:**

For the purposes of this test 'family member' means parent, aunt or uncle, grandparent or adult sibling or legal guardian.

It should be considered whether there is another family member able to care for the child in the UK and the impact on the child's best interests of any separation. Relevant factors include:

- i. the nature of the relationship between the person we are proposing to deport and the child – for example, is the person the child's primary carer (i.e. the person who

would normally have day-to-day care and wider welfare and developmental responsibilities for the child) or would have done so if they hadn't been in prison?

- ii. who has been looking after the child while the parent has been in prison?
- iii. are both parents and the child a functioning family unit or are the parents separated?
- iv. Is there are wider support network? Are the wider family close?
- v. who would look after the child if the person was removed and whether they are able to care for the child? Relevant factors here include:
  - could they reasonably be expected to fulfil the role of primary carer? For example, have they fulfilled that role in the past? Are they physically able to care for the child?
  - what contact has the child had with the family member before and what is the nature of the existing relationship?
  - any other factors which undermine the ability of that individual to act as the primary carer of the child or would suggest they are unsuitable (e.g. previous convictions, immigration status etc);
  - we should be prepared to take account of the person's willingness to look after the child but would need to consider whether this is genuine in light of their wider circumstances;
- vi. supporting evidence from other family members / social services etc or relevant court orders; and
- vii. the views of the child as expressed by the child or on their behalf.

Where a child is older or otherwise semi-independent of the parent and there is evidence that they are by being looked after through other arrangements (for example, with local authority or wider community support) it may be possible to remove the parent and allow the child to stay in the UK.

### **Criminality definitions**

#### **"Serious Harm"**

Reference to an "*offence which has caused serious harm*" includes, but is not limited to, causing death or serious injury to an individual or group of individuals. A person does not need to be convicted for specifically causing a death or serious injury. Examples might include but are not limited to:

#### **(a) Manslaughter;**

**(b) Dangerous driving;**

**(c) Driving whilst under the influence of drink and/or drugs;**

**(d) Arson.**

**“Persistent Offenders”**

References to a “*persistent offender who, in the view of the Secretary of State, has shown a disregard for the law.*” involves a case-specific assessment of the nature, extent, seriousness and impact of the person’s offending, taking into account the following non-exhaustive list of factors. However, this is not the same as the aggregate offences threshold which routinely triggers consideration of deportation.

- (a) The number of offences committed; look at how many offences have been committed by the individual. There is no numerical value or limit to which deportation begins to outweigh the person’s right to family or private life. But this should be borne in mind when looking at the factors at (b), (c), (d) and (e) below in reaching a decision about persistence and whether the public interest is served in that person’s deportation.
- (b) The seriousness of those offences; the sentence or disposal should be the primary indicator of the seriousness of the offence, but nevertheless consider the nature of any offence(s) the person has been convicted of and whether there are offences which give rise to the public interest being met.
- (c) Any escalation in seriousness of the offences; consider whether the pattern of offending gives particular cause to believe that the public interest would be served by the person’s deportation and that it would outweigh that person’s right to family or private life. The aim is to identify a pattern of escalating offending and intervene before a very serious offence is committed.
- (d) The timescale over which they were committed; consider over what timescale the offending has taken place and how recent the last of the offending took place. Less weight *might* be placed on a series of offences committed over a very short period of time which has long since ceased, particularly if this could be attributed to a particular incident or issue in the person’s life which would make deportation now a disproportionate response. But, repeated criminality over a lengthy period of time would weigh in favour of deportation. The length of time the person has spent in the UK will be an appropriate consideration. For example, a person who has committed 4 offences in the 10 years they have spent in the UK might not be viewed as a persistent offender; a person who commits 3 in just 6 months’ residence might be.
- (e) The frequency within which they were committed; again, the length of time the person has spent in the UK will be an appropriate consideration. The less time a person has spent in the UK relative to the number and level of offending, the more deportation begins to outweigh a person’s right to family or private life; and
- (f) Any action taken to address the cause of the offending; consider any programmes or activities aimed at addressing the cause of the offending. Examples might include courses aimed at reduction on alcohol dependency or drug dependency, anger management etc. However, these must demonstrate that they are having the

necessary impact such that the person's offending can be seen to have significantly reduced such that their right to family or private life outweighs the public interest in deporting them.

## **Bail**

UKBA's detention policy gives 2 main reasons for detention:

1. Is detention the last resort?
2. Is removal imminent?

### **Questions to consider when preparing for a bail hearing:**

- When is the person going to be removed?
- Is there any bar to removal such as no travel documents?
- Is there an outstanding appeal?
- Why was the person detained and have they previously had reporting conditions imposed on them?
- Have they complied with conditions previously?

The IAC's own guidance (**Presidential Guidance Note No 1 of 2011: Bail guidance for Immigration Judges**, available on the IAC website) contains the following extract:

#### ***When is an Immigration Judge likely to grant bail?***

*In essence, an Immigration Judge will grant bail where there is no sufficiently good reason to detain a person and lesser measures can provide adequate alternative means of control. An Immigration Judge will focus in particular on the following three criteria (which are in no particular order) when deciding whether to grant immigration bail.*

- a. The reason or reasons why the person has been detained.*
- b. The length of the detention to date and its likely future duration.*
- c. The likelihood of the person complying with conditions of bail.*

*These issues are dealt with below in turn. However, in practice it is often not possible to separate one issue from the others and Immigration Judges will need to look at all the information in the round.*

## **Surety questions**

The types of questions that you will need to ask sureties should be focused around the following areas:

- The relationship between them and the applicant
- Evidence of contact
- Do they have the money available to them (3 months bank statements)?
- Have any large amounts of money recently entered the account and its provenance
- Is the amount of money offered relative to the money in their account?
- Proof of their identity
- Evidence of employment
- Proof of address
- How they intend to exert influence on the applicant
- Are they aware of previous immigration offences i.e. overstaying, and what did they do at that time to encourage regularisation of stay, or inform UKBA of the situation?

## **Bail Scenarios**

### **Scenario 1**

The applicant has absconded previously. He has one surety, his 18-year-old niece. He will live with her in her flat. She works during the day in a café, earning £7.00 per hour. She has put up £1000 recognisance.

### **Scenario 2**

The surety works in the city, earning £300,000 per year. He is the godfather to the applicant's cousin. £1000 has been offered. The applicant will live with his cousin.

### **Scenario 3**

The surety has put up £5000. He has displayed no source of income. The PO has restricted information on the file that states the surety finished a 5 year sentence for dealing drugs last year. His immigration status is unclear.

### **Scenario 4**

The applicant is being detained awaiting deportation. He has already served a 7 year sentence in the UK for rape. The bail summary contains no indication of when he will be deported. As you go into the court room there is a journalist from the Daily Mail asking you why the applicant is still in the UK. The surety's status in the UK is unclear; he has put up £1000 recognisance.

What questions are you going to ask the sureties/applicants?

## **Appeals Legislation**

**Section 82:** Right of appeal general

**Section 84:** grounds of appeal.

**Section 83:** Appeal: asylum claim /humanitarian protection upgrade appeal.

**Section 85/85A:** relevant date

**Section 92:** Appeal from within the UK: general

**Section 94:** Appeal from within United Kingdom: unfounded human rights or asylum claim

**Section 96:** earlier right of appeal

### **Adjournment scenarios**

For each of the below scenarios, identify sub paragraphs of the procedure rules and practice directions you would refer the IJ to when opposing or making the request.

1. The representative is asking for an adjournment on the day of the hearing. He wants to obtain a medical report to show that the appellant was raped 3 years ago. He says that the report is going to prove that the appellant is telling the truth. He states that it goes to the core issue as UKBA are arguing that the appellant is not credible.
2. The appellant is sick. The Representative would like a 2 week adjournment.
3. The wrong interpreter has been booked. The representative has asked for an adjournment to the next available date in order for the correct interpreter to be provided.
4. The representative was only instructed 1 week ago, and only yesterday received the case file. He would like a 2 week adjournment in order to fully prepare the case.
5. The representative has instructed an expert who will counter what the COIS states. She is requesting an adjournment.
6. The representative has just submitted a 400 page bundle. It is 9:50 am on the morning of the hearing. You are seeking an adjournment in order to consider the new information.
7. You submitted a document and fingerprint evidence from the German authorities during preliminary issues proving that the appellant was in Germany during the time of his claimed detention in Sri Lanka. The representative states that he needs an adjournment to deal with the new information.

## TIPS FOR CROSS-EXAMINATION

- Be clear and concise.
- Keep it relevant.
- Make good use of leading questions..
- Attempt to anticipate the answer to your question.
- Close all the doors.
- Don't ask the fatal final question.
- Be wary of asking 'how' or 'why'
- Don't open the door.
- Don't show your dismay.
- Don't argue.
- Avoid asking the appellant for information they cannot know.
- Listen.
- Be prepared.
- Do not misquote evidence.
- Be flexible.
- Follow a structure.
- Put your case.

## **Exercise - Cross Examination & Credibility**

Review the entire respondent and appellant bundles for Jasvinder Mistry. The aim of this exercise is to challenge through effective cross examination the credibility of Ms Mistry's claim.

Select one of the following areas and devise succinct questions to ask your appellant.

### **Date of the marriage / Birth of her first son**

Interview questions 19-38, 114

Witness statement paragraphs 4-5

Birth certificate (page 14)

Additional witness statement paragraphs 2-3

### **Affair – plausibility**

Interview questions 39-48, 57-62, 87

Witness statement paragraphs 9-10

### **First son's accident**

Interview questions 41-44, 71-74

Hospital appointment card (page 15)

Witness statement paragraph 8

### **Discovery of the affair**

Interview questions 76-86

Witness statement paragraph 10

## **Witness Game**

**Review the scenario below. You should decide on no more than 20 questions per witness to establish whether the appellant knows her witness as claimed.**

### **Appellant**

Sagal Omar Ali claims to come from the Reer Hamar clan in Somalia. She is 22 and lived in Mogadishu until she left in 2007. She met up with the witness by accident in Hyde Park. Sagal lives at Flat 1, Victoria Road, London SW12.

### **Witness**

Sahra Khalid Omar has claimed to be from the same part of Mogadishu. She is 22 also and went to school with Sagal. The school had 50 children aged 5-11. Sahra left Somalia when she was 12.

### **Further information**

They meet up now every Friday evening at Finsbury Park Mosque.

Neither is married or has a boyfriend. Sahra came here with her family in 1998.

## **RS and SS (Exclusion of appellant from hearing) Pakistan [2008] UKAIT 00012**

The general rule that an appellant who is in the United Kingdom cannot be excluded from the hearing of his own appeal does not mean that he cannot, by himself or by his representative, consent to a requirement that he be absent from part of it. Evidence may gain in credibility from the removal of a possibility that a later witness has heard the evidence that an earlier witness gave. If two appeals are combined it is proper for an Immigration Judge to ask, and proper for a representative to agree, that one appellant remain outside while the other gives evidence. An alternative course of action is to hear the appeals successively.

## Submissions Template (Asylum & Human Rights)

### *Rely on the reasons for refusal letter*

- Has it been amended?
- Are you relying on the letter in its entirety or are you excluding certain paragraphs?



### **Credibility**

- Your submissions on credibility must be presented to the judge in a logical, persuasive manner. Start with your strongest point.
- Include all types of credibility (discrepancies, inconsistencies, implausibility issues).
- Address the appellant's 'personal' credibility and s8 2004 Act.
- Remember to conclude your submissions on credibility with a clear indication of what you want the judge to do with them e.g. *"For all these reasons I submit that the appellant is not a credible witness and has fabricated his claim"*. Alternatively, you may be challenging only certain elements of his claim e.g. *"Whilst it is accepted that the appellant is gay, for the reasons I have described, I submit that his claim to be wanted by the authorities is not genuine and he is, therefore, not in need of protection"*.



### **Alternative arguments**

- It must be made clear to the judge that these are alternative arguments, which remain valid and must be considered even if the judge does not agree with your credibility submissions.
- **Convention reason:** *If you are arguing that, even taking the appellant's claim at its highest, he does not have a convention reason, this should be clearly stated.*
- **Change of circumstances:** does case law or objective evidence indicate that, due to a change of circumstances in his home country, the appellant would no longer be at risk?
- **Internal relocation.** Is this an option for the appellant?
- **Sufficiency of protection.** Is this available to the appellant?
- **Prosecution or persecution.** Is the appellant simply fleeing prosecution, without there being any real risk of persecution?



### **Supporting evidence**

- You may well have already referred to supporting evidence earlier in your submissions, if not make sure it is covered at this point.
- If you are relying on a **COIS or US State Department report** then refer the judge to the relevant sections and make sure you have read them beforehand.
- **Case law.** Can you distinguish the appellant's case? Are the cases binding? If you are serving case law make sure you have read the determination and can explain to the judge exactly which paragraphs are relevant and why.
- **Medical reports, expert reports, arrest warrants etc.** Do not simply ignore these, they must be dealt with. If possible, explain why the judge should place little weight on them (only photocopy available, ease with which they are available etc). Also rely on Tanveer Ahmed and invite the judge to consider the documents in the round, in particular in light of any earlier credibility submissions you have made.



### **Humanitarian Protection**

- In most cases, you will be submitting that the appellant fails to qualify for humanitarian protection for the same reasons you have raised in relation to the asylum claim.



### ***Human Rights***

- Any Article 2 or 3 claim will usually stand or fall with the asylum claim and for any other Article to succeed, a flagrant denial will need to be shown following Ullah.



### ***Article 8***

- If the appellant is relying on Article 8 then address the judge on this.



### ***Dismiss***

- End your submissions by inviting the judge to dismiss the appeal.

## **Rely on the reasons for refusal letter or notice of decision**

- Has it been amended?
- Are you relying on the letter in its entirety or are you excluding certain paragraphs?



### **Credibility**

- Credibility issues can apply to the appellant and/or the sponsor(s).
- Include all types of credibility (discrepancies, inconsistencies, implausibility issues).
- Address personal credibility, in particular, any previous deception, overstaying or failure to comply with conditions.



### **Relevant immigration rule**

- Address all of the relevant parts of the rule. Even if credibility is not challenged, it is perfectly acceptable to submit that the appellant has not discharged the burden of proof that lies on him.



### **Supporting evidence**

- You may well have already referred to supporting evidence earlier in your submissions; if not make sure it is covered at this point.
- You must address any documents, even if you do not receive them until the day of the hearing.
- Check the relevant date and compare this to the date of any documents e.g. bank statements
- If you are maintaining an allegation of forgery, do you have sufficient evidence?



### **Article 8**



### **Awarding of costs**



### **Dismiss**

- End your submissions by inviting the Judge to dismiss the appeal.

### **Submissions exercise**

Write and present a persuasive submission to the Judge on the questions you asked in the cross examination exercise, or a submission that distinguishes the appellant from the case of BK (Risk – Adultery-PSG) India CG [2002] UKIAT 03387

You may only put the submission points to the Judge if the appellant had the opportunity to respond during evidence.

## **Charging for Appeals**

### Procedure Rule 23A

- (1) Except as provided for in paragraph (2), the Tribunal may not make any order in respect of costs (or, in Scotland, expenses) pursuant to section 29 of the Tribunals, Courts and Enforcement Act 2007 (power to award costs).
- (2) If the Tribunal allows an appeal, it may order the respondent to pay to the appellant an amount no greater than-
  - a. any fee paid under the Fees Order that has not been refunded; and
  - b. any fee which the appellant is or may be liable to pay under that Order.

The following lines should be used as a basis for arguing that costs should not be awarded against UKBA, but will need to be tailored to the individual case at hand.

Unless it is clear that an error has been made by UKBA at the decision making stage you should generally submit that:

- Costs should not be awarded.
- The decision was made in good faith and based on the information available to the decision taker.
- The decision was taken on the individual merits of the case and in accordance with the immigration rules and relevant applicable policies.
- If the Judge is minded to take a different view to the initial decision maker on the basis of the evidence provided or attach greater weight to some evidence than has been done so by UKBA, it was clearly still open to UKBA to come to the original decision and costs should therefore not be awarded.
- If the Judge is minded to allow the appeal:
  - Merely because the appellant has paid for an appeal which has been allowed is not in itself a reason to award costs in their favour.
  - Costs should not be awarded because the appellant has contributed to the need for an appeal by (eg) not providing, or delaying provision of, all relevant information on time; making errors in the application; not responding to UKBA enquiries; not raising human rights issues with UKBA which later form the basis for the appeal.
  - In any event they should not automatically award the maximum costs allowed.

## Documents

### Tanveer Ahmed (Pakistan) [2002] UKIAT00439 \*

In summary the principles set out in this determination are:

- In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on.
- The decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round
- Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegation should not be made without such evidence. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that a document is reliable. The decision maker still needs to apply principles 1 and 2.” (paragraph 38)

## Expert Reports

### The Author

### The Contents

### How the report relates to the appellant

## Medical Reports

**Headed paper:** The report should be on headed paper detailing the address; and telephone/fax number of the surgery/practice. It should also be signed by the doctor who wrote the report.

**Qualifications:** The doctor should outline their qualifications within the report, this usually takes a CV form. Does the doctor have appropriate qualifications to make the assessment they have. It is widely accepted that a GP is not qualified to make a diagnosis of PTSD, this requires someone to have specialist qualifications i.e. a Consultant Psychiatrist. The website address for the GMC is on the handout. If you have any concerns regarding a doctor's qualifications you can conduct a search here.

**Dates:** The date of the report is important in different ways depending upon the nature of the report. If the appellant has submitted the report to support an Article 3/8 claim, then the report will need to be up to date. The Judge is making an assessment of the "current medical condition" of the appellant. If the report is 6 months old for example, this will not be helpful.

If the report is intended to support the general claim of the appellant, then an assessment of its assistance needs to be made. For example, if the appellant's case is that they were raped 3 years ago, then a report obtained to confirm this but dated 2 weeks ago is unlikely to be able to confirm the event took place. Furthermore, you may need to

consider why the report has only been obtained now. How long has the appellant been in the UK, and why did it take so long to obtain?

**Diagnosis and Prognosis:** The Judge needs to know what the doctor's diagnosis is. It is essential that this is clear. It is also essential that a clear prognosis has also been made. What is the outlook / progression of the illness likely to be for the appellant?

**Treatment:** It may be that the doctor hasn't recommended treatment for the appellant; in which case it may become difficult for the appellant to rely on this ground for staying in the UK. If the doctor has recommended treatment, you will need to establish whether the appellant is actually following the recommended course. You will also need to establish whether or not the treatment (or similar treatment) is available in the country of return, irrespective of any cost that may be attached to that treatment.

**Methodology:** How did the doctor arrive at their diagnosis? Did they have sight of previous medical records, or have they relied entirely upon the appellant's self-reporting. How long did they meet with the appellant prior to making the diagnosis? If they are diagnosing specific illnesses / conditions such as PTSD, did they use the appropriate diagnostic criteria? (see handout). Was the doctor sufficiently qualified to use the criteria?

**Inconsistencies:** Has the appellant given an account of the events that led to their departure from their home country to the doctor? Is that account consistent with the account given to UKBA? If not, not only does this call into question the credibility of the appellant but it may also undermine the doctor's diagnosis.

**Objectivity:** The Doctor must remain impartial. They should not stray into the role of advocate or Judge. The starting point for a doctor is to believe their patient. The Judge will be making an assessment of credibility after hearing evidence.

"As members of the Medical Foundation for the Care of Victims of Torture, the authors are no doubt perfectly within their rights not to challenge a patient's story. As lawyers we should not want to intrude into their medical expertise, but we should not be surprised to learn that the medical care of any individual in the situation in which he finds himself, is not likely in many cases to begin by accusing him of lying. But it is not the role of the doctor to provide (either generally or in particular cases) an assessment of a claimant's truthfulness. That, if the story is challenged, is for the appropriate court. (And, of course, it goes without saying that, despite the title of the body, it does not follow that the Foundation's patients have all been subject to what a lawyer would class as 'torture')"

STARRED Secretary of State for the Home Department v D (Tamil) [2002] UKIAT 00702, para 71 (Devaseelan).

With regard to the final sentence of the quote, doctors do not use the same tests as the judiciary, representatives and UKBA when considering torture. Caselaw has established those tests. Therefore when a doctor refers to terms such as "Torture" it does not mean that the appellant has met the thresholds in law.

**Self-reporting:** The doctor would have taken the account from the appellant. This will usually be based wholly upon the appellant's own self-reporting. Is there anything in the report that suggests the doctor has actually seen the symptoms described?

**Have the courts formed a view on the doctor?** Search via [www.bailii.org](http://www.bailii.org) (?) or Google

**Has the doctor used the Istanbul Protocol?** The Istanbul Protocol is guidance for medical professionals who assess individuals who allege torture and ill-treatment and

advises on how to report on the issue. It provides an assessment criterion for individual scars.

**187.** The following discussion is not meant to be an exhaustive discussion of all forms of torture, but it is intended to describe in more detail the medical aspects of many of the more common forms of torture. For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution given by the patient. The following terms are generally used:

(a) Not consistent: the lesion could not have been caused by the trauma described;

(b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;

(c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;

(d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;

(e) Diagnostic of: this appearance could not have been caused in any way other than that described.

**SA (Somalia) [2006] EWCA Civ 1302** strongly advises medical professionals to apply this criteria. They stated that such professionals would be “well-advised” to consider the Istanbul protocol regarding description or degrees of consistency of injuries (para 29).

The medical professional should assess the consistency of the scar, but also provide examples of what else may have caused the injury if their finding is one of consistent or highly consistent.

The handout provides summaries of some useful cases. Highlight some of them but don’t go into too much detail.

There is a wealth of caselaw regarding medical cases and medical reports. The caselaw pages should be checked regularly.

### **File minute guidance**

#### **File Minutes:**

- Minutes should be brief, but must explain why a decision has been reached i.e. why you applied for an adjournment.
- Minutes should include details of all liking attached to the file.
- Any instructions, including a Judge's directions, should be clear and unambiguous.
- Brief details of any action taken, including emails, letters and telephone contact; must be included.
- Minute sheets must not contain defamatory comments, nor flippancy or sarcastic remarks.
- Conclude any minute with your signature, printed name, job-title, department and telephone number.
- All minute-sheets should be tagged securely to the left of the file, in date order with the most recent entry on top.

#### **Documents:**

- All documentary evidence, including Appellant's bundles, correspondence and envelopes (for proof of posting), should be securely tagged to the right of the file, in date order, with the most recent document on top.
- Any documents removed should be replaced with a photocopy. A minute should then be raised recording when, and to whom, the original has been sent.

- Certain documents, i.e. passport and fragile originals, should first be secured in an envelope or enclosure file before attaching to the file.
- Copies of outgoing correspondence must be attached to the file.
- Avoid unnecessary duplication.
- Do not use elastic bands to secure files.
- Record of Proceedings should be attached in this section
- Do not write on any documents in this section.

## **Further Appeals**

### **The statutory framework:**

#### **Tribunals Courts and Enforcement Act 2007**

##### **11. Right to appeal to Upper Tribunal**

- (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-Tier Tribunal other than an excluded decision.
- (2) Any party to a case has a right of appeal, subject to subsection (8)
- (3) That right may be exercised only with permission (or, in Northern Ireland, leave)
- (4) Permission (or leave) may be given by -
  - (a) the First-Tier Tribunal, or
  - (b) the Upper Tribunal,

on an application by the party

#### **R (Iran) & Others [2005] EWCA 982**

- Making perverse or irrational findings on material matters.

- Failure to give reasons or adequate reasons for findings on material matters.
- Failure to take account and / or resolve conflicts of fact or opinion on material matters.
- Giving weight to immaterial matters.
- Making a material misdirection of law on any material matter.
- Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or fairness of the proceedings.
- Making a mistake as to a material fact which could be established by objective and uncontested evidence, where the appellant and / or his advisors were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.

## Further Appeals

