GARDEN COURT NORTH
CHAMBERS
of IAN MACDONALD QC

PLP JR NORTH

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Using Judicial review in Immigration cases

17 July 2014

IMPLICATION OF THE TRANSFER OF MOST IMMIGRATION JRs to the UPPER TRIBUNAL

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As of 1 November 2013, most immigration judicial review was transferred to the Upper Tribunal. Any new or pending applications for permission for JR have been transferred to the UT as of 9 September 2013.

Note that you can issue judicial reviews in your regional centres. The forms can be found at:

http://www.justice.gov.uk/tribunals/immigration-asylum-upper/application-for-judicial-review

The exceptions are listed at section 3 of the Lord Chief Justice's Direction of 21 August 2013.

http://www.ein.org.uk/news/most-immigration-judicial-review-applications-move-upper-tribunal-november

Procedure in the UT

- See Part 4 of THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008 (as amended) and
- the Practice Direction (as amended) IMMIGRATION JUDICIAL REVIEW IN THE IMMIGRATION AND ASYLUM CHAMBER OF THE UPPER TRIBUNAL dated 17 October 2011.
- Which can be found at:

http://www.justice.gov.uk/tribunals/rules

  - Use the form on the Tribunal website, currently T480.
  - Send two paginated and indexed bundles with the application, which include all documents to be relied upon with a list of essential reading; or a statement, including a statement of truth, of the matters relied upon.

In the light of the continuing inability of the Secretary of State to file acknowledgements of service in immigration judicial review proceedings within the time limit contained in the Tribunal Procedure (Upper Tribunal) Rules 2008 and in the light of the general guidance given by the High Court in R (on the application of Singh and Others) v Secretary of State for the Home Department [2013] EWHC 2873 (Admin), the following general arrangements (which will be kept under review) apply in the Immigration and Asylum Chamber of the Upper Tribunal.

Kumar cont.

(1) The Tribunal will, in immigration judicial reviews, regard an Acknowledgement of Service filed within six weeks of service of the claim on the Secretary of State as falling routinely for consideration and will not undertake an initial consideration of the judicial review application before the end of that six week period.

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Public Law Challenges to Appendix FM

I. Challenging the Minimum Financial Threshold of 18,600 under the partner route in Appendix FM

MM, R (On the Application Of) v The Secretary of State for the Home Department [2013] EWHC 1900 (Admin)

In *MM* the Administrative Court found that the minimum income requirement as currently formulated in the rules is "so onerous in effect as to be an unjustified and disproportionate interference with a genuine spousal relationship".

MM cont.

"123. Although there may be sound reasons in favour of some of the individual requirements taken in isolation, **I conclude that when applied to either recognised refugees or British citizens the combination of more than one of the following five features of the rules to be so onerous in effect as to be an unjustified and disproportionate interference with a genuine spousal relationship.** In particular that is likely to be the case where the minimum income requirement is combined with one or more than one of the other requirements discussed below. The consequences are so excessive in impact as to be beyond a reasonable means of giving effect to the legitimate aim.

MM cont.

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"124. The five features are:

i. **The setting of the minimum income level to be provided by the sponsor at above the £13,400 level identified by the Migration Advisory Committee as the lowest maintenance threshold under the benefits and net fiscal approach** (Conclusion 5.3). Such a level would be close to the adult minimum wage for a 40 hour week. Further the claimants have shown through by their experts that of the 422 occupations listed in the 2011 UK Earnings Index, only 301 were above the £18,600 threshold[16].

MM cont.

ii. **The requirement of £16,000 before savings can be said to contribute to rectify an income shortfall.** iii. **The use of a 30 month period for forward income projection, as opposed to a twelve month period** that could be applied in a borderline case of ability to maintain. iv. **The disregard of even credible and reliable evidence of undertakings of third party support** effected by deed and supported by evidence of ability to fund. v. **The disregard of the spouse's own earning capacity** during the thirty month period of initial entry.

MM cont.

- Awaiting CoA judgment from hearing on 4-5 March
- UKVI is continuing to put some decisions on hold whilst awaiting the outcome of MM; they should write to applicants and notify them if this is the case
- On 24 April Home Office published new guidance on the minimum income threshold for family visa applicants

MM cont.

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- "The hold on decision-making applies to applications made under Appendix FM where the application would be refused solely because the rules relating to the minimum financial threshold are not met. This includes, where relevant, the evidence requirements in Appendix FM-SE."
- By end of 2013, 2628 settlement visa applications made overseas were on hold and 386 leave to remain applications made in the UK were on hold
- UKVI appealing all cases that succeed in tribunal by reference to MM

II. EX.1 not a free-standing provision of the rules

Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 00063 (IAC)

Headnote:

"It is plain from the architecture of the Rules as regards partners that EX.1 is "parasitic" on the relevant Rule within Appendix FM that otherwise grants leave to remain. If EX.1 was intended to be a free- standing element some mechanism of identification would have been used. The structure of the Rules as presently drafted requires it to be a component part of the leave granting Rule. This is now made plain by the respondent's guidance dated October 2013."

Sabir cont.

The policy referred to by Mr Thathall (dated October 2013) states (1.0, third paragraph) (with emphasis added)

3.2.7 …….. Paragraph EX.1 is not to be considered in isolation. It is not a route in itself, but the basis on which applicants with family life in the UK can be granted leave to remain…..

III. Which version of the rules applies to applications made before 9 July?

Edgehill & Anor v Secretary of State for the Home Department [2014] EWCA Civ 402

- R's case:
  - applications made under article 8 before 9th July 2012 did not fall under any of the Immigration Rules, either old or new. The decision maker simply had to apply article 8, taking into account the wealth of guidance provided by Strasbourg and the domestic courts.
  - appellate tribunals make article 8 decisions by reference to the current state of affairs, not by reference to the state of affairs when the Secretary of State reached her decision. In both of the present cases the current state of affairs included new rule 276ADE, providing a requirement for 20 years' continuous residence.

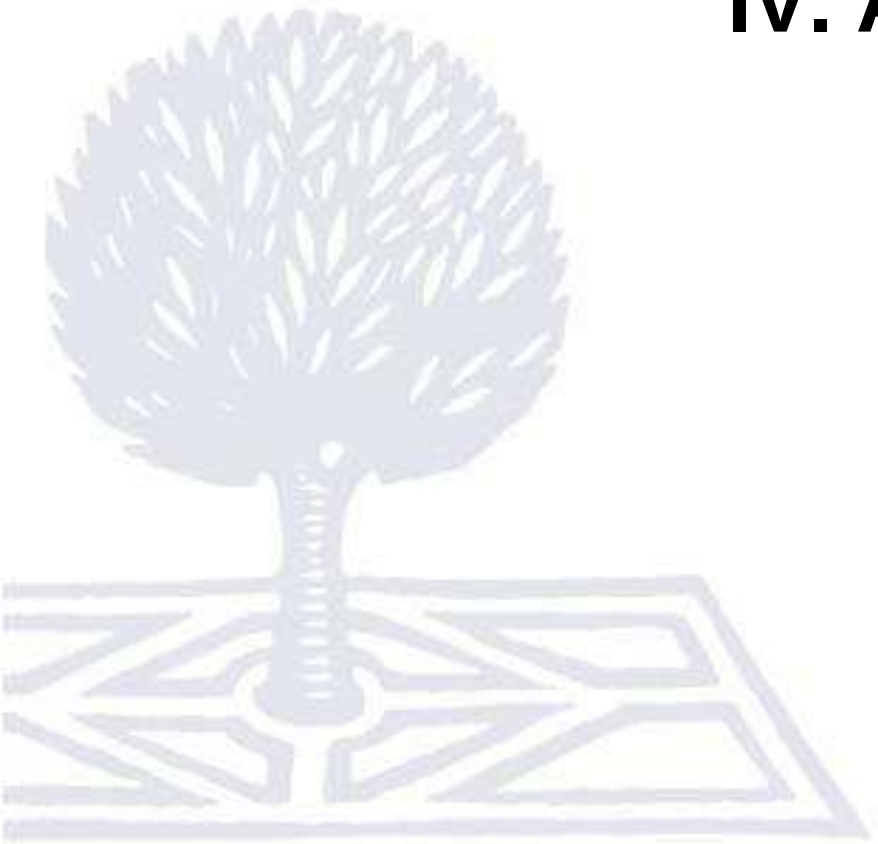
Edgehill cont.

"[R's argument] produces the bizarre result that the new rules impact upon applications made before 9th July 2012, even though the transitional provisions expressly state that they do not do so. The Immigration Rules need to be understood not only by specialist immigration counsel, but also by ordinary people who read the rules and try to abide by them."

Edgehill cont.

However note: “A mere passing reference to the 20 years requirement in the new rules will not have the effect of invalidating the Secretary of State's decision. The decision only becomes unlawful if the decision maker relies upon rule 276ADE (iii) as a consideration materially affecting the decision.”

IV. Article 8



Article 8 (MF vs Gulshan)

- One stage or two stage test
- “Exceptionality”
- “Unjustifiably harsh consequences”
- Whether there needs to be an “arguable case that there may be good grounds” or “a good arguable case” for granting leave to remain outside the rules.

V. Insurmountable Obstacles

Insurmountable obstacles

What constitutes "insurmountable obstacles" in provisions such as EX.1 (see UT in *Gulshan (Article 8 – new Rules – correct approach) Pakistan* [2013] UKUT 640 (IAC) (17 December 2013)) = “practical possibilities of relocation”; and

VI. “No ties”

No ties

What constitutes "no ties" for the purposes of para 276 ADE (as well as para 399A) – see UT case of *Ogundimu (Article 8 – new rules) Nigeria* [2013] UKUT 00060 (IAC) = “a concept involving something more than merely remote or abstract links to the country of proposed deportation or removal. It involves there being a connection to life in that country.”

Future Challenges to Appendix FM

Challenges

- The introduction of “reasonableness” under the 7 year child rule;
- The lacuna in the partner/ parent route whereby cohabitation of at least two years is necessary to qualify as a “partner” but for the purposes of the parent route cohabitation of any duration disqualifies you; and
- How those in the UK as overstayers of any duration can succeed under the rules when EX.1 is applied but those who are here for example as visitors cannot.
- Challenge to the proportionality of the Adult Dependent Relative route

Using JR where no current right of appeal

Removal Decisions

Use the SSHD's Removal Decision guidance in your LBC where applicant has dependent British citizen child or child who has been in the UK for at least 3 years; where applicant supported by Home Office or Local Authority; or where other exceptional/ compelling reasons.

The guidance can be found (for now) at https://www.gov.uk/government/publications/requests-for-removal-decisions

Common public law errors

- Not considered under correct paragraph of the rules (children's private life under para 278ADE(iv): 7 years continuous residence and not reasonable to remove);
- Not applying a policy;
- Applying new rules to old applications;
- No stand alone Article 8 assessment/ consideration of child's best interests;
- Failure to exercise a discretion
- Material error as to fact;
- No or no adequate reasons given.

Common problems

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- No response to LBCs;
- Remedy granted purportedly under PAP but after issue of proceedings;
- Delays including repeat requests by R for extension of time in filling AOS;
- Substantive remedy granted but not costs;
- Treat reconsideration as same decision/ old date/ out of time for JR ;
- Judge makes a (negative) permission decision despite negotiations/ consent order

Getting your Costs

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CPR 44.2

…the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party;

Costs case law

R (Dempsey) v Sutton LBC [2013] EWCA Civ 863, per Pill LJ:

> appellant entitled to full costs as "the initial commencement of proceedings was justified"; she achieved her central aim, i.e. an offer of accommodation from the local authority; she was justified in going to court to ensure her position was protected. [22-24]

Emezie

Emezie v Secretary of State for the Home Department [2013] EWCA Civ 733 adopts *Dempsey* approach:

> "the starting point now is whether the claimant has achieved what he sought in his claim." [4]

This includes obtaining interim relief, as in that case, which does not require any consideration of the merits of the underlying claim.

Bahta & Ors v Secretary of State for the Home Department & Ors [2011] EWCA Civ 895

"59. What is not acceptable is a state of mind in which the issues are not addressed by a defendant once an adequately formulated letter of claim is received by the defendant. In the absence of an adequate response, a claimant is entitled to proceed to institute proceedings. If the claimant then obtains the relief sought, or substantially similar relief, the claimant can expect to be awarded costs against the defendant. Inherent in that approach, is the need for a defendant to follow the Practice Direction (Pre-Action Conduct) or any relevant Pre-Action Protocol, an aspect of the conduct of the parties specifically identified in CPR r.44.3(5). The procedure is not inflexible; an extension of time may be sought, if supported by reasons."

Bahta cont.

"Notwithstanding the heavy workload of UKBA, and the constraints upon its resources, there can be no special rule for government departments in this respect."

Bahta cont.

"a culture in which an order that there be no order as to costs in a case involving a public body as defendant, because a costs order would only transfer funds from one public body to another is in my judgment no longer acceptable."

Bahta cont.

Lord Justice Pill also had “serious misgivings” about the UK Border Agency’s claim to avoid costs when a claim is settled for “purely pragmatic reasons“:

> “The expression ‘purely pragmatic’ covers a multitude of possibilities. A clear explanation is required, and can expect to be analysed, so that the expression is not used as a device for avoiding an order for costs that ought to be made.”

IMPACT OF IMMIGRATION ACT 2014

Areas of challenge

1) The legal residence test

2) Evidence and ‘new matters’

1) Administrative review

1) Clause 20-22 ‘the right to rent’

Residence test

- Limiting civil legal aid to those with a ‘strong connection to the UK’.
- Being implemented by affirmative instrument instead of primary legislation preventing scrutiny by both houses.
- Judgment is awaited in *The Queen (on the application of The Public Law Project) v The Lord Chancellor (Office of the Children's Commissioner intervening*) CO/17247/2013.

Residence test

On 30th June 2014 the Joint Committee on Human Rights concluded that the residence test would breach the United Nations Convention on the Rights of the Child as it would prevent children from being effectively represented in legal proceedings which affected them.

http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/14/1402.htm

Evidence and ‘new matters’

IA 2014 amends Part 5 of 2002 Act. s85A is replaced with s85. s85(4) says:

(4) On an appeal under section 82(1) against a decision [the Tribunal] may consider any matter which [it] thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

“(5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.

(6) A matter is a “new matter” if—

(a) it constitutes a ground of appeal of a kind listed in section 84 or any reason that the appellant has for wishing to enter or remain in the United Kingdom, and

(b) the Secretary of State has not previously considered the matter in the context of—

(i) the decision mentioned in section 82(1), or

(ii) a statement made by the appellant under section 120.”

Joint Committee on Human Rights view

45. We recognise that this provision is permissive rather than directive … and that it seeks to distinguish between new evidence and new grounds. Nevertheless, we remain concerned, even after considering the Minister's explanation of the purpose of the provision, about whether it is compatible with the right of access to court, the principle of equality of arms and the rule of law for the court's power to consider a new matter to depend on the "consent" of the Secretary of State. We are struck by the fact that the Government could not identify any other similar provisions in other statutory contexts, which confirms our sense that this provision crosses a line which has not previously been crossed in relation to an aspect of a tribunal's jurisdiction being dependent on the consent of the Minister who is the respondent to the appeal."

Administrative review

- There is currently very little concrete information in the draft Bill on administrative review but it is proposed that where there is no right of appeal administrative review will suffice – an internal review by a different individual.
- The Applicant pays £80 which is refunded if they are successful.
- They have 10 days to make the application.
- They can expect to wait 28 days maximum for a response as opposed to the current 12 weeks

Administrative review

Points to consider:

- Likely growth in JR and private JRs
- What is your target decision for JR?
- Time limits
- Introduces Art 6 angle. Time to revisit to revisit Maaouia v France [2000] ECHR 455? Or is JR an adequate remedy providing access to the courts?
- Relief in this case would be from the High Court seeking a declaration of incompatibility.

Clause 20-22 right to rent

The requirement for landlords to check the immigration status of their potential tenants (and be confident of that throughout their tenancy) or face a fine is obviously open to abuse.

In terms of JR there is potential for challenges based on a statute which encourages discrimination on the basis of race/nationality and potential associated discrimination (in a joint tenant situation where one is subject to immigration control)

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