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Designated Judge John McCarthy: The New Bail Regime

LEGISLATION

Schedule 10 to the Immigration Act 2016

Download: http://www.legislation.gov.uk/ukpga/2016/19/schedule/10/enacted

HOME OFFICE POLICY

Immigration Bail Version 1.0 12 Jan 2018

Download:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/673954/immigration-bail-v1_0.pdf

CASE LAW

Unlawful detention and immigration bail: B (Algeria) v Secretary of State for the Home Department [2018] UKSC 5 (8 February 2018)

Download: http://www.bailii.org/uk/cases/UKSC/2018/5.html

Vulnerable persons and detention: VC, R (On the Application Of) v The Secretary of State for the Home Department [2018] EWCA Civ 57 (02 February 2018)

Download: http://www.bailii.org/ew/cases/EWCA/Civ/2018/57.html

SSHD consent in removal cases: Roszkowski v Secretary of State for the Home Department [2017] EWCA Civ 1893 (23 November 2017)

Download: http://www.bailii.org/ew/cases/EWCA/Civ/2017/1893.html

Is cooperation required?: Secretary of State for the Home Department v JM (Zimbabwe) [2017] EWCA Civ 1669 (25 October 2017)

Download: http://www.bailii.org/ew/cases/EWCA/Civ/2017/1669.html

Curfews and electronic monitoring: Gedi, R (On the Application Of) v Secretary of State for Home Department [2016] EWCA Civ 409 (17 May 2016)

Download: http://www.bailii.org/ew/cases/EWCA/Civ/2016/409.html

UK Parliament Acts/I/IH-IN/Immigration Act 2016 (2016 c 19)/SCHEDULE 10 Immigration Bail/Part 1 Main Provisions

SCHEDULE 10

Immigration Bail

Section 61

Part 1

Main Provisions

Power to grant immigration bail

1

(1) The Secretary of State may grant a person bail if--

(a) the person is being detained under paragraph 16(1), (1A) or (2) of Schedule 2 to the Immigration Act 1971 (detention of persons liable to examination or removal),

(b) the person is being detained under paragraph 2(1), (2) or (3) of Schedule 3 to that Act (detention pending deportation),

(c) the person is being detained under section 62 of the Nationality, Immigration and Asylum Act 2002 (detention of persons liable to examination or removal), or

(d) the person is being detained under section 36(1) of the UK Borders Act 2007 (detention pending deportation).

(2) The Secretary of State may grant a person bail if the person is liable to detention under a provision mentioned in sub-paragraph (1).

(3) The First-tier Tribunal may, on an application made to the Tribunal for the grant of bail to a person, grant that person bail if--

(a) the person is being detained under paragraph 16(1), (1A) or (2) of Schedule 2 to the Immigration Act 1971,

(b) the person is being detained under paragraph 2(1), (2) or (3) of Schedule 3 to that Act,

(c) the person is being detained under section 62 of the Nationality, Immigration and Asylum Act 2002, or

(d) the person is being detained under section 36(1) of the UK Borders Act 2007.

(4) In this Schedule references to the grant of immigration bail, in relation to a person, are to the grant of bail to that person under any of sub-paragraphs (1) to (3) or under paragraph 10(12) or (13) (release following arrest for breach of bail conditions).

(5) A person may be granted and remain on immigration bail even if the person can no longer be detained, if--

(a) the person is liable to detention under a provision mentioned in sub-paragraph (1), or

(b) the Secretary of State is considering whether to make a deportation order against the person under section 5(1) of the Immigration Act 1971.

(6) A grant of immigration bail to a person does not prevent the person's subsequent detention under a provision mentioned in sub-paragraph (1).

(7) For the purposes of this Schedule a person is on immigration bail from when a grant of immigration bail to the person commences to when it ends.

(8) A grant of immigration bail to a person ends when--

(a) in a case where sub-paragraph (5) applied to the person, that sub-paragraph no longer applies to the person,

(b) the person is granted leave to enter or remain in the United Kingdom,

(c) the person is detained under a provision mentioned in sub-paragraph (1), or

(d) the person is removed from or otherwise leaves the United Kingdom.

(9) This paragraph is subject to paragraph 3 (exercise of power to grant immigration bail).

Conditions of immigration bail

2

(1) Subject to sub-paragraph (2), if immigration bail is granted to a person, it must be granted subject to one or more of the following conditions--

(a) a condition requiring the person to appear before the Secretary of State or the First-tier Tribunal at a specified time and place;

(b) a condition restricting the person's work, occupation or studies in the United Kingdom;

(c) a condition about the person's residence;

(d) a condition requiring the person to report to the Secretary of State or such other person as may be specified;

(e) an electronic monitoring condition (see paragraph 4);

(f) such other conditions as the person granting the immigration bail thinks fit.

(2) Sub-paragraph (3) applies in place of sub-paragraph (1) in relation to a person who is being detained under a provision mentioned in paragraph 1(1)(b) or (d) or who is liable to detention under such a provision.

(3) If immigration bail is granted to such a person--

(a) subject to sub-paragraphs (5) to (9), it must be granted subject to an electronic monitoring condition,

(b) if, by virtue of sub-paragraph (5) or (7), it is not granted subject to an electronic monitoring condition, it must be granted subject to one or more of the other conditions mentioned in sub-paragraph (1), and

(c) if it is granted subject to an electronic monitoring condition, it may be granted subject to one or more of those other conditions.

(4) Immigration bail granted in accordance with sub-paragraph (1) or (3) may also be granted subject to a financial condition (see paragraph 5).

(5) Sub-paragraph (3)(a) does not apply to a person who is granted immigration bail by the Secretary of State if the Secretary of State considers that to impose an electronic monitoring condition on the person would be--

(a) impractical, or

(b) contrary to the person's Convention rights.

(6) Where sub-paragraph (5) applies, the Secretary of State must not grant immigration bail to the person subject to an electronic monitoring condition.

(7) Sub-paragraph (3)(a) does not apply to a person who is granted immigration bail by the First-tier Tribunal if the Secretary of State informs the Tribunal that the Secretary of State considers that to impose an electronic monitoring condition on the person would be--

(a) impractical, or

(b) contrary to the person's Convention rights.

(8) Where sub-paragraph (7) applies, the First-tier Tribunal must not grant immigration bail to the person subject to an electronic monitoring condition.

(9) In considering for the purposes of this Schedule whether it would be impractical to impose an electronic monitoring condition on a person, or would be impractical for a person to continue to be subject to such a condition, the Secretary of State may in particular have regard to--

(a) any obstacles to making arrangements of the kind mentioned in paragraph 4 in relation to the person,

(b) the resources that are available for imposing electronic monitoring conditions on persons to whom sub-paragraph (2) applies and for managing the operation of such conditions in relation to such persons,

(c) the need to give priority to the use of those resources in relation to particular categories of persons to whom that sub-paragraph applies, and

(d) the matters listed in paragraph 3(2) as they apply to the person.

(10) In this Schedule "Convention rights" is to be construed in accordance with section 1 of the Human Rights Act 1998.

(11) In this Schedule "bail condition", in relation to a person on immigration bail, means a condition to which the person's bail is subject.

Exercise of power to grant immigration bail

3

(1) The Secretary of State or the First-tier Tribunal must have regard to the matters listed in sub-paragraph (2) in determining--

(a) whether to grant immigration bail to a person, and

(b) the conditions to which a person's immigration bail is to be subject.

(2) Those matters are--

(a) the likelihood of the person failing to comply with a bail condition,

(b) whether the person has been convicted of an offence (whether in or outside the United Kingdom or before or after the coming into force of this paragraph),

(c) the likelihood of a person committing an offence while on immigration bail,

(d) the likelihood of the person's presence in the United Kingdom, while on immigration bail, causing a danger to public health or being a threat to the maintenance of public order,

(e) whether the person's detention is necessary in that person's interests or for the protection of any other person, and

(f) such other matters as the Secretary of State or the First-tier Tribunal thinks relevant.

(3) A person who is being detained under paragraph 16(1) of Schedule 2 to the Immigration Act 1971 must not be granted immigration bail by the First-tier Tribunal until after the end of the period of 8 days beginning with the date of the person's arrival in the United Kingdom.

(4) A person must not be granted immigration bail by the First-tier Tribunal without the consent of the Secretary of State if--

(a) directions for the removal of the person from the United Kingdom are for the time being in force, and

(b) the directions require the person to be removed from the United Kingdom within the period of 14 days beginning with the date of the decision on whether the person should be granted immigration bail.

(5) If the Secretary of State or the First-tier Tribunal decides to grant, or to refuse to grant, immigration bail to a person, the Secretary of State or the Tribunal must give the person notice of the decision.

(6) Where the First-tier Tribunal is required under sub-paragraph (5) to a give a person notice of a decision, it must also give the Secretary of State notice of the decision.

(7) Where the decision is to grant immigration bail, a notice under sub-paragraph (5) or (6) must state--

(a) when the grant of immigration bail commences, and

(b) the bail conditions.

(8) The commencement of a grant of immigration bail may be specified to be conditional on arrangements specified in the notice being in place to ensure that the person is able to comply with the bail conditions.

Electronic monitoring condition

4

(1) In this Schedule an "electronic monitoring condition" means a condition requiring the person on whom it is imposed ("P") to co-operate with such arrangements as the Secretary of State may specify for detecting and recording by electronic means one or more of the following--

(a) P's location at specified times, during specified periods of time or while the arrangements are in place;

(b) P's presence in a location at specified times, during specified periods of time or while the arrangements are in place;

(c) P's absence from a location at specified times, during specified periods of time or while the arrangements are in place.

(2) The arrangements may in particular--

(a) require P to wear a device;

(b) require P to make specified use of a device;

(c) require P to communicate in a specified manner and at specified times or during specified periods;

(d) involve the exercise of functions by persons other than the Secretary of State or the First-tier Tribunal.

(3) If the arrangements require P to wear, or make specified use of, a device they must--

(a) prohibit P from causing or permitting damage to, or interference with the device, and

(b) prohibit P from taking or permitting action that would or might prevent the effective operation of the device.

(4) In this paragraph "specified" means specified in the arrangements.

(5) An electronic monitoring condition may not be imposed on a person unless the person is at least 18 years old.

Financial condition

5

(1) In this Schedule a "financial condition" means a condition requiring the payment of a sum of money by the person to whom immigration bail is granted ("P") or another person, in a case where P fails to comply with another condition to which P's immigration bail is subject.

(2) A financial condition may be imposed on P only if the person imposing the condition thinks that it would be appropriate to do so with a view to ensuring that P complies with the other bail conditions.

(3) The financial condition must specify--

(a) the sum of money required to be paid,

(b) when it is to be paid, and

(c) the form and manner in which it is to be paid.

(4) A sum to be paid under a financial condition is to be paid to the person who granted the immigration bail, subject to sub-paragraph (5).

(5) If the First-tier Tribunal has directed that the power in paragraph 6(1) (power to vary bail conditions) is to be exercisable by the Secretary of State in relation to P, the sum is to be paid to the Secretary of State.

(6) No sum is required to be paid under a financial condition unless the person who is liable to make a payment under it has been given an opportunity to make representations to the person to whom it is to be paid.

(7) In England and Wales a sum payable under a financial condition is recoverable as if it were payable under an order of the county court in England and Wales.

(8) In Scotland a sum payable under a financial condition may be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

(9) In Northern Ireland a sum payable under a financial condition is recoverable as if it were payable under an order of a county court in Northern Ireland.

(10) Where action is taken under this paragraph for the recovery of a sum payable under a financial condition, the requirement to pay the sum is--

(a) in relation to England and Wales, to be treated for the purposes of section 98 of the Courts Act 2003 (register of judgments and orders etc) as if it were a judgment entered in the county court;

(b) in relation to Northern Ireland, to be treated for the purposes of Article 116 of the Judgments Enforcement (Northern Ireland) Order 1981 (SI 1981/226 (NI 6)) (register of judgments) as if it were a judgment in respect of which an application has been accepted under Article 22 or 23(1) of that Order.

Power to vary bail conditions

6

(1) Subject to this paragraph and to paragraphs 7 and 8, where a person is on immigration bail--

(a) any of the conditions to which it is subject may be amended or removed, or

(b) one or more new conditions of the kind mentioned in paragraph 2(1) or (4) may be imposed on the person.

(2) The power in sub-paragraph (1) is exercisable by the person who granted the immigration bail, subject to sub-paragraphs (3) and (4).

(3) The Secretary of State may exercise the power in sub-paragraph (1) in relation to a person to whom immigration bail was granted by the First-tier Tribunal if the Tribunal so directs.

(4) If the First-tier Tribunal gives a direction under sub-paragraph (3), the Tribunal may not exercise the power in sub-paragraph (1) in relation to the person.

(5) The First-tier Tribunal may not exercise the power in sub-paragraph (1)(a) so as to amend an electronic monitoring condition.

(6) If the Secretary of State or the First-tier Tribunal exercises, or refuses to exercise, the power in sub-paragraph (1), the Secretary of State or the Tribunal must give notice to the person who is on immigration bail.

(7) Where the First-tier Tribunal is required under sub-paragraph (6) to give notice to a person, it must also give notice to the Secretary of State.

Removal etc of electronic monitoring condition: bail managed by Secretary of State

7

(1) This paragraph applies to a person who--

(a) is on immigration bail--

(i) pursuant to a grant by the Secretary of State, or

(ii) pursuant to a grant by the First-tier Tribunal in a case where the Tribunal has directed that the power in paragraph 6(1) is exercisable by the Secretary of State, and

(b) before the grant of immigration bail, was detained or liable to detention under a provision mentioned in paragraph 1(1)(b) or (d).

(2) Where the person is subject to an electronic monitoring condition, the Secretary of State--

(a) must not exercise the power in paragraph 6(1) so as to remove the condition unless sub-paragraph (3) applies, but

(b) if that sub-paragraph applies, must exercise that power so as to remove the condition.

(3) This sub-paragraph applies if the Secretary of State considers that--

(a) it would be impractical for the person to continue to be subject to the condition, or

(b) it would be contrary to that person's Convention rights for the person to continue to be subject to the condition.

(4) If, by virtue of paragraph 2(5) or (7) or this paragraph, the person is not subject to an electronic monitoring condition, the Secretary of State--

(a) must not exercise the power in paragraph 6(1) so as to impose such a condition on the person unless sub-paragraph (5) applies, but

(b) if that sub-paragraph applies, must exercise that power so as to impose such a condition on the person.

(5) This sub-paragraph applies if, having considered whether it would be impractical or contrary to the person's Convention rights to impose such a condition on the person, the Secretary of State--

(a) does not consider that it would be impractical to do so, and

(b) does not consider that it would be contrary to the person's Convention rights to do so.

Amendment etc of electronic monitoring condition: bail managed by First-tier Tribunal

8

(1) This paragraph applies to a person who--

(a) is on immigration bail pursuant to a grant by the First-tier Tribunal in a case where the Tribunal has not directed that the power in paragraph 6(1) is exercisable by the Secretary of State, and

(b) before the person was granted immigration bail, was detained or liable to detention under a provision mentioned in paragraph 1(1)(b) or (d).

(2) Where the person is subject to an electronic monitoring condition, the First-tier Tribunal--

(a) must not exercise the power in paragraph 6(1) so as to remove the condition unless sub-paragraph (3) applies, but

(b) if that sub-paragraph applies, must exercise that power so as to remove the condition.

(3) This sub-paragraph applies if the Secretary of State notifies the First-tier Tribunal that the Secretary of State considers that--

(a) it would be impractical for the person to continue to be subject to the condition, or

(b) it would be contrary to that person's Convention rights for the person to continue to be subject to the condition.

(4) If, by virtue of paragraph 2(7) or this paragraph, the person is not subject to an electronic monitoring condition, the First-tier Tribunal--

(a) must not exercise the power in paragraph 6(1) so as to impose such a condition on the person unless sub-paragraph (5) applies, but

(b) if that sub-paragraph applies, must exercise that power so as to impose such a condition on the person.

(5) This sub-paragraph applies if the Secretary of State notifies the First-tier Tribunal that the Secretary of State--

(a) does not consider that it would be impractical to impose such a condition on the person, and

(b) does not consider that it would be contrary to the person's Convention rights to impose such a condition on the person.

Powers of Secretary of State to enable person to meet bail conditions

9

(1) Sub-paragraph (2) applies where--

(a) a person is on immigration bail subject to a condition requiring the person to reside at an address specified in the condition, and

(b) the person would not be able to support himself or herself at the address unless the power in sub-paragraph (2) were exercised.

(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of that person at that address.

(3) But the power in sub-paragraph (2) applies only to the extent that the Secretary of State thinks that there are exceptional circumstances which justify the exercise of the power.

(4) The Secretary of State may make a payment to a person on immigration bail in respect of travelling expenses which the person has incurred or will incur for the purpose of complying with a bail condition.

(5) But the power in sub-paragraph (4) applies only to the extent that the Secretary of State thinks that there are exceptional circumstances which justify the making of the payment.

Arrest for breach of immigration bail

10

(1) An immigration officer or a constable may arrest without warrant a person on immigration bail if the immigration officer or constable--

(a) has reasonable grounds for believing that the person is likely to fail to comply with a bail condition, or

(b) has reasonable grounds for suspecting that the person is failing, or has failed, to comply with a bail condition.

(2) Sub-paragraph (3) applies if an appropriate judicial officer is satisfied that there are reasonable grounds for believing that a person liable to be arrested under this paragraph is to be found on any premises.

(3) The appropriate judicial officer may issue a warrant authorising any immigration officer or constable to enter, by reasonable force if necessary, the premises named in the warrant for the purposes of searching for and arresting that person.

(4) Sections 28J and 28K of the Immigration Act 1971 (warrants: application and execution) apply, with any necessary modifications, to warrants under sub-paragraph (3).

(5) Sub-paragraph (6) applies where--

(a) a warrant under this paragraph is issued for the purposes of the arrest of a person under this paragraph, and

(b) an immigration officer or a constable enters premises in reliance on the warrant and detains a person on the premises.

(6) A detainee custody officer may enter the premises, if need be by reasonable force, for the purpose of carrying out a search.

(7) In sub-paragraph (6)--

"detainee custody officer" means a person in respect of whom a certificate of authorisation is in force under section 154 of the Immigration and Asylum Act 1999 (detained persons: escort and custody), and

"search" means a search under paragraph 2(1)(a) of Schedule 13 to that Act (escort arrangements: power to search detained person).

(8) Paragraphs 25A to 25C of Schedule 2 to the Immigration Act 1971 (entry and search of persons and premises) apply in relation to a person arrested under this paragraph as they apply in relation to a person arrested under that Schedule.

(9) A person arrested under this paragraph--

(a) must, as soon as is practicable after the person's arrest, be brought before the relevant authority, and

(b) may be detained under the authority of the Secretary of State in the meantime.

(10) The relevant authority is--

(a) the Secretary of State, if the Secretary of State granted immigration bail to the arrested person or the First-tier Tribunal has directed that the power in paragraph 6(1) is exercisable by the Secretary of State in relation to that person, or

(b) otherwise, the First-tier Tribunal.

(11) Where an arrested person is brought before the relevant authority, the relevant authority must decide whether the arrested person has broken or is likely to break any of the bail conditions.

(12) If the relevant authority decides the arrested person has broken or is likely to break any of the bail conditions, the relevant authority must--

(a) direct that the person is to be detained under the provision mentioned in paragraph 1(1) under which the person is liable to be detained, or

(b) grant the person bail subject to the same or different conditions, subject to sub-paragraph (14).

(13) If the relevant authority decides the person has not broken and is not likely to break any of the bail conditions, the relevant authority must grant the person bail subject to the same conditions (but this is subject to sub-paragraph (14), and does not prevent the subsequent exercise of the powers in paragraph 6).

(14) The power in sub-paragraph (12) to grant bail subject to the same conditions and the duty in sub-paragraph (13) to do so do not affect the requirement for the grant of bail to comply with paragraph 2.

(15) In this paragraph--

"appropriate judicial officer" means--

(a) in relation to England and Wales, a justice of the peace;

(b) in relation to Scotland, the sheriff or a justice of the peace;

(c) in relation to Northern Ireland, a lay magistrate;

"premises"--

(a) in relation to England and Wales, has the same meaning as in the Police and Criminal Evidence Act 1984;

(b) in relation to Scotland, has the same meaning as in section 412 of the Proceeds of Crime Act 2002;

(c) in relation to Northern Ireland, has the same meaning as in the Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (NI 12)).

Duty to arrange consideration of bail

11

(1) Subject as follows, the Secretary of State must arrange a reference to the First-tier Tribunal for the Tribunal to decide whether to grant bail to a person if--

(a) the person is being detained under a provision mentioned in paragraph 1(1)(a) or (c), and

(b) the period of four months beginning with the relevant date has elapsed.

(2) In sub-paragraph (1)(b) "the relevant date" means--

(a) the date on which the person's detention began, or

(b) if a relevant event has occurred in relation to the person since that date, the last date on which such an event has occurred in relation to the person.

(3) The following are relevant events in relation to a person for the purposes of sub-paragraph (2)(b)--

(a) consideration by the First-tier Tribunal of whether to grant immigration bail to the person;

(b) withdrawal by the person of an application for immigration bail treated as made by the person as the result of a reference under this paragraph;

(c) withdrawal by the person of a notice given under sub-paragraph (6)(b).

(4) The reference in sub-paragraph (3)(a) to consideration of whether to grant immigration bail to a person--

(a) includes such consideration regardless of whether there is a hearing or the First-tier Tribunal makes a determination in the case in question;

(b) includes the dismissal of an application by virtue of provision made under paragraph 12(2).

(5) The reference in sub-paragraph (3)(a) to consideration of whether to grant immigration bail to a person does not include such consideration in a case where--

(a) the person has made an application for bail, other than one treated as made by the person as the result of a reference under this paragraph, and

(b) the First-tier Tribunal is prevented from granting bail to the person by paragraph 3(4) (requirement for Secretary of State's consent to bail).

(6) The duty in sub-paragraph (1) to arrange a reference does not apply if--

(a) section 3(2) of the Special Immigration Appeals Commission Act 1997 (persons detained in interests of national security etc) applies to the person, or

(b) the person has given to the Secretary of State, and has not withdrawn, written notice that the person does not wish the person's case to be referred to the First-tier Tribunal under this paragraph.

(7) A reference to the First-tier Tribunal under this paragraph in relation to a person is to be treated for all purposes as an application by that person for the grant of bail under paragraph 1(3).

Tribunal Procedure Rules

12

(1) Tribunal Procedure Rules must make provision with respect to applications to the First-tier Tribunal under this Schedule and matters arising out of such applications.

(2) Tribunal Procedure Rules must secure that, where the First-tier Tribunal has decided not to grant a person immigration bail, the Tribunal must dismiss without a hearing any further application for the person to be granted immigration bail which--

(a) is an application to which sub-paragraph (3) applies, but

(b) is not an application to which sub-paragraph (4) applies.

(3) This sub-paragraph applies to an application made during the period of 28 days beginning with the date of the decision mentioned in sub-paragraph (2).

(4) This sub-paragraph applies to an application on which the person demonstrates there has been a material change in the person's circumstances.

Transitional provision

13

(1) Regulations under section 92(1) may, in particular, provide for a person to whom this sub-paragraph applies to be treated, for such purposes as may be specified, as having been granted immigration bail in such circumstances and subject to such conditions as may be specified.

(2) Sub-paragraph (1) applies to a person who, at the specified time, was not in detention on the basis that--

(a) the person had been temporarily admitted to the United Kingdom under paragraph 21 of Schedule 2 to the Immigration Act 1971,

(b) the person had been released from detention under that paragraph,

(c) the person was liable to be detained under paragraph 2(1) of Schedule 3 to the Immigration Act 1971 but, by virtue of a direction of the Secretary of State or the court, was not so detained,

(d) the person was liable to be detained under paragraph 2(2) or (3) of that Schedule but was not so detained,

(e) the person had been released from detention under section 36(3) of the UK Borders Act 2007, or

(f) the person had been released on bail from detention under any provision of the Immigration Acts.

(3) Regulations under section 92(1) may, in particular--

(a) make provision about the circumstances in which the power in paragraph 6(1) may or must be exercised so as to impose an electronic monitoring condition on a person to whom this sub-paragraph applies;

(b) enable the Secretary of State to exercise a discretion in determining whether an electronic monitoring condition should be imposed on such a person,

and may, in particular, do so by providing for paragraph 7 or 8 to have effect with modifications in relation to such a person.

(4) Sub-paragraph (3) applies to a person who--

(a) by virtue of regulations under section 92(1) is treated as having been granted immigration bail as a result of falling within--

(i) sub-paragraph (2)(c), (d) or (e), or

(ii) sub-paragraph (2)(f) on the basis that the person had been released on bail from detention under paragraph 2 of Schedule 3 to the Immigration Act 1971,

(b) is not treated as being subject to an electronic monitoring condition, and

(c) is not otherwise subject to an electronic monitoring condition.

(5) Sub-paragraph (3) applies to a person who--

(a) is on immigration bail pursuant to a grant before the coming into force of paragraph 2(2) and (3), or the coming into force of those provisions in relation to grants of that kind,

(b) before the grant of immigration bail, was detained or liable to detention under a provision mentioned in paragraph 1(1)(b) or (d), and

(c) is not subject to an electronic monitoring condition.

(6) In this paragraph "specified" means specified in regulations under section 92(1).

NOTES

Initial Commencement

To be appointed

To be appointed: see s 94(1).

Appointment

Paras 1, 2(1), (4), (11), 3-6, 9-13: Appointment: 15 January 2018: see SI 2017/1241, reg 2(c); for transitional provisions see reg 3, Schedule (as amended by SI 2018/31, reg 2).

Subordinate Legislation

Immigration Act 2016 (Commencement No 7 and Transitional Provisions) Regulations 2017, SI 2017/1241 (made under para 13(1)).
Immigration Act 2016 (Commencement No 7 and Transitional Provisions) (Amendment) Regulations 2018, SI 2018/31 (made under para 13(1)).

Adam Pipe: Immigration, Asylum and Human rights Case Law Update

Changes to the Immigration Rules: Implementing MM

GEN.3.1.(1) Where:

(a) the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1. or E-LTRC.2.1. applies, and is not met from the specified sources referred to in the relevant paragraph; and

(b) it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of entry clearance or leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal could result in unjustifiably harsh consequences for the applicant, their partner or a relevant child; then

the decision-maker must consider whether such financial requirement is met through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of

Appendix FM-SE (subject to the considerations in sub-paragraphs (3) to (8) of that paragraph).

(2) Where the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1. or E-LTRC.2.1. is met following consideration under sub-paragraph (1) (and provided that the other relevant requirements of the Immigration Rules are also met), the applicant will be granted entry clearance or leave to remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1. or D-LTRC.1.1. or paragraph 315 or 316B of the Immigration Rules.

GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.

(3) Where the exceptional circumstances referred to in sub-paragraph (2) above apply, the applicant will be granted entry clearance or leave to enter or remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2., D-LTRPT.1.2., D-ECDR.1.1. or D-ECDR.1.2.

(4) This paragraph does not apply in the context of applications made under section BPILR or DVILR.

GEN.3.3.(1) In considering an application for entry clearance or leave to enter or remain where paragraph GEN.3.1. or GEN.3.2. applies, the decision-maker must take into account, as a primary consideration, the best interests of any relevant child.

(2) In paragraphs GEN.3.1. and GEN.3.2., and this paragraph, "relevant child" means a person who:

> *(a) is under the age of 18 years at the date of the application; and*
>
> *(b) it is evident from the information provided by the applicant would be affected by a decision to refuse the application.*

§21A Appendix FM-SE

Other sources of income, financial support or funds in exceptional circumstances

21A(1). Where paragraph GEN.3.1.(1) of Appendix FM applies, the decision-maker is required to take into account the sources of income, financial support or funds specified in sub-paragraph (2).

(2) Subject to sub-paragraphs (3) to (8), the following sources of income, financial support or funds will be taken into account (in addition to those set out in, as appropriate, paragraph E-ECP.3.2., E-LTRP. 3.2., E-ECC.2.2. or E-LTRC.2.2. of Appendix FM):

(a) a credible guarantee of sustainable financial support to the applicant or their partner from a third party;

(b) credible prospective earnings from the sustainable employment or self-employment of the applicant or their partner; or

(c) any other credible and reliable source of income or funds for the applicant or their partner, which is available to them at the date of application or which will become available to them during the period of limited leave applied for.

(3) Where the applicant is a child:

(a) other references in this paragraph to "applicant" mean the "applicant's parent" under paragraph E-ECC.1.6. or E-LTRC.1.6. of Appendix FM; and

(b) references in this paragraph to "partner" refer to the "applicant's parent's partner" under those paragraphs.

(4) The onus is on the applicant to satisfy the decision-maker of the genuineness, credibility and reliability of the source of income, financial support or funds relied upon, on the basis of the information and evidence provided, having regard (in particular, but without limitation) to the factors set out below.

(5) The source of income, financial support or funds must not be a loan, unless evidence submitted with the application shows that:

(a) the source is a mortgage on a residential or commercial property in the UK or overseas which at the date of application is owned by the applicant, their partner or both, or by the third party to whom sub-paragraph (2)(a) refers;

(b) the mortgage is provided by a financial institution regulated by the appropriate regulatory body for the country in which that institution is operating; and

(c) the mortgage payments are reasonably affordable by the person(s) responsible for them and are likely to remain so for the period of limited leave applied for.

(6) Any cash savings or any current financial investment or product relied upon by the applicant under sub-paragraph (2)(c) must at the date of application be in the name(s), and under the control, of the applicant, their partner or both.

(7) Any cash savings relied upon by the applicant must enable the financial requirement in paragraph E-ECP.3.1.(b), E-LTRP.3.1.(b), E-ECC.2.1.(b) or E-LTRC.2.1.(b) of Appendix FM (as applicable) to be met, except that the criteria in sub-paragraph (8)(c) apply in place of the requirements in paragraphs 11 and 11A of this Appendix.

(8) In determining the genuineness, credibility and reliability of the source of income, financial support or funds relied upon under sub-paragraph (2), the decision-maker will take into account all the information and evidence provided, and will consider (in particular):

(a) in respect of a guarantee of sustainable financial support from a third party:

(i) whether the applicant has provided verifiable documentary evidence from the third party in question of their guarantee of financial support;

(ii) whether that evidence is signed, dated and witnessed or otherwise independently verified;

(iii) whether the third party has provided sufficient evidence of their general financial situation to enable the decision-maker to assess the likelihood of the guaranteed financial support continuing for the period of limited leave applied for;

(iv) whether the third party has provided verifiable documentary evidence of the nature, extent and duration of any current or previous financial support which they have provided to the applicant or their partner;

(v) the extent to which this source of financial support is relied upon by the applicant to meet the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1., E-ECC.2.1. or E-LTRC.2.1. of Appendix FM (as applicable); and

(vi) the likelihood of a change in the third party's financial situation or in their relationship with the applicant or the applicant's partner during the period of limited leave applied for.

(b) in respect of prospective earnings from sustainable employment or self-employment of the applicant or their partner:

(i) whether, at the date of application, a specific offer of employment has been made, or a clear basis for self-employment exists. In either case, such employment or self-employment must be expected to commence within three months of the applicant's arrival in the UK (if the

applicant is applying for entry clearance) or within three months of the date of application (if the applicant is applying for leave to remain);

(ii) whether the applicant has provided verifiable documentary evidence of the offer of employment or the basis for self-employment, and, if so, whether that evidence:

(aa) is on the headed notepaper of the company or other organisation offering the employment, or of a company or other organisation which has agreed to purchase the goods or services of the applicant or their partner as a self-employed person;

(bb) is signed, dated and witnessed or otherwise independently verified;

(cc) includes (in respect of an offer of employment) a signed or draft contract of employment;

(dd) includes (in respect of self-employment) any of a signed or draft contract for the provision of goods or services; a signed or draft partnership or franchise agreement; an application to the appropriate authority for a licence to trade; or details of the agreed or proposed purchase or rental of business premises;

(iii) whether, in respect of an offer of employment in the UK, the applicant has provided verifiable documentary evidence:

(aa) of a relevant employment advertisement and employment application;

(bb) of the hours to be worked and the rate of gross pay, which that evidence must establish equals or exceeds the National Living Wage or the National Minimum Wage (as applicable, given the age of the person to be employed) and equals or exceeds the going rate for such work in that part of the UK; and

(cc) which enables the decision-maker to assess the reliability of the offer of employment, including in light of the total size of the workforce and the turnover (annual gross income or sales) of the relevant company or other organisation;

(iv) whether the applicant has provided verifiable documentary evidence that at the date of application, the person to be employed or self-employed is in, or has recently been in, sustained employment or self-employment of the same or a similar type, of the same or a similar level of complexity and at the same or a similar level of responsibility;

(v) whether the applicant has provided verifiable documentary evidence that the person to be employed or self-employed has relevant professional, occupational or educational qualifications and that these are recognised in the UK;

(vi) whether the applicant has provided verifiable documentary evidence that the person to be employed or self-employed has the level of English language skills such prospective employment or self-employment is likely to require;

(vii) the extent to which this source of income is relied upon by the applicant to meet the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1., E-ECC.2.1. or E-LTRC.2.1. of Appendix FM (as applicable); and

(viii) where an offer of employment is relied upon, and where the proposed employer is a family member or friend of the applicant or their partner, the likelihood of a relevant change in that relationship during the period of limited leave applied for.

(c) in respect of any other credible and reliable source of income or funds for the applicant or their partner:

(i) whether the applicant has provided verifiable documentary evidence of the source;

(ii) whether that evidence is provided by a financial institution regulated by the appropriate regulatory body for the country in which that institution is operating, and is signed, dated and witnessed or otherwise independently verified;

(iii) where the income is or the funds are based on, or derived from, ownership of an asset, whether the applicant has provided verifiable documentary evidence of its current or previous ownership by the applicant, their partner or both;

(iv) whether the applicant has provided sufficient evidence to enable the decision-maker to assess the likelihood of the source of income or funds being available to them during the period of limited leave applied for; and

(v) the extent to which this source of income or funds is relied upon by the applicant to meet the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1., E-ECC.2.1. or E-LTRC.2.1. of Appendix FM (as applicable).

Insurmountable Obstacles
Mudibo, R (on the application of) v Secretary of State for the Home Department [2017] EWCA Civ 1949 (28 November 2017)
http://www.bailii.org/ew/cases/EWCA/Civ/2017/1949.html

This case illustrates the difficulty of satisfy the 'insurmountable obstacles' test and the need for evidence rather than a mere assertion.

30. *This was a clear case of family life begun and continued while the appellant was in this country unlawfully, with no legitimate reason to expect that her presence would be permitted to continue. Respect must be given to family life and regard had to be had to both members of this family. However, I agree with Mr Malik that, applying the relevant test under the Immigration Rules and in the decided cases in this country and in Strasbourg, this application for permission to apply for judicial review was rightly refused.*

31. *The obstacles to family life, which were said to be insurmountable, were Mr Ali's inability to work, his inability to support himself in Tanzania and the relative standards of medical care for Mr Ali's condition here and in Tanzania. It seems to me that the evidence on all these points was tenuous in the extreme. There was no evidence given by Mr Ali at all: he did not explain what work he had been accustomed to, what his skills were and what the real obstacles to employment were for him. There was no evidence from any quarter as to what obstacles there were to support for the couple in Tanzania and no explanation as to what the appellant's own employment prospects were. The medical evidence was brief and relatively old and nothing was provided to establish a case of lack of necessary medication and/or medical care in Tanzania. As Mr Malik submitted, the claim to "insurmountable obstacles" amounted in reality to mere assertion. In my judgment, therefore, this proposed claim for judicial review had no real chance of success and permission was rightly refused at both stages in the Upper Tribunal.*

Article 3 medical cases & Paposhvili

EA & Ors (Article 3 medical cases - Paposhvili not applicable: Afghanistan) [2017] UKUT 445 (07 August 2017)

http://www.bailii.org/uk/cases/UKUT/IAC/2017/445.html

In *EA* the Tribunal considered the seminal judgment of the ECtHR in *Paposhvili v Belgium, 13 December 2016, ECtHR (Application No 41738/10)*. At §183 of *Paposhvili* the ECtHR said: *'The Court considers that the "other very exceptional cases" within the meaning of the judgment in N. v. the United Kingdom (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.'* The Tribunal found that this statement was not consistent with UK domestic law most clearly expressed in *GS (India) [2015] 1 WLR 3312* where the Court of Appeal confined Article 3 health claims to deathbed cases. The Tribunal therefore held (head note): *'The test in Paposhvili v Belgium, 13 December 2016, ECtHR (Application No 41738/10) is not a test that it is open to the Tribunal to apply by reason of its being contrary to judicial precedent.'* Permission to appeal has been granted to challenge this unwelcome reported decision.

AM (Zimbabwe) & Anor v The Secretary of State for the Home Department [2018] EWCA Civ 64 (30 January 2018)

http://www.bailii.org/ew/cases/EWCA/Civ/2018/64.html

It is clear from the judgment in *AM* that the issue of Article 3 medical cases and *Paposhvili* will have to be resolved by the Supreme Court. The Court of Appeal find that *Paposhvili* represents a very modest extension to Article 3 protection. As Sales LJ says at §38, *'the boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e. likely "rapid" experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state'*.

Discussion

(i) Should this court rule upon the meaning of the judgment in Paposhvili?

29. *An issue arises whether it is appropriate for this court to express any view about the true meaning and effect of the guidance in Paposhvili, and in particular regarding the test in para. [183] of the judgment in that case. The appellants contend that we should not venture to do this, but should simply apply the law as laid down domestically by the House of Lords in N v Secretary of State for the Home Department and dismiss the appeals, with a view to granting permission to apply to the Supreme Court. They say that since we are bound to dismiss the appeals, anything we say about the new test in Paposhvili will be obiter and will not provide assistance for other courts or tribunals. The Secretary of State, however, disputes this and argues that we should review and rule upon the meaning and effect of the guidance in Paposhvili.*

30. *As noted above, the parties in the present appeals are agreed that on the facts of their particular cases neither AM nor Mr Nowar can satisfy the test for breach of Article 3 set out in N v Secretary of State for the Home Department and N v United Kingdom. The parties are also in agreement that the decision of the House of Lords in N v Secretary of State for the Home Department is binding authority so far as this court is concerned regarding the test to be applied in domestic law in this type of case, with the consequence that both appeals to this court have to be dismissed. It is common ground that this is so even though it appears that the ECtHR has more recently, in Paposhvili, decided to clarify or qualify to some degree the test previously laid down in N v United Kingdom, which corresponds with that set out by the House of Lords in N v Secretary of State for the Home Department. This is a result of application of the usual rules of precedent in this jurisdiction: see Kay v Lambeth London Borough Council [2006] UKHL 10; [2006] 2 AC 465, at [43].*

31. *However, the appeals have been brought with a view to seeking to rely on the new guidance given by the ECtHR in Paposhvili not in this court, but on a further appeal to the Supreme Court. It is clear that the appellants will seek to extend existing orders preventing their removal from the UK until the final determination of their cases in the court and tribunal system, on the basis that their appeals will or should be going to the Supreme Court. Ordinarily, permission would only be granted for an appeal to the Supreme Court in a case in which there was a real prospect of success on the facts of that case.*

32. *There is also a significant number of other cases involving claims by foreign nationals to resist removal from the UK by invoking Article 3 on medical grounds which are already in the system, in which again reliance is sought to be placed on Paposhvili even though the claims have been dismissed by application of N v Secretary of State for the Home Department and N v United Kingdom. In those cases, orders have been made in a similar way to prevent the removal of the appellants from the UK until final determination of their cases, which are on hold until the position in relation to the adoption of the guidance in Paposhvili into domestic law has been clarified.*

33. *In addition, similar new claims based on application of Article 3 on medical grounds may be brought forward at any time. In relation to those claims, all courts below the Supreme Court will be bound by the decision in N v Secretary of State for the Home Department, but claimants may contend that they have grounds for saying that their cases are covered by the new guidance in Paposhvili (in particular at para. [183]) and that any question of their removal from the UK should be stayed until the Supreme Court has decided to modify domestic law (potentially decisively in their favour) by reference to that guidance.*

34. *In all of these situations, where an appellant or other claimant has no good claim to resist removal from the UK other than on the footing that the Supreme Court might adopt the guidance in Paposhvili, a stay of removal would usually only be justified pending a new decision by the Supreme Court if their case would satisfy the test set out in Paposhvili at para. [183]. If a court or tribunal at a full hearing can determine that it does, a stay is likely to be justified; and if not, not. If a court or tribunal is for some reason having to make a decision regarding a stay without a full examination of the Article 3 case with reference to the test in Paposhvili, then it might be sufficient if the claimant has a good arguable case that his claim would satisfy that test.*

35. *In all these situations, the test in para. [183] of Paposhvili provides the relevant criterion which will in practical terms determine whether a stay of removal from the UK is justified or not. Therefore, contrary to the argument of the appellants, it is relevant and appropriate for this court to rule upon the meaning and effect of the guidance in Paposhvili, in particular as regards the test in para. [183]. In doing so, we will provide guidance to other courts and tribunals which are faced with arguments based on the test in Paposhvili to ensure that they adopt a uniform and consistent approach to such arguments. At the very least, what we say will be persuasive authority.*

36. *However, in my view it goes further than this. We are providing authoritative guidance on the true interpretation of a legal criterion governing how courts and tribunals in the domestic legal system should make judgments regarding the exercise of their powers to grant stays of removal. That guidance will be formally binding upon courts and tribunals below the level of the Supreme Court, in the usual way.*

The effect of the judgment in Paposhvili

37. *I turn, therefore, to consider the extent of the change in the law applicable under the Convention which is produced by the judgment in Paposhvili, as compared with the judgments in D v United Kingdom and N v United Kingdom. In my view, it is clear both that para. [183] of Paposhvili, set out above, relaxes the test for violation of Article 3 in the case of removal of a foreign national with a medical condition and also that it does so only to a very modest extent.*

38. *So far as the ECtHR and the Convention are concerned, the protection of Article 3 against removal in medical cases is now not confined to deathbed cases where death is already imminent when the applicant is in the removing country. It extends to cases where "substantial grounds have been shown for believing that [the applicant], although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy" (para. [183]). This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e. to the Article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e. likely "rapid" experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state.*

39. *There are a number of powerful indicators, including in the Grand Chamber's judgment itself, which support this interpretation of para. [183] and the inference that the Grand Chamber only intended to make a very modest extension of the protection under Article 3 in medical cases:*

    i) Article 3 is an unqualified right with a high threshold for its application (see N v United Kingdom, para. [43], and also Paposhvili, para. [174]);

    ii) the Grand Chamber cited with approval at paras. [175]-[181] the ECtHR's previous case-law set out there, including in particular D v United Kingdom and N v United Kingdom, and in doing so it specifically noted at para. [178] that N v United Kingdom was a case in which there had been no violation of Article 3 where removal of the applicant would result in a significant reduction in her life expectancy;

    iii) as appears from the Grand Chamber judgments in N v United Kingdom, at para. [43], and in Paposhvili, at paras. [178], [181] and [183], the paradigm case for finding a violation of Article 3 in a medical case is D v United Kingdom, and the Grand Chamber in Paposhvili was only concerned to provide guidance regarding the "other very exceptional cases" referred to in N v United Kingdom at para. [43], i.e. those "where the humanitarian considerations are equally compelling" to those in D v United Kingdom (ibid.; and Paposhvili, para. [178]): see Paposhvili, paras. [181]-[183]. The Grand Chamber in Paposhvili itself recited at para. [177] the circumstances in D v United Kingdom which made it a compelling case and characterised it as a case of "very exceptional circumstances" - it should be noted that this characterisation was not used in the judgment in D v United Kingdom itself, but was stated to be the relevant characterisation of that case by the Grand Chamber in its judgment in N v United Kingdom and is deliberately repeated by the Grand Chamber here in its judgment in Paposhvili;

    iv) the Grand Chamber in Paposhvili seeks only to "clarify" the approach set out in N v United Kingdom (see para. [182]), not to effect any major change to what had been authoritatively laid down in that case; and

    v) the Grand Chamber at para. [183] in Paposhvili, as well as using the rubric "other very exceptional cases", which itself indicates how rarely the test in Article 3 will be found to be satisfied in medical cases, emphasised in the final sentence that it was still intending to indicate that there was "a high threshold for the application of Article 3" in medical cases. This echoes the point made by the Grand Chamber in para. [43] of N v United Kingdom, set out above, about the high threshold for application of Article 3.

40. *It is true that if one read the phrase "would face a real risk … of being exposed … to a significant reduction in life expectancy" in para. [183] out of context, it might be taken to indicate a very wide extension of the protection of Article 3 in medical cases, since in very many such cases where a foreign national is receiving treatment at a higher level of effectiveness in the removing state than would be available in the receiving state (e.g. in the case of those suffering from AIDS) they would be able to say they would face a real risk of a significant reduction of life expectancy if they were removed. But this is not a tenable interpretation of para. [183] of Paposhvili, read in its proper context. N v United Kingdom was itself a case where removal resulted in a very significant reduction in life expectancy (as was also noted in Paposhvili at para. [178]), in which no violation of Article 3 was found, and the Grand Chamber in Paposhvili plainly regarded that case as rightly decided. N v United Kingdom was itself a Grand Chamber judgment, decided by 14 votes to 3. It is impossible to infer that by the formula used in para. [183] of Paposhvili the ECtHR intended to reverse the effect of N v United Kingdom. Moreover, the Grand Chamber's formulation in para. [183] requires there to be a "serious" and "rapid" decline in health resulting in intense suffering to the Article 3 standard where death is not expected, and it makes no sense to say in the context of analysis under Article 3 that a serious and rapid decline in health is not a requirement where death rather than intense suffering is the harm expected. In my view, the only tenable interpretation of para. [183], read in context, is the one given above.*

41. *In that regard, it is also significant that even on the extreme and exceptional facts of the Paposhvili case, where the applicant faced a likelihood of death within 6 months if removed to Georgia, the Grand Chamber did not feel able to say that it was clear that a violation of Article 3 would have occurred for that reason had he been removed. Instead, all that the Grand Chamber held was that the applicant had raised a sufficiently credible Article 3 case that it gave rise to a procedural obligation for the relevant Belgian authorities to examine that case with care and with reference to all the available evidence. The violation of Article 3 which the Grand Chamber held would have occurred if the applicant had been removed to Georgia was a violation of that procedural obligation.*

Disposal of the two appeals

42. *In the two cases before us, we have heard full argument on whether the Article 3 claims of AM and Mr Nowar fall within the scope of the test in para. [183] of the judgment in Paposhvili. We are in a position to determine that question. Accordingly, in these appeals it is not appropriate at this stage for us simply to consider whether either of them has a good arguable case that his situation falls within para. [183] of Paposhvili or not.*

43. *In my judgment, neither AM's nor Mr Nowar's claim satisfies the test in para. [183] of Paposhvili. We can and should rule accordingly. I would add that even if the question for us were whether either claim constitutes a good arguable case that their situation satisfies that test, my view is that it is clear that neither of them does constitute such a case.*

44. *AM's claim fails to satisfy the test in para. [183] of Paposhvili because he has failed to show that there are substantial grounds to believe he faces a real risk of a serious and rapid decline in his health resulting either in intense suffering (to the Article 3 standard) or death in the near future if he is removed to Zimbabwe. He is HIV positive, but does not yet have AIDS. He has adduced no medical report which says that he is likely to die soon if removed to Zimbabwe, even if he received no treatment at all; or that he could not tolerate, without side-effects, any of the range of ARV treatments available in Zimbabwe; or that, if the only ARV treatments available to him in Zimbabwe are ones which would produce side-effects, those side-effects would be so severe as the cost of keeping him alive that they would constitute suffering at an intensity to bring his case within Article 3 according to the high threshold which applies in that regard. AM's case is not even as strong as that of the applicant with AIDS in N v United Kingdom, which the Grand Chamber in Paposhvili has affirmed was correctly decided.*

45. *Mr Nowar's claim fails to satisfy the test in para. [183] of Paposhvili because he too has failed to show that there are substantial grounds to believe he faces a real risk of a serious and rapid decline in his health likely to result in his death in the near future if he is removed to Jordan. The evidence is that his cancer is in full remission at the moment. It is speculative whether and when it might recur and, if it does, what Mr Nowar's life expectancy would be. Also, he was successfully treated for his cancer*

previously in Jordan and there is no good reason to think the same effective treatment would not be available to him in Jordan if his cancer does recur. The Grand Chamber has affirmed in Paposhvili, and indeed has emphasised in its judgment, that a violation of Article 3 does not occur just because the care in the receiving state does not meet the same high standards as the care in the removing state: see paras. [178], [189] and [192], set out above. Article 3 does not impose an obligation on a removing state ensure an absence of disparities between the health service provision which it is able to provide and that available in the receiving state.

46. *The effect of this analysis for each appellant is that his appeal to this court should be dismissed and any application for an extension of the stay of his removal from the UK is likely to be dismissed as well, subject to what might happen in relation to any grant of permission to appeal to the Supreme Court in these cases. We have not heard argument about that and I express no view about it, save to say that (a) as presently advised, it seems to me to be highly desirable that the Supreme Court should consider the impact of Paposhvili for the purposes of domestic law at an early stage, and (b) I think these cases fall a long way short of satisfying the test in para. [183] of Paposhvili and consequently I have some doubt whether they are ideal as vehicles for that exercise. If this court were to refuse permission to appeal, the appellants could of course ask the Supreme Court for permission to appeal and it might be appropriate to extend the stay of removal in their cases while that procedure was implemented.*

The SSHD's policy on British Children (and their parents)

The new February 2018 policy

Family Migration: Appendix FM Section 1.0b
Family Life (as a Partner or Parent) and Private Life: 10-Year Routes
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/683449/Family-Private-Life-10yr-routes-v1.0ext.pdf

Where the child is a British citizen
Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave the UK because, in practice, the child will not, or is not likely to, continue to live in the UK with another parent or primary carer, EX.1.(a) is likely to apply.

In particular circumstances, it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules.

If the decision maker is minded to refuse an application in circumstances in which the applicant would then be separated from a child in the UK, this decision should normally be discussed with a senior caseworker.

In every case, all the circumstances must be carefully considered in the round, with the best interests of the child constituting a primary (but not the only or paramount) consideration.

SF and others (Guidance, post-2014 Act) [2017] UKUT 120 (IAC) (16 February 2017)
http://www.bailii.org/uk/cases/UKUT/IAC/2017/120.html
In this brief but significant decision the Vice President found that the SSHD's guidance, that it was not reasonable for British children to leave the United Kingdom, was relevant to the Tribunal's assessment of the case, even in the absence of a *'not in accordance with the law'* ground of appeal. The appeal was allowed on that basis. The relevant guidance can be found at section 11.2.3 of the Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) *'Family Life as a Partner or Parent and Private Life, 10 year Routes'*.

7. *Mr Wilding, however, has with the fairness which Presenting Officers always attempt to apply, drawn our attention to an important guidance document. It is the Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes". It is the edition of August 2015 and therefore not in force at the date of the decision under appeal, but it was in force at the date of the First-tier Tribunal hearing and decision, and is still in force. It contains important guidance about the following topic at 11.2.3: Would it be unreasonable to expect a British Citizen Child to leave the UK? We will set out the relevant parts, they are as follows:*

> *"Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice Judgment in Zambrano.*
> *...*
> *Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.*
>
> *In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.*
> *It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.*
>
> *The circumstances envisaged could cover amongst others:*
>
> - *criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;*
> - *a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.*
>
> *In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision."*

We were not specifically referred to any other part of this document and we do not need to set any more out.

8. *Mr Wilding very properly accepted this was not, from the point of view of the relationship between the first appellant, the mother, and the British citizen child, a case which involves criminality; and this was not a case in which the conduct of the mother or of the other children was such as to give rise to considerations of such weight as to justify separation: but in any event it does not appear that there has been any consideration given to the possibility of the British citizen child staying with another parent or alternative primary care in the EU. There is said to be a grandmother here. No other details are known; certainly the Secretary of State has not at any stage taken the view that there was an alternative primary*

carer, and in any event, of course the result of the decision would be the separation of the youngest child from his siblings and from his mother if they had to return to Albania leaving him here.

9. It appears to us inevitable that if the guidance to which Mr Wilding has drawn our attention had been applied to the present family, at any time after it was published, and on the basis that the youngest child is a British citizen, the conclusion would have been that the appellants should have been granted a period of leave in order to enable the British citizen child to remain in the United Kingdom with them. The question is then whether that guidance as guidance has any impact on the First-tier Tribunal or on us.

10. It is clear that the appellants do not have available to them a ground of appeal on the basis that the decision was not in accordance with the law such as before the amendments made to the 2002 Act by the 2014 Act they might have had. Nevertheless it appears to us that the terms of the guidance are an important source of the Secretary of State's view of what is to be regarded as reasonable in the circumstances, and it is important in our judgement for the Tribunal at both levels to make decisions which are, as far as possible, consistent with decisions made in other areas of the process of immigration control.

11. If the Secretary of State makes a decision in a person's favour on the basis of guidance of this sort, there can of course be no appeal, and the result will be that the decision falls below the radar of consideration by a Tribunal. It is only possible for Tribunals to make decisions on matters such as reasonableness consistently with those that are being made in favour of individuals by the Secretary of State if the Tribunal applies similar or identical processes to those employed by the Secretary of State.

12. On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance. But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it.

13. In our judgement, therefore, the way forward in this case is to conclude that, not for the reasons argued by Mr Eaton, but for those, as it happens, argued by Mr Wilding, this is a case where it would be unreasonable to expect the youngest child to leave the United Kingdom. We will therefore set aside the decision of the First-tier Tribunal and substitute a decision allowing the appeals of all three appellants on that ground. The period of leave is a matter to be determined by the Secretary of State.

Adult Dependent Relatives: what is reasonable for the individual concerned?

BRITCITS v The Secretary of State for the Home Department [2017] EWCA Civ 368 (24 May 2017)

http://www.bailii.org/ew/cases/EWCA/Civ/2017/368.html

59. Second, as is apparent from the Rules and the Guidance, the focus is on whether the care required by the ADR applicant can be "reasonably" provided and to "the required level" in their home country. As Mr Sheldon confirmed in his oral submissions, the provision of care in the home country must be reasonable both from the perspective of the provider and the perspective of the applicant, and the standard of such care must be what is required for that particular applicant. It is possible that insufficient attention has been paid in the past to these considerations, which focus on what care is both necessary and reasonable for the applicant to receive in their home country. Those considerations include issues as to the accessibility and geographical location of the provision of care and the standard of care. They are capable of embracing emotional and psychological requirements verified by expert medical evidence. What is reasonable is, of course, to be objectively assessed.

...

76. Thirdly, for the reasons I have given the appellant has not established that the conditions for entry and right to remain for ADRs under the new ADR Rules are incapable of practical fulfilment in virtually all cases for parents, let alone for all the categories of ADRs entitled to apply, whose family life engages Article 8. In particular, rejection on the basis of the availability of adequate care in the ADR's home country turns upon whether the care which is available is reasonable for the ADR to receive and of the level required for that applicant. Contrary to the submission of the appellant, those considerations are capable, with appropriate evidence, of embracing the psychological and emotional needs of elderly parents.

Visit Visas, Appeals and Article 8

Secretary of State for the Home Department v Abbas [2017] EWCA Civ 1393 (28 September 2017)
http://www.bailii.org/ew/cases/EWCA/Civ/2017/1393.html
Visit visa appeal allowed: no family life but on basis of ability to develop private life. Upheld by UT. Overturned by CA. No positive obligation to admit in respect of private life.

2. The important point of principle which arises in this appeal is this:
"To what extent does the state have a positive obligation on grounds of private life (where no relevant family life exists) to grant entry clearance for an adult to visit an elderly relative located in the United Kingdom?" The appellant Secretary of State is represented by Ms Giovannetti QC and Mr Colin Thomann. The respondent has played no part in the appeal.

3. In my judgment the answer to that question is that no such positive obligation exists. There is no sign of it having been recognised in the jurisprudence of the Strasbourg Court. It is inconsistent with the jurisprudence on the positive obligation under article 8 as regards family life which that court has recognised and would sit uneasily with its approach to the extra-territorial reach of the ECHR.

Entry Clearance Officer, Sierra Leone v Kopoi [2017] EWCA Civ 1511 (10 October 2017)
http://www.bailii.org/ew/cases/EWCA/Civ/2017/1511.html
Family visit Appeal. Allowed by FTT upheld by UT. ECO's appeal allowed by CoA. No family life. Note the postscript at para 32 which shows limits of JR in visit cases.

19. *Kugathas remains good law: see e.g. R (Britcits) v Secretary of State for the Home Department [2017] EWCA Civ 368, [61] and [74] (Sir Terence Etherton MR), [82] (Davis LJ) and [86] (Sales LJ). As Sir Terence Etherton MR pithily summarised the position at [74], in order for family life within the meaning of Article 8(1) to be found to exist, "There must be something more than normal emotional ties".*

20. *In my view, by no stretch of the imagination can the present case be brought within the principles set out in these authorities. Unlike the position in Kugathas, the respondent is not even a member of Emmanuel's immediate family and her claim to fall within the scope of family life in Article 8(1) is weaker than that of the claimant in that case. Clearly the respondent has no dependency upon Emmanuel, Ms Wilson and the children, nor is she the beneficiary of any established pattern of support provided to her by them. Her case thus has to be distinguished from Boyle v United Kingdom (1994) 19 EHRR 179, in which the European Commission of Human Rights found that an uncle enjoyed family life with his nephew where he had frequent contact with the nephew from the time of his birth, spent considerable time with him, lived in close proximity and often looked after him at weekends, and was properly described as "a good father figure" to him ([44]). No doubt in the present case there are emotional ties felt on both sides, but there is nothing to indicate that these go beyond the normal emotional ties experienced between family members in very many families.*

21. *The same can be said looking at the picture from the point of view of Emmanuel, Ms Wilson and the children. The perspective of the children was particularly emphasised in the submissions made to the ECM, the FTT and the Upper Tribunal and in the submissions made to us by Mr Yeo for the respondent. However, they are plainly in no relationship of dependency of any kind at all in respect of the respondent. It may be that some emotional ties exist between them, but it has to be said that in the case of the children they appear to be very weak ties. Only the older child has actually met the respondent, on a visit to Sierra Leone aged about two, and it must be highly doubtful that he remembers that. The sense of emotional connection the children have with the respondent is considerably weaker than the sense of emotional connection between family members in the Kugathas case itself, which was found not to constitute family life for the purposes of Article 8.*

22. *In my view, there plainly is no existing "family life" between the respondent on the one hand and any of Emmanuel, Ms Wilson and the children on the other. The Upper Tribunal was wrong to hold that there is.*

23. *Mr Yeo sought to suggest that the ECO was under some sort of obligation to grant the respondent leave to enter so that she and the children could seek to develop a relationship together. No authority was cited which lent any support to such a contention. If family life does not exist, it is difficult to see how a state interferes with it by declining to grant leave to someone to enter the jurisdiction to try to bring it into existence. Nor could it be said that any implied positive obligation arises under Article 8 to grant leave to enter to the respondent to come to try to develop a more substantial relationship with the children in order to try to create a family life which does not currently exist. That would be an implied right of extraordinary width affecting the ordinary right of states to control their borders in a profound and far-reaching way: it clearly cannot be spelled out of the terms of Article 8(1).*

24. *The basic position is that "The duty imposed by Article 8 [right of respect for family life] cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country": Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471, para. 68. Still less could it be said that Article 8 affords the respondent, who is not a spouse or member of the immediate family, a right to come to the UK to visit Emmanuel, Ms Wilson and the children.*

25. *The principle stated by the European Court of Human Rights in Abdulaziz is applied in cases concerning claims for family reunification involving children: see e.g. Sen v Netherlands (2001) 36 EHRR 7, in which the applicable principles were re-affirmed as follows at para. 36:*

    "(a) The extent of a State's obligation to admit to its territory relatives of settled migrants will vary according to the particular circumstances of the persons involved and the general interest.
    (b) As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.
    (c) Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory."

26. *In the Sen case the Court considered an application for a child left in Turkey by her Turkish parents to gain entry clearance to come to live with them in the Netherlands. The Court was concerned first to identify whether the bond uniting the applicants amounted to "family life". It concluded that it did so, on the basis that the child in question, who was a minor aged 9 at the relevant time, was born of a marital union and therefore was ipso jure part of that relationship: para. 28. In the present case, however, none of the relevant individuals can rely on such a relationship between themselves at this first stage of the analysis. Instead, they would have to point to something special in the factual context of their case which shows that "family life" exists between them despite the comparative remoteness of their relationship, but they are unable to do so.*

27. *Next, at paras. 29ff, the Court considered whether there had been an interference with the exercise of the applicants' right to respect for their "family life" or a failure to comply with a positive obligation under Article 8, the principles applicable to such an obligation being similar to those governing negative obligations (para. 31). For the purpose of this stage of the analysis, having stated the general principles at para. 36, set out above, the Court stated that it took into consideration "the age of the children concerned, their situation in their country of origin and their degree of dependence on their parents" (para. 37).*

28. *On the particular facts of the Sen case, the Court found that the refusal of entry clearance for the child involved a breach of Article 8, distinguishing in that regard another family reunification case involving a child who was a minor and his parent in which no violation of Article 8 had been found (Ahmut v Netherlands (1997) 24 EHRR 62). However, the principles identified by the Court in Sen and the factors it treated as relevant point strongly against there being any violation of Article 8 in the present case, even if it were possible to say that there was "family life" in existence in a relevant sense. For instance, if one focuses on the children, although they are very young they are not dependent on the respondent and they are already safely settled in a secure family life with their parents in the UK. There is no pressing Article 8 interest of theirs which means that, as a matter of "the fair balance which has to be struck between the competing interests of the individual and the community as a*

whole" (Sen, para. 31), the general principles identified in para. 36, set out above, should be treated as overridden so that the respondent must be granted leave to enter.

29. *In general terms, I consider that the Upper Tribunal (Mr Justice McCloskey, President, and UT Judge Perkins) in Mostofa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) was correct to observe at [24] that "... it will only be in very unusual circumstances that a person other than a close relative will be able to show that the refusal of entry clearance comes within the scope of Article 8(1)"; and I think the Upper Tribunal made pertinent comments about this when it continued: "In practical terms this is likely to be limited to cases where the relationship is that of husband and wife or other close life partners or a parent and minor child and even then it will not necessarily be extended to cases where, for example, the proposed visit is based on a whim or will not add significantly to the time that the people involved spend together" (albeit I would wish to reserve my opinion whether even these comments might have expressed the position too widely, in light of the principle stated in Abdulaziz). Clearly, on this approach, the respondent's case does not fall within the scope of Article 8(1).*

30. *In my view, the shortness of the proposed visit in the present case is a yet further indication that the refusal of leave to enter did not involve any want of respect for anyone's family life for the purposes of Article 8. A three week visit would not involve a significant contribution to "family life" in the sense in which that term is used in Article 8. Of course, it would often be nice for family members to meet up and visit in this way. But a short visit of this kind will not establish a relationship between any of the individuals concerned of support going beyond normal emotional ties, even if there were a positive obligation under Article 8 (which there is not) to allow a person to enter the UK to try to develop a "family life" which does not currently exist.*

Conclusion

31. *For the reasons given above, I would allow this appeal.*

32. *As a post-script it is perhaps worth referring to the wider picture. By virtue of section 88A of the 2002 Act, the respondent had no right of appeal to the FTT on the simple question of whether she did in fact comply with the requirements of the version of paragraph 41 of the Immigration Rules which was applicable to her application for leave to enter, i.e. whether she was a genuine visitor who would leave at the end of her visit. If she was dissatisfied with the ECO's decision on that question, she could instead have applied for judicial review in relation to it when the ECM affirmed it after review. But the argument on such a judicial review would have had to be directed to whether the ECO's assessment on the facts was rationally open to him on the evidence before him. This contrasts with the position on an appeal to the FTT, in which it is open to the FTT to make its own findings of fact on the evidence and it is not limited to asking whether the administrative decision-maker's assessment of the facts was rational or not. In the present case, for example, whilst the FTT was entitled to find on the evidence before it that the respondent was a genuine visitor, I think the respondent might have had difficulty in showing that the ECO reached an irrational conclusion that she was not, on the evidence before him. The evidence available gave scope for people rationally to differ regarding their assessment of the facts.*

See also:
Secretary of State for the Home Department v Onuorah [2017] EWCA Civ 1757 (03 November 2017)
http://www.bailii.org/ew/cases/EWCA/Civ/2017/1757.html

Evidential Flexibility
Mudiyanselage v The Secretary of State for the Home Department [2018] EWCA Civ 65 (30 January 2018)
http://www.bailii.org/ew/cases/EWCA/Civ/2018/65.html

In *Mudiyanselage* the Court of Appeal review the many different versions of the SSHD's Evidential Flexibility Policy which sits alongside §245AA. The Court holds that in the

later versions of the policy there is no longer a general policy to correct minor errors and flexibility will only apply in the circumstances set out in §245AA. The Court also deals with when a document is a specified document for the purpose of §245AA.

OVERVIEW

52. *In both Mandalia and SH (Pakistan) the challenge to the Secretary of State's failure to exercise evidential flexibility succeeded because of the particular language of the EFP as it then stood. In Mandalia there was no need to consider paragraph 245AA because it was not in force at the material time (though NB Lord Wilson's comment referred to at para. 42 above). In SH (Pakistan) paragraph 245AA was in play, but the terms of the Guidance were held to create an obligation on the Secretary of State to exercise evidential flexibility in some circumstances which the rule did not cover. But the language which was decisive in those cases has now changed: that process started with version 2 of the Guidance, which was effective from 20 May 2013, and was completed by version 4, effective from 1 October 2013. The question whether the EFP can be treated as a source of more extensive rights than appear in paragraph 245AA itself must be judged on the basis of the Guidance as it stood at the material time.*

53. *As to that, I have already said that the terms of the section on "Obtaining Additional Information" were at the time with which we are concerned indistinguishable from those of paragraph 245AA itself. Mr Mustafa pointed out that the opening paragraphs of the introductory section remained substantially identical up to and including version 7, and that they referred generally to asking for clarification or for missing documents or information where "there are minor errors or omissions on specified documents". Mr Balroop likewise focused on this phrase, submitting that it demonstrated, as one would expect, that the Secretary of State's intention was that otherwise valid applications should not fail simply because of minor mistakes. That is a fair point as far as it goes, but the Guidance must be read as a whole and in the context of the rule to which it relates. If the introductory section were read as stating a general policy that caseworkers should seek further information in any case where there was a minor error or omission that would make nonsense of the (now) carefully limited terms of the section on obtaining additional information, and indeed of the equally limited terms of paragraph 245AA itself. In my view it should be read as simply introducing the subject-matter of the EFP, with the actual content of the policy appearing in the subsequent sections. I appreciate that, as Mr Mustafa pointed out, Elias LJ in SH (Pakistan) did not rely only on p. 5 of the Guidance but also on p. 2. But at that stage the two parts of the Guidance gave an essentially consistent message: the policy was a broad one, and the particular cases identified at p. 5 were stated to be only examples. A different approach is necessary now that their provisions diverge.*

54. *Accordingly in my view the correct construction of versions 4-7 of the Guidance is that there is no longer a general policy to allow correction of minor errors: evidential flexibility will only apply in the particular cases provided for by paragraph 245AA. That may seem hard, but the reasons for having a more restricted policy are articulated in the authorities referred to above and summarised in Nyasulu. The mismatch with the Rules which was identified in SH (Pakistan) no longer exists. In fact I strongly suspect that that mismatch was always unintentional and that it was the result of incompetence in ensuring that the requirements of the Rules and the Guidance coincided. It would hardly be the first time that such mistakes have occurred in the Home Office: the web of Rules and Guidance has become so tangled that even the spider has difficulty controlling it.*

55. *That analysis is consistent with that adopted by the Secretary of State herself in version 8 of the Guidance. In the section referred to at para. 35 (3) above, caseworkers are directed to concede challenges to decisions to refuse evidential flexibility taken at any time prior to the coming into force of version 4 of the Guidance (i.e. on or before 30 September 2013), on the basis that the ratio of the decisions in Mandalia and/or SH (Pakistan) would apply to such cases. The position is regarded as being changed by the implementation of version 4, which "mirrors the requirements in paragraph 245AA".*

56. *As I have acknowledged, the fact that the scope of the EFP is now much more limited than originally increases the scope for harsh outcomes – that is, for cases where a PBS application fails because of a minor error or omission which could have been rectified if the applicant was notified of it but which*

does not fall into one of the specific categories identified at paragraph 245AA (b). There may be very particular cases where such an outcome can be avoided by the application of the common law duty of fairness; but I agree with Beatson LJ in SH (Pakistan) that the effect of that duty is constrained by the context of the PBS as expounded in the various authorities reviewed above. The clear message of those authorities, including Mandalia, is that occasional harsh outcomes are a price that has to be paid for the perceived advantages of the PBS process. It is important not to lose sight of the fact that the responsibility is on applicants to ensure that the letter of the requirements of the PBS is observed: though that may sometimes require a good deal of care and attention to detail, because of the regrettable complexity of the Rules, it will normally be possible to get it right.

WHEN IS A SPECIFIED DOCUMENT NOT A SPECIFIED DOCUMENT ?

57. *I should deal at this stage with one particular issue about paragraph 245AA which arises in both Khan and Negbenebor. It is clear both from the introductory words of sub-paragraph (b) and from the first sentence of sub-paragraph (c) that paragraph 245AA is intended to operate only where the applicant has submitted a specified document: what sub-paragraph (b) does is to give the applicant the opportunity to correct errors of the defined kinds in a specified document which has been submitted. But that leads to a logical problem. Mr Malik – who principally argued this point for the Secretary of State – contended that a document which fails to comply with the various requirements contained in the relevant SD paragraph (or equivalent), or indeed with paragraph 39B (d) (originals not copies), cannot be a specified document at all, with the result that the conditions for the operation of paragraph 245AA would not arise.*

58. *Logical as such a submission might appear if viewed in isolation, it plainly cannot be correct in the context of paragraph 245AA, since if it were accepted there would be no scope for the operation of sub-paragraphs (b) or (d). It is easy enough to resolve the conundrum as regards heads (i)-(iii) under sub-paragraph (b) (and heads (i) and (ii) under sub-paragraph (d)): the draftsman plainly intended that what was submitted as a specified document but which was in the wrong format, or was a copy instead of an original, would count as a specified document for the purpose of the paragraph – in this context "specified document" means "purported specified document". It is not quite so easy as regards head (iv) under sub-paragraph (b) (and head (iii) under sub-paragraph (d)) – that is, where the defect is that the document "does not contain all of the specified information". Identifying exactly what that phrase is intended to cover needs some unpacking. It cannot have been intended that a document that simply showed none of the specified information at all would be covered by the rule. If, to take an extreme example by way of illustration, the requirement were that the document showed that an applicant had a Ph D but what was submitted showed instead that he or she had only an MA, that could not sensibly be described as a case where the document "did not contain all of the required information": it did not contain the essential information required and would simply be the wrong document. That is common sense, but it is reinforced by the phraseology of "not … all of the specified information". It is accordingly, I believe, necessary to distinguish between, on the one hand, cases where the information which is missing is so wholesale as to affect the fundamental character of the document and, on the other, cases where it is secondary, so that it makes sense to say that the document is still of the kind specified albeit that it does not contain the particular information in question. Such a distinction seems to me to reflect the underlying policy behind the rule, as reflected in the reference in the introductory section of the Guidance to "minor errors".*

59. *In so far as that approach may be said to depart from the literal language of the Rules – though I do not believe it really does – there is warrant for such an approach in the decision of the Supreme Court in Mahad v Entry Clearance Officer [2009] UKSC 16, [2010] 1 WLR 48 – see esp per Lord Brown at para. 10 (p. 55 B-C).*

Tier 1 Entrepreneurs, Business Expansion & Fairness of Interviews

Anjum, R (on the application of) v Entry Clearance Officer, Islamabad (entrepreneur - business expansion - fairness generally) [2017] UKUT 406 (IAC) (16 August 2017)
http://www.bailii.org/uk/cases/UKUT/IAC/2017/406.html

In this helpful Tier 1 Entrepreneur Judicial Review decision from McCloskey J. the Tribunal found that using part of the prescribed £200,00 to purchase a second business in order to develop and expand an existing business was compatible with the Tier 1 Entrepreneur rules. This case is also very useful in considering ECO interviews and the analysis at §§11-22 is helpful. The President held the *'[a]n immigration interview may be unfair, thereby rendering the resulting decision unlawful, where inflexible structural adherence to prepared questions excludes the spontaneity necessary to repeat or clarify obscure questions and/or to probe or elucidate answers given.'* See also §4 where the President encourages the use of 'amended grounds and reply' in JR proceedings in response to the detailed grounds of defence.

(i) A proposal by a Tier 1 Entrepreneur applicant who operates an existing business to use part of the prescribed minimum finance of £200,000 to purchase a second business for the purpose of developing and expanding the existing enterprise is compatible with paragraph 245 of the Immigration Rules.

(ii) An immigration interview may be unfair, thereby rendering the resulting decision unlawful, where inflexible structural adherence to prepared questions excludes the spontaneity necessary to repeat or clarify obscure questions and/or to probe or elucidate answers given.

The Applicant's Case

10. Paragraph 245D(c) of the Rules stipulates that the minimum funds - £200,000 - remain available to the applicant " until such time as it is spent for the purposes of his business or businesses". There follows a definition of " available" which is not germane in the present context. This in turn is followed by a provision which explains what " invested" or " spent" excludes. There are four excluded types of expenditure:

(i) The applicant's own remuneration.

(ii) Buying the business from a previous owner, where the money goes to that previous owner rather than into the business.

(iii) Investing in businesses other than those which the applicant is running as self employed or as a director.

(iv) Any spending which is not directly for the purpose of establishing or running the applicant's own business or businesses.

Each of these prohibited forms of expenditure is disjunctive.

11. Ms Braganza developed the procedural unfairness ground of challenge succinctly. Fundamentally, the terms in which the Applicant's responses to certain important questions were recorded are, she submitted, manifestly incomplete, unclear or unintelligible. Elementary fairness required the ECO to follow up on certain answers for the purpose of clarification, explanation and elimination. There was a failure to do so. The interview record was, on its face, manifestly unreliable. These shortcomings were of obvious materiality since the interview record was of pivotal importance in the successive refusal decisions. Finally, Ms Braganza highlighted that successive failures to respond affirmatively to requests to disclose the interview record were in breach of the relevant guidance.

12. At this juncture it is appropriate to focus on certain aspects of the Applicant's interview record. In response to question 17, he stated that during the previous five years -

" ... I have been working for eBay and I established a business there as well."

He was then asked " What type of business?", replying:

" I have online shop through eBay."

Next, he explained the goods which he sold via this business. Question 20 asked:

> *" What do you plan to do if you are granted entry clearance as a T1 Entrepreneur?"*

The Applicant responded:

> *" I will promote **the same business** by generating my own website and I will promote it through eBay who have 20,000 positive feedback. They want me to invest £50,000 ....*
>
> *[Our emphasis]*
>
> ***21. Who wants you to invest that? ....***
>
> *It is my own business plan I desire to invest this money. "*

["invest" is verbatim]

In response to question 24, the Applicant reiterated his intention to invest £200,000 in his business. There followed these questions and answers:

> ***" 26. Can you tell me the breakdown of how you will invest the [£200,000] ?***
>
> *In online business sale is directly proportional to listing.*
>
> ***27. I want to know how you will invest the £200,000. What will you spend it on?***
>
> *It depends on the number of orders. The more orders I get online, the more items I will export from Pakistan, China and India.*
>
> ***28. But you have not told me how you need to invest £200,000. You already have a business and are already trading.***
>
> *According to the business plan, £80,000 will be required to decorate my office. I am doing a business deal with a company who need £50,000 which I will have to pay.*
>
> ***29. What kind of deal is that, what will you get from it?***
>
> *It is an established shop through eBay company and I intend to take over it. Their yearly sale is about [£320,000] . I will need to import the material in containers. One container will cost about £40,000 including 10 more selling items which are currently popular in the market."*
>
> ***30. So £50,000 of your money will be to buy this existing business?***
>
> *Yes, I will **take over**. "*
>
> *[Our emphasis]*

13. *At this juncture we interpose the following analysis. The Applicant made clear that all of the funds would be invested in his business. The key fact is that he has an existing business. He was not proposing to engage in the prohibited activity of purchasing "**the**" business from someone else. Rather he was proposing to acquire another online retail entity which would be added to and amalgamated with his existing online business. This would entail investment in and expansion of his extant business. None of this can in our view be gainsaid.*

14. *We remind ourselves of the well-established principle that the construction of any document is a question of law. In the absence of any witness statement evidence from the Respondent, we analyse the interview record in the following way.*

15. *Those in attendance were the Applicant, the ECO (interviewer) and an interpreter. The ECO evidently asked the questions in English, these were then translated into Urdu, the Applicant replied in Urdu and the interpreter then translated his replies into English. The ECO was typing both the questions and the answers as the interview progressed. There was no audio recording.*

16. *At the outset of the interview the Applicant confirmed that the ECO was speaking audibly. The initial questions were evidently of the routine, pro-forma variety. Some of the ensuing questions were evidently prepared in advance. Others were plainly reactive to the Applicant's replies. At the conclusion of the interview the questions and answers were not read to the Applicant. Nor was he given the opportunity of reading the document. He was not invited to comment upon, correct or amplify any of the responses recorded. Notably there was no attempt to explore or clarify the two manifestly incoherent responses (as recorded) noted above viz to questions 21 and 26. It is also clear that around the middle of the interview the Applicant was reproached by the ECO for "flicking through" a copy of his Business Plan and desisted as a result. This is suggestive of an approach which was unfriendly and an atmosphere of discomfort.*

17. *One striking feature of the interview record is that the Applicant was not asked <u>any</u> questions about the content of his Business Plan. Nor did the interviewing ECO attempt to correlate any of the Applicant's replies to the latter. Furthermore, this exercise was not attempted in the ensuing refusal decision, the subsequent affirmation thereof or the response to the PAP letter. There was at no time any exploration of the link clearly made in the Business Plan between the Applicant's existing business ("UK Bargain Outlet") and his proposed future business ("Xeon Traders Limited"). In the Business Plan it is stated:*

> *" This business plan for Xeon Traders Limited, an already established eBay top ranking bedding retailer with the name of UK Bargain Outlet, has been written to ascertain feasibility of the current business **and future expansion plans**. The plan details UK and Europe bedding industry structure, trends, future potential and outlines **the future strategic course of action of Xeon Traders Limited**."*

None of this was either explored with the Applicant in interview or addressed in the successive decisions and reviews which materialised.

18. *A brief perusal of the Business Plan makes abundantly clear that the Applicant was proposing to <u>enlarge and develop</u> his existing business. For example:*

> *" Started in early 2013 Xeon Traders Limited ('the company') blue print lies in the growing online market for homeware and bedding in Europe, especially the United Kingdom. A business which started as a part time activity is one of the top ranked and **fastest growing** bedding shops on eBay ....*
>
> *As a part of its growth plan Xeon Traders Limited intends **to increase** its web presence by launching its own website **and start a new wholesale business**. "*

The above passage is contained in the " Company Summary" section. The direct nexus between the existing business and the proposed future expansion is also clear from the " Management Summary" section. The following extract from the " Financial Plan" is also of significance:

> *" Xeon Traders Limited financial plan has all the required ingredients required for providing **expansion of the business**, paving the way for **new investments** and providing enough fiscal room to change the way in which the company conducts business in changing business environment."*

[Our emphasis.]

In the " Projected Profit and Loss" section, it was represented that the net income of the business would rise to £267,331 by 2017. In the " Projected Balance Sheet" total assets of £1,166,717 by 2017 were forecast. None of the foregoing was probed, explored or highlighted in the questions posed by the ECO.

19. *We consider, based on what they have written and taking into account the interview record, that neither the ECO nor the ECM correctly appreciated those features of the Applicant's business proposal addressed above. This misunderstanding is rooted in, inter alia, the procedural unfairness of the interview and engages the further public law misdemeanours of irrationality and mistake of fact. Linked to this is the negative assessment of the Applicant's response to the "projective turnover" (sic) question 36:*

> *Q. "What is your projective [sic] turnover for 2016?*
>
> *A. £300,350 from one shop which I am currently running".*

This invites the following brief analysis:

(a) The question was both unfair and confusing as the relevant section of the Business Plan did not employ the language of "turnover" and this was neither defined nor clarified by the interviewer.

(b) There was a manifest failure by both the ECO and the ECM to appreciate that the Applicant's response related to his existing business, rather than his planned enlarged future business.

(c) Neither the ECO nor the ECM took cognisance of the figure of just under £300,000 (£286,354) in respect of " earning before interest and taxes" for the year 2016 in the Business Plan.

(d) The possibility of evolving circumstances and plans was ignored.

Once again this (viz the response to question 36) is a paradigm illustration of an answer crying out for further probing, exploration and clarification: there was none.

20. *At this juncture we turn to examine the governing legal principles. This Tribunal had occasion recently to review the doctrine of procedural fairness in R (AM) v Secretary of State for the Home Department [2017] UKUT 262 (IAC), at [76] particularly:*

> *"While the decision of the House of Lords in R v SSHD, ex parte Doody and Others [1994] 1 AC 531 involved a very different context, namely the release of prisoners sentenced to life imprisonment, I consider that the terms in which Lord Mustill devised his celebrated code of procedural fairness makes clear that it is of general application. Furthermore, its association with the EU and ECHR legal rules and principles outlined above is unmistakable. The passage in question (at page 560D) is not susceptible to cherry picking and demands reproduction in full:*
>
> > *'My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'"*

In the same decision, this Tribunal took cognisance of what was stated concerning interviews of immigrants in R (Mapah) v Secretary of State for the Home Department [2003] EWHC 306 (Admin) at [62]:

> ***"(1) Problems of interpretation can and do occur;***
>
> ***(2) Questions, translated into the applicant's language and replies given in that language, are not recorded as such but in the English translation;***
>
> ***(3) Records cannot always, despite exhortation, be literally verbatim;***
> ***(4) The reversal of the requirement for read back removed a measure of protection against unremarked mistakes in recording by the interviewer;***
>
> ***(5) An applicant does not necessarily have the benefit of representation or his own interpreter. Such an applicant will be at a disadvantage in identifying errors of translation;***
>
> ***(6) Immigration officials and Tribunals of Appeal frequently judge credibility against a criterion of consistency;***
>
> *(7) Tape recording of an interview by the applicant or by the Secretary of State would do much to alleviate these problems if and when they occur."*

21. *In R (Dirshe) v Secretary of State for the Home Department [2005] EWCA Civ 421, the Court of Appeal, having cited the above passage with approval, said the following of asylum interviews, at [14]:*

> *" The interview is a critical part of the procedure for determining asylum decisions. It provides the applicant with an opportunity to expand on or explain his written account and for the respondent, through the interviewing officer, to test that account and explore any apparent inconsistencies in that account. The interview could well be critical to any determination by either the respondent or appellate authorities as to the credibility of the applicant. The record of the interview is created by the interviewing officer, who is acting on behalf of the respondent. It follows that fairness requires that the procedure should give to the applicant an adequate opportunity to challenge its reliability or adequacy."*

Latham LJ continued, at [16]:

> *" So long as the Secretary of State continues with the practice of relying upon a written record of the interview in its present form, the applicant must have an adequate means of ensuring that the record is, as we have said, both accurate and reliable."*

Notably, the Court then highlighted the variably factors of the skills and qualifications of the interpreter and the quality of the transcription by the interviewing officer, together with the issue of digest (or summary). The Court emphasised the vital importance of providing a tape recording of such interviews. While we are alert to the differing context which prevailed in Dirshe, the general tenor of the judgment and the procedural concerns which it identifies apply with a degree of modification and clearly resonate in the present litigation context.

22. *We conclude without hesitation that the Applicant's procedural unfairness challenge is made out. This conclusion is based on the analysis and reasons set out above. The single enduring reason for the refusal of the Applicant's Tier 1 application was based on a series of interview answers which on any reasonable and fair showing demanded further probing and clarification, together with a linkage to the Business Plan, in particular those passages highlighted above. Furthermore structurally, for the reasons given above, there was an inherent risk that the interview would give rise to a procedurally unfair substantive decision. This risk duly materialised in the present case.*

23. *We turn to consider the second ground of challenge. In succinct terms the Secretary of State's case is that the impugned decisions are sustainable because, on the basis of certain replies made by the*

Applicant during interview, he was proposing to expend £50,000 of the minimum fund of £200,000 for a purpose prohibited by the Rules. Assuming that this contention is based on a correct construction of the Rules, we consider that it must fail for the reasons given above. In short the significant procedural deficiencies in the interview have the effect that the factual foundation necessary for this assessment was plainly lacking. This assessment was not lawfully open to the ECO or ECM by reason of the procedural deficiencies which we have diagnosed.

24. *Independently, we consider that this assessment is unsustainable in law on the further basis that it entails a misconstruction and/or misapplication of the Rules. We begin by reminding ourselves of the correct approach to every exercise of construction of the Immigration Rules. In Mahad v Entry Clearance Officer [2009] UKSC 16, Lord Brown stated at [10]:*

> *" The Rules are not to be construed with the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the word used, recognising that they are statements of the Secretary of State's administrative policy."*

In Odelola v Secretary of State for the Home Department [2009] 1 WLR 1230, Lord Hoffman stated at [4] that construction "... depends upon the language of the rule, construed against the relevant background".

25. *Paragraph 245D(a) is the dominant, umbrella provision. It states:*

> *"This route is for migrants who wish to establish, join* ***or take over*** *one or more businesses in the UK "*

[Our emphasis]

There is no suggestion that the Tier 1 Entrepreneur requirements enshrined in paragraph 245 et seq of the Rules exclude an existing business. The Applicant's application was not refused on this basis. We take this as our starting point. Nor has this argument been canvassed on behalf of the Respondent. The key provision of the Rules in the present context is paragraph 245D(ii)(2). We consider that there is no complexity or sophistication in either the language employed or the clear intent of the words. This provision of the Rules prohibits the purchase of the business concerned from a previous owner where the applicant intends to draw the purchase monies from the minimum fund of £200,000. The rule states clearly that the expenditure of any part of the funds for this purpose is prohibited. Stated succinctly, that is not this case.

26. *Furthermore, this provision of the paragraph 245 rÃ©gime is not to be considered in isolation. Rather it must be evaluated in conjunction with all that precedes and follows it in this discrete compartment of the Rules. Inter alia, there is no prohibition against taking over an existing business. Indeed this is expressly permitted. One asks, rhetorically, how a takeover could realistically be effected in the real world of commerce in the absence of financial or other valuable consideration. Furthermore, the use of the definite article (" the business") is, in our judgement, of some importance. The phraseology of this section of the Rules also includes " business or businesses", " one or more businesses", " proposed business activities" and " his business". Fundamentally, the minimum fund of £200,000 must be invested in the existing or proposed business or businesses. This is stated emphatically in paragraph 245D(c): the whole of the minimum fund of £200,000 must be " spent for the purposes of [the applicant's] business or businesses".*

27. *Having considered these assorted provisions as a whole and in their full context, we are satisfied that where a Tier 1 applicant operates an existing business, the Rules do not prohibit the use of part of the minimum fund to purchase a second business for the purpose of developing and expanding the existing enterprise. This represents, par excellence, investment in the Tier 1 business. It does not fall foul of the mischief of a smokescreen application which will involve investment of some or all of the minimum fund in something else. Nor does it encroach upon the related mischief of successive non-British business owners engaging in chain sales of the same business. On the contrary it is clearly harmonious with two*

of the identifiable underlying purposes of the Tier 1 scheme namely the promotion of the United Kingdom economy and the maintenance of properly regulated immigration control.

28. *We consider it clear from the Applicant's responses during the interview that this permitted activity, namely utilisation of part of the funds to purchase a second business for the purpose of expanding and developing an existing enterprise, is precisely what he was proposing to do with a portion - £50,000 - of his £200,000 fund. This is clear from his replies to the questions considered as a whole, in particular questions 17, 20, 21 and 28 - 30. Thus this aspect of the Applicant's business proposal was permitted by the Rules. From this it follows that the ECO and ECM misinterpreted, or misapplied, the Rules provisions in question. We therefore reject the centrepiece of Mr Karim's argument. The Applicant's second ground of challenge succeeds accordingly.*

Omnibus Conclusion and Remedy

29. *On the grounds and for the reasons elaborated above the Applicant's challenge succeeds. The appropriate remedy is an order quashing the impugned decisions. The effect of this order is that the Respondent must remake the impugned decisions duly guided by this judgment and, in particular, giving full effect to the principles of procedural fairness.*

Appeals: New Matters

Mahmud (S. 85 NIAA 2002 - 'new matters' : Iran) [2017] UKUT 488 (IAC) (16 August 2017)

http://www.bailii.org/uk/cases/UKUT/IAC/2017/488.html

In this important reported decision, a Vice Presidential panel of the UT considered section 85 NIAA 2002 and what is a 'new matter' which requires the consent of the SSHD before it can be considered at an appeal. The UT held that whether something is or is not a 'new matter' must be determined by the First-tier Tribunal itself [§44]. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) NIAA 2002. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal [§29]. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal [§30]. In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive [§31]. The Tribunal said this by way of example *'evidence that a couple had married since the decision is likely to be new evidence but not a new matter where the relationship had previously been relied upon and considered by the Secretary of State. Conversely, evidence that a couple had had a child since the decision is likely to be a new matter as it adds an additional distinct new family relationship'* [§31]. At §§45-46 the UT provide a structure for Tribunals to follow in determining this issue.

Conclusions on the meaning of a 'new matter' in section 8(6)

29. *A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal. For example, medical evidence of a serious health condition could be a matter which constitutes a ground of appeal on human rights grounds based on Article 3 of the European Convention on Human Rights which if*

breached, would mean that removal would be contrary to section 6 of the Human Rights Act, a ground of appeal in section 84(2) of the 2002 Act. Similarly, evidence of a relationship with a partner in the United Kingdom could be a matter which constitutes a ground of appeal based on Article 8 and for the same reasons could fall within section 84(2) of the 2002 Act as if made out, removal would be contrary to section 6 of the Human Rights Act.

30. *A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. In the absence of this restriction, section 85(5) of the 2002 Act could potentially allow the Respondent to give the Tribunal jurisdiction to consider something which is not a ground of appeal by consent, thereby undermining sections 82 and 84 of the 2002 Act;*

31. *Practically, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive. By way of example, evidence that a couple had married since the decision is likely to be new evidence but not a new matter where the relationship had previously been relied upon and considered by the Secretary of State. Conversely, evidence that a couple had had a child since the decision is likely to be a new matter as it adds an additional distinct new family relationship (with consequential requirements to consider the best interests of the child under section 55 of the Borders, Citizenship and Immigration Act 2009) which itself could separately raise or establish a ground of appeal under Article 8 that removal would be contrary to section 6 of the Human Rights Act.*

32. *In accordance with the construction of section 85(6)(a) of a 'new matter' contended for by Counsel for the Appellant, he submitted that on the facts of this case, the Respondent had considered the matter, (namely whether the Appellant's removal from the United Kingdom would be contrary to section 6 of the Human Rights Act 1998 on the grounds that there would be a disproportionate interference with his right to respect for private and family life protected by Article 8 of the European Convention on Human Rights) so that no further matter raising the same ground could be a 'new matter' within section 85(6)(b). For the reasons set out above, the primary submission fails and therefore so does the submission that in fact, the Respondent had considered the matter. The fact that the Respondent had, in her decision dated 19 May 2016, considered the Appellant's private and family life on the basis of information known to her at that date, was not sufficient to show consideration of the matter now relied upon: the Appellant's relationship with a new partner and her child. Actual consideration in a decision letter of the new factual matrix relied upon is required for a matter to fall outside section 85(6)(b) and therefore not be a 'new matter'.*

The Secretary of State's consent to the Tribunal to consider a new matter, section 85(5)

33. *The second part of construction with which we have to deal is the meaning of consent in section 85(5) of the 2002 Act. A Tribunal may consider new matters if the Secretary of State has given the Tribunal consent to do so.*

34. *Mr Chelvan submitted that the procedure to give or withhold consent is contained within rule 24 of the Procedure Rules, which itself acts as a gatekeeper to ensure equality between the parties. Emphasis was placed on rules 24(2) and (3) which are said to contain a mandatory requirement for the Respondent to provide a statement in opposition to all matters, specifically including those raised in box E of the notice of appeal form (the new matters section). This requires a reading of rule 24(2) to include a requirement that if the Respondent takes the view that something raised in the notice of appeal is a new matter governed by section 85(5) and (6) of the 2002 Act, she is obliged to indicate that and to indicate if she intends to withhold consent.*

35. *It was further submitted that the failure to file such a statement means that by omission, the Respondent does not oppose the new matter being raised in the appeal notice and is deemed by that conduct to have given consent for the new matter to be considered by the First-tier Tribunal. Reliance was placed on the Upper Tribunal's decision in MH (Respondent's bundle: Documents not provided) Pakistan [2010] UKUT 168 to support the submission by analogy with a situation where the Respondent was found to have been required to submit a document to the Tribunal in accordance with*

a different requirement in former rules (rule 13 of the Asylum and Immigration Tribunal (Procedure) Rules 2005) which was designed to ensure that an appellant knew the case that he had to meet on appeal. It was held in that case that the tribunal was entitled to conclude that a document not furnished under that rule was not a document on which the Respondent relied.

36. *First, we express caution in using procedure rules as an aid to statutory construction generally and specifically for the purpose construing the meaning of 'consent' in section 85(5) of the 2002 Act. The procedure rules govern the procedure to be applied to matters that are before the Tribunal to determine in an appeal, whereas in the present situation, the effect of section 85(5) is that the Tribunal has no jurisdiction to consider a new matter. Procedure rules governing determination of an appeal can therefore offer little if any assistance on the interpretation of statute which determines the jurisdiction of the Tribunal itself. Secondly, we do not consider that rule 24 contains any such mandatory requirement on the Respondent in relation to consent for new matters. Thirdly, in any event, it would be contrary to the clear language in section 85(5) requiring the Secretary of State to have given consent, to find that by means of procedural rules, deemed consent can be inferred by inaction. Section 85(5) of the 2002 Act requires actual consent by the Respondent which cannot be deemed or implied.*

37. *Rule 24(2) expressly states that the Respondent must, if the Respondent intends to change or add to the grounds or reasons relied upon in the notice or the other documents referred to in paragraph (1)(a), provide the Tribunal and the other parties with a statement of whether the Respondent opposes the appellant's case and the grounds for such opposition (emphasis added). The requirement to make a statement is clearly conditional. The condition that the Respondent wishes to change or add to the grounds reasons relied upon, does not include any requirement to make a new decision on a new matter identified in the notice of appeal or in a section 120 notice, nor to indicate if consent is withheld for such a new matter to be considered by the Tribunal. The decision in MH (Pakistan) is not applicable to the present case which significantly differs on its facts as to the type of document or statement in issue. MH (Pakistan) was concerned with a failure to submit a specified document in the old rule 13, such that the document could not be relied upon by the Respondent. Rule 24 does not require the Respondent to make any statement or new decision as to new matters raised by an appellant which is qualitatively different to the failure to submit an existing document used at the time of the decision.*

38. *Further it appears that if the Respondent had made a statement pursuant to rule 24, the effect would inevitably be that the matter would not be a 'new matter' because it had in fact been considered by the Respondent in the context of the decision under appeal and would therefore not meet the definition in section 85(6)(b)(i) of the 2002 Act. The construction of rule 24 contended for by the Appellant would have the result of rendering section 85(5) of the 2002 Act devoid of any application in practice.*

39. *Mr Chelvan made further submissions as to whether there was in place an appropriate procedure for the Respondent to give or withhold consent to the First-tier Tribunal to deal with a new matter if rule 24 was not applicable. Relevant to these submissions are the contents of the Respondent's policy 'Rights of Appeal' version 3, which sets out guidance for those acting on behalf of the Respondent as to how to handle 'new matters'. This includes when any 'new matter' should be considered, before the appeal hearing if possible and if not at a CMR or substantive appeal hearing; together with guidance on the process of giving or refusing consent. There was no specific challenge to the contents of this part of the guidance, only to the effect that it had not been complied with by the Respondent in the present appeal.*

40. *There is no dispute between the parties that the Respondent has not followed the process for refusing consent set out in the guidance in this case as no written reasons have ever been provided for the refusal. However, that is not a matter which assists this Appellant in the context of this statutory appeal and it cannot constitute a ground of appeal which can be pursued in this Tribunal. A failure by the Respondent to follow her own guidance is a public law issue which could potentially be challenged by an application for Judicial Review but that is outside the scope of this appeal. We do not consider that this raises any issues of procedural fairness in the conduct of a statutory appeal and unless and until the Respondent expressly gives consent for the consideration of a new matter by the Tribunal, an appellant must be aware the issues may not be considered. There is no power for the First-tier Tribunal, or the Upper Tribunal to determine whether the Respondent has appropriately for fairly*

withheld consent: again that is a matter only challengeable in Judicial Review proceedings on public law grounds.

41. *In the light of the above, we turn now to answer the specific questions raised initially by Judge Bruce when giving directions for determination of this appeal.*

Question (i) Having regard to the statutory scheme was the Tribunal empowered to consider for itself whether the material relating to Ms P was a 'new matter'?

42. *The Respondent accepts that her view in any particular case as to whether a matter is a 'new matter' is not determinative of the issue, nor must it be accepted by the First-tier Tribunal. Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue.*

43. *Counsel for the Appellant submitted that the First-tier Tribunal was not empowered to consider for itself whether the material as to the Appellant's new relationship was a 'new matter' but this was premised on the basis that as a matter of fact in the context of this appeal, the Respondent had already considered the Appellant's private and family life and the new relationship could not therefore as a matter of law be a new matter. The Appellant did not make, and realistically could not make any objection to the proposition that it was a matter for the First-tier Tribunal to determine its jurisdiction to hear, or not to hear, issues raised in the notice of appeal.*

44. *Section 85(5) and (6) of the 2002 Act place limits on the jurisdiction of the First-tier Tribunal, which is a statutory tribunal: the Tribunal must determine issues of jurisdiction for itself.*

Question (ii) - If the Tribunal was empowered to consider for itself whether the material relating to Ms P was a 'new matter', what were the relevant factors for consideration?

45. *Counsel for the Respondent submitted that the following provides a structure for a Tribunal to assess whether it has jurisdiction to consider particular material, as follows:*

(1) What is the 'matter' which it is alleged constitutes a 'new matter' for the purpose of section 85(5)? What are its ingredients both in fact and in law?

(2) Does the 'matter' constitute a ground of appeal of a kind listed under section 84?

(3) Has the Respondent previously considered the 'matter' in the context of the decision referred to in section 82(1)?

(4) Has the Respondent previously considered the 'matter' in the context of a statement made by the appellant under section 120?

(5) If the 'matter' is a 'new matter', has the Respondent given consent for the Tribunal to deal with the 'new matter'?

46. *This proposed structure approaches the matter by way of identification of the relevant law and facts and then follows through consideration of the constituent parts of section 85 of the 2002 Act. That is an appropriate and sensible process to adopt as a matter of practice. The issue of whether a 'matter' is a 'new matter' is inevitably a fact sensitive one to be assessed in each appeal, but should be identifiable by something being raised that is distinguishable from and outside of the context of the original claim and decision in response to it, as well as something which constitutes a ground of appeal in section 84 of the 2002 Act.*

Question (iii) - Was there any identifiable error in the Tribunal's conclusion that the material relating to Ms P was a 'new matter' given that the Appellant had raised Article 8 family life grounds before the Respondent's decision, and in the grounds of appeal, some six months prior to the hearing?

47. *Judge Hussain dealt with the preliminary issue of jurisdiction to consider the material relating to the Appellant's relationship with Ms P and her child in paragraphs 7 to 11 of his decision. Having set out the chronology, including that the first reference to a different partner was in the notice of appeal and*

it was not until two or three days prior to the appeal hearing, when the Appellant's bundle was served, that any evidence in connection with claimed relationship was provided. Judge Hussain rejected the submission that this was not a new matter but merely a new circumstance given that the substantive issue of the Appellant being in a relationship had already been raised, albeit a relationship with a different person. Judge Hussain went on to record that the Respondent had not given any consideration to this claimed relationship and had not consented to this new matter being determined by the First-tier Tribunal. As such he found that he had no jurisdiction to consider the material and to have determined otherwise would have made the First-tier Tribunal the decision-maker at first instance.

48. *There is no error of law in the consideration of the factual background or application of section 85(5) and (6) of the 2002 Act by the First-tier Tribunal in this case and we therefore dismiss the appeal on the first ground. The Appellant had previously claimed to be in a relationship with a different person and it was on that basis that the Respondent had determined and refused his claim based on family life - particularly as there was no evidence in support of the claimed relationship. In the notice of appeal, the Appellant relied on a different, new relationship and in his bundle in support of his appeal provided evidence of that relationship. A new relationship with a different partner coupled with an entirely new type of relationship of a parent/child type with Ms P's child, is factually distinct from the claim made by the Appellant originally. Although the Respondent had broadly considered the Appellant's right to respect for family life, she had not considered these specific relationships. The new matter consisted of new evidence which itself could support an appeal that the Appellant's removal would be contrary to section 6 of the Human Rights Act and which had not been considered by the Respondent in the context of the original decision nor a section 120 statement (the Appellant has not to date made a statement pursuant to the section 120 notice served by the Respondent). In these circumstances, the Appellant's relationship with Ms P and her child is a new matter within section 85(6) of the 2002 Act and it is accepted that there has been no express consent by the Respondent for this to be considered such that the First-tier Tribunal had no jurisdiction to consider it pursuant to section 85(5).*

Question (iv) - Was the failure to address Article 8 at all in the determination an error of law regardless of the answers to (i) to (iii) above?

49. *The Appellant raised Article 8 as a ground of appeal against the Respondent's decision, and the First-tier Tribunal was required to determine it. As confirmed in paragraph 11 of the decision under appeal, this ground of appeal was not pursued orally at the hearing by Counsel for the Appellant appearing on that occasion; however the ground of appeal based on the right to respect for private and family life under Article 8 was not formally withdrawn. In these circumstances, it would have been preferable for the First-tier Tribunal to have specifically recorded whether the appeal was allowed or dismissed on this specific ground (rather than a simple dismissal on all grounds): however, in the absence of jurisdiction to consider the new relationship relied upon, there were no remaining aspects of private or family life of substance on which any tribunal could have allowed the appeal.*

Further matters raised by the Appellant

50. *Outside of the grounds of appeal, Counsel for the Appellant also submitted that there was a material error of law in the First-tier Tribunal's decision in relying on an inaccurate and misleading statement made by the Home Office Presenting Officer during the course of proceedings. That statement was said to be that the Home Office Presenting Officer had submitted that there had been no prior mention of the Appellant's new relationship and no opportunity for the new relationship to be assessed by the Respondent had been given, that submission being recorded in paragraph 8 of the decision. Technically that statement is not entirely accurate given that the new relationship was raised in the notice of appeal form, some six months prior to the hearing of the appeal, which gave the Respondent an opportunity to assess it. Although Counsel appearing for the Appellant at the hearing before the First-tier Tribunal accepted, wrongly, that no prior notice had been given of the relationship; neither submission was in any event relied upon by Judge Hussain, nor was it material to his decision that the Appellant's relationship was a new matter which he did not have jurisdiction to consider. In accordance with section 85 of the 2002 Act, the issue was not whether the Respondent had had an opportunity to consider a new matter put forward but whether, if a new matter was raised, she had actually considered it (if she had, it could not be a 'new matter') or whether she had consented to the First-tier Tribunal dealing with it. There is no error of law and this point has no bearing on the actual grounds of appeal.*

51. *Linked to this point, was a submission on behalf of the Appellant, that pursuant to rule 24(1)(a) of the Procedure Rules, the Respondent was required, as part of the documentation to be sent to the Tribunal, to send back to it the notice of appeal which was originally sent to her from the Tribunal. The submission seemed to stem from a concern that the Respondent had no procedure in place to consider or deal with matters raised in the grounds of appeal and the deliberate separation of the grounds from the appeal bundle, contrary to rule 24, prevented such consideration. In the present appeal, this was submitted to have arguably led to the Presenting Officer's submission to the Tribunal that there was no prior notice of the relationship.*

52. *Mr Chelvan submitted that rules 24(1)(a), read together with (2) and (3) require that the notice of appeal is a document which the Respondent must provide to the Tribunal. Specifically, rule 24(1)(a) lists three documents, (i) the notice of the decision; (ii) the notice of appeal; and (iii) any other document the respondent provided to the appellant giving reasons for that decision.*

53. *On any sensible reading of rule 24(1)(a) this is not one of the documents which the Respondent was obliged to provide to the Tribunal. The phrase "the notice of the decision to which the notice of appeal relates" refers to a single document and cannot be split into two separate requirements. In any event, there is no doubt that the notice of appeal was before the First-tier Tribunal. It is expressly referred to in paragraph 7 of the decision and was obviously available to both parties at the hearing. There is no dispute that as a matter of fact this document raised the Appellant's new relationship. The submission that there was some kind of error by the Respondent in the documents that she provided to the Tribunal is unsustainable in accordance with the clear words of rule 24(1)(a) and on the facts where it is clear that the document was available to all.*

54. *Finally, Counsel for the Appellant made broad submissions about the impact of the Respondent's delay in decision-making between the Appellant's first appeal being allowed on 2 October 2012 and the fresh asylum and human rights decision being taken on 19 May 2016 and whether there is or should be a general duty on the Respondent in cases where there is such a delay in a decision being taken, to invite an applicant to provide further submissions and up-to-date information. It was submitted that as a matter of good practice, the Respondent should send out a questionnaire requesting submissions and supporting evidence of new matters as a matter of routine.*

55. *The issue of the impact, if any, on the lapse of time between the first appeal being allowed and the fresh decision being taken is a matter which would be relevant to the assessment under Article 8 in the context of consideration of the Appellant's claim to have established family life with Ms P and her child. For the reasons set out above, that is not a matter which the First-tier Tribunal had jurisdiction to consider; it remains a point which is a matter for future consideration in a different context and not an issue which we need to determine. Similarly, as to whether there is a general duty on the Respondent to request up to date information in outstanding cases is outside the scope of the present appeal. In any event, there is no doubt that the Appellant was at liberty to present new material to the Respondent at any time he chose to do so.*

Grounds of appeal (b) to (d) - asylum

56. *We heard argument from both parties as to the remaining grounds of appeal on the substantive asylum decision in this case. It is not necessary to make any findings as to whether there was a material error of law on any of these grounds because in any event, for the separate reason set out below, the decision must be set aside and remitted to the First-tier Tribunal for fresh determination.*

57. *It became apparent during the course of the oral hearing that the Appellant's bundle submitted to the First-tier Tribunal was missing every other page. Judge Hussain queried with Counsel for the Appellant appearing before him as to whether a particular page was missing in the Appellant's written statement and was told that there was no missing text: the page was intentionally blank and had been the subject of an error in numbering only. That was clearly a further mistake by Counsel: there was a page missing, and it was not blank. No further queries were made as to the other blank pages in the Appellant's bundle despite the fact that it was evident that every other page of the bundle was missing. For example, the Appellant's bundle included documents containing internal pagination including only odd numbered pages.*

58. *We allow the appeal on asylum grounds on the basis of a procedural irregularity in the hearing of the appeal. In the context of an asylum appeal where there were missing pages from the Appellant's written statement and medical evidence as well as the Respondent's own country information, is not possible for us to find that this procedural irregularity was immaterial. We therefore set aside the decision on the asylum and humanitarian protection grounds as well as under Articles 2 and 3 of the European Convention on Human Rights and remit the appeal on these grounds to be determined afresh by the First-tier Tribunal in the light of our decision on s 85 and on the article 8 grounds.*

Deprivation of Citizenship

Sleiman (deprivation of citizenship; conduct: Lebanon) [2017] UKUT 367 (IAC) (19 July 2017)
http://www.bailii.org/uk/cases/UKUT/IAC/2017/367.html

In an appeal against a decision to deprive a person of a citizenship status, in assessing whether the appellant obtained registration or naturalisation "by means of" fraud, false representation, or concealment of a material fact, the impugned behaviour must be directly material to the decision to grant citizenship.

Deprivation of Citizenship
Hysaj & Ors, R (on the application of) v Secretary of State for the Home Department [2017] UKSC 82 (21 December 2017)
http://www.bailii.org/uk/cases/UKSC/2017/82.html
The Supreme Court allowed this appeal by consent and overruled the cases of R v Secretary of State for the Home Department ex p Akhtar [1981] QB 46 & Bibi v Entry Clearance Officer, Dhaka [2007] EWCA Civ 740. The appellants had made false representations in their applications for citizenship. When these frauds came to light the SSHD decided that the grants of citizenship were a nullity, so that the appellants were not and had never been British citizens. The issue before the Supreme Court was whether the Appellant's misrepresentations made the subsequent grant of citizenship to them a nullity rather than rendering them liable to be deprived of that citizenship under sections 40 and 40A of the British Nationality Act 1981. Lady Hale found that Section 40 of the 1981 Act makes provision for the SSHD to deprive a person of citizenship obtained by registration or naturalisation in circumstances which would include the sort of misrepresentations as to identity made by the appellants. The original nullity approach involved the purported grant of citizenship to someone impersonating another real person but it had been expanded to include cases where persons had adopted a false identity. This had led to uncertainty in the law and gave rise to a number of illogical and unsatisfactory results such as the effect of third parties (partners and children etc).

The previous case law
9. There are four relevant decisions in the Court of Appeal before this one but none in the House of Lords or Supreme Court. For convenience, the applicant for citizenship is referred to as X and the identity in which he applied for citizenship is referred to as Y.
10. In R v Secretary of State for the Home Department, Ex p Sultan Mahmood [1981] QB 58, decided in 1978, X impersonated Y, a real person, who was his dead brother-in-law and cousin, to obtain registration as a British citizen under section 5A of the British Nationality Act 1948. Roskill LJ held that there were three possible effects of the purported grant. First, it might have been a grant to Y; but it could not have been, because Y was dead. Second, it might have been a grant to X; but it could not have been, because the Secretary of State had no knowledge of X, believing him to be Y. Third, it might have been of no effect at all; as it could not be the first or the second, it could only be a nullity. Accordingly, X had never become a citizen of the United Kingdom.

11. The next case, decided in 1980, was R v Secretary of State for the Hone Department, Ex p Parvaz Akhtar [1981] QB 46. X was registered as a citizen by his purported father, Z, in the name of Y, under section 7(1) of the 1948 Act, which allows for the registration of a minor child of a British citizen. X was not the son of Z. Applying Mahmood, the Court of Appeal held that the Secretary of State had no power or intention to register X or any Y other than an actual son of Z. Accordingly, X never became a citizen of the United Kingdom.

12. Next came R v Secretary of State for the Home Department, Ex p Ejaz [1994] QB 496. X applied for citizenship in her real name under section 6(2) of the 1981 Act, which provides for the naturalisation of a person who is married to a British citizen. Later, it turned out that X's husband was not, and never had been, a British citizen, having been granted a British passport in a false identity. The Court of Appeal declined to hold that the grant of citizenship was a nullity, pointing to the uncertainty and injustice which could be caused by holding that a person had never been a citizen, which could have effects upon third parties such as children, and was highly undesirable in matters of status. Deprivation of citizenship, on the other hand, did not have such retrospective effect.

13. Then came Bibi v Entry Clearance Officer, Dhaka [2007] EWCA Civ 740, [2008] INLR 683. X had obtained entry to the United Kingdom by assuming the identity of Y, another real person who had been granted an employment voucher to enable him to enter. After living here for five years, X was registered as a British citizen in the name of Y. The appellants were the wife and four children of X and claimed a right of abode in the United Kingdom based on the purported citizenship of X. The Court of Appeal held that, because X had applied for citizenship in a false identity, Mahmood and Akhtar applied and there never was a grant of citizenship to him.

14. As the Secretary of State points out, these cases demonstrate a gradual expansion of the nullity approach since Mahmood. Thus, Mahmood established that if X adopts the identity of Y, another real person, and Y has the characteristics required to obtain citizenship, the purported grant of citizenship to X in the identity of Y is a nullity. Akhtar decided that if X adopts the identity of Y, where Y is not a real person but a false identity created by X (or someone else for him) having the characteristics required to obtain citizenship, the purported grant of citizenship to X as Y is a nullity. Bibi decided that, if X adopts the identity of Y, another real person, and X acquires the characteristics needed to obtain citizenship by using the identity of Y, the purported grant of citizenship to X as Y is a nullity.

15. The present case went a stage further than Bibi and decided that if X adopts the identity of Y, where Y is a false identity created by X and X acquires the characteristics needed to obtain citizenship by using the identity Y, the purported grant of citizenship to X as Y is a nullity.

The Secretary of State's position

16. Having reviewed the matter after permission to appeal was granted in this case on 27 February 2017, the Secretary of State has come to the conclusion that the law took a wrong turning after Mahmood. The Mahmood type of case involves two real people, X and Y. X impersonates Y for the purpose of applying for citizenship. Y has the characteristics required for citizenship. Y is considered by the Secretary of State and is granted citizenship. But Y has never applied for it, may not want it, or may even be dead. Thus it cannot be said that citizenship has been granted either to Y or to X. Accordingly there was no grant of citizenship. Mahmood, in the Secretary of State's view, remains good law.

17. By contrast, in the later cases, X uses a false identity created by him (or someone on his behalf) and in that identity he acquires the characteristics needed to obtain citizenship. X applies for citizenship using the false identity Y. But X meets the requirements for citizenship albeit having acquired them by using the false identity Y. X is considered for citizenship by the Secretary of State in identity Y and is granted citizenship in that identity. In such a case, in the Secretary of State's view, the grant of citizenship is valid, albeit that the person may later be deprived of it under section 40. Ejaz was rightly decidedbut Akhtar and Bibi were wrongly decided.

18. Those cases, and the Court of Appeal's decision in this case, were based on the principle that there is a category of fraud as to identity which is so serious that a purported grant of citizenship is of no effect. But, argues the Secretary of State, the courts have not articulated any clear or principled definition of the types of fraud which will be so serious as to have this consequence. In the current cases, for example, neither appellant pretended to be someone he was not. Mr Hysaj used his real name but put forward a false date of birth, nationality and place of birth in gaining his ILR and gained citizenship on the basis of the ILR that he himself had obtained. Mr Bakijasi used a false name in gaining his ILR but otherwise gained citizenship in the same way. Ouseley J held that the key characteristics of identity for this purpose were the name, date of birth, and nationality or the country and place of birth, because this was the information on the certificate. But he also held that there had to be fraud - innocent mistakes or misunderstandings were not enough (paras 46, 47). Such uncertainty means that the law is difficult to apply in practice.

19. It also has a number of illogical and unsatisfactory consequences. Thus it is not clear when the use of a false identity to obtain citizenship by one person will lead to the nullification of the grant of citizenship to those making a derivative claim, whether as a spouse or child. It is not easy to reconcile Akhtar, Ejaz and Bibi. Logically, as Ouseley J pointed out in this case (para 55) either all derivative citizenship should be of no effect

if the citizenship from which it is derived is of no effect, or the nullity should be confined to the person who obtained citizenship using the false identity. As Ouseley J also pointed out (para 69) the logic of the position then adopted by the Secretary of State would also nullify the grant of ILR, but the Secretary of State has never contended for this.
20. This court agrees with the reasoning now put forward by the Secretary of State. It follows that the decisions of the Court of Appeal in Akhtar and Bibi must be overruled and that this appeal must be allowed by consent in terms of the detailed order proposed.

ETS: out of country appeal not sufficient alternate remedy

Ahsan v The Secretary of State for the Home Department (Rev 1) [2017] EWCA Civ 2009 (05 December 2017)

http://www.bailii.org/ew/cases/EWCA/Civ/2017/2009.html

In this significant decision, which represents the latest instalment in the ETS TOEIC saga, the Court of Appeal consider whether an out of county appeal is a sufficient remedy for individuals facing an allegation that they had cheated in their tests. In these cases the Appellants had received section 10 1999 Act decisions and one had received a decision that his human rights claim was clearly unfounded. Arguments were advanced relying upon the Supreme Court decision in Kiarie and Byndloss, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 42 (14 June 2017). The Court of Appeal found that 'an out-of-country appeal would not satisfy the Appellants' rights, either at common law or under article 8 of the Convention, to a fair and effective procedure to challenge the decisions to remove them; and that in those circumstances, subject to the human rights claim issue considered below, they were entitled to proceed with such a challenge by way of judicial review.' [97]. However that conclusion depends on the circumstances of an individual case and the issues it raises. The conclusions of the Court are summarised at paragraphs 97-98, 128-129 & 158 of the judgment of Underhill LJ.

Conclusion

97. For the reasons given above I would hold that an out-of-country appeal would not satisfy the Appellants' rights, either at common law or under article 8 of the Convention, to a fair and effective procedure to challenge the decisions to remove them; and that in those circumstances, subject to the human rights claim issue considered below, they were entitled to proceed with such a challenge by way of judicial review.

98. I emphasise that that conclusion depends on the particular features of the Appellants' cases, namely that the nature of the issues raised by their appeals was such that they could not be fairly decided without hearing their oral evidence, and also that facilities for giving such evidence by video-link were not realistically available. Even if those features are shared by the great majority of TOEIC cheating cases, it does not follow that they will be present in all cases where the legislation provides for an out-of- country appeal: in particular, whether it is necessary for the appellant to give oral evidence will depend on the nature of the issues.

...

Concluding Observations

128. We have been told that a large number of applications to the UT for permission to apply for judicial review have been stayed pending the outcome in these appeals. It follows from the foregoing discussion that decisions may still have to be taken on a case-by-case basis about whether a human rights appeal does in the circumstances of the particular case afford an appropriate alternative to proceeding by way of judicial review.

That produces a less clear-cut outcome than a blanket decision that a human rights appeal either is always or is never an appropriate alternative remedy; but I am afraid that cannot be helped. The Secretary of State may in the end, after consideration of this judgment, prefer not to take the point; but that must be for her assessment. If she does take it in all or some cases, she will no doubt wish to consider how best to ensure that applicants are made aware of the availability, or potential availability, of a human rights appeal in their particular cases. And it may be that some applicants, once they are made aware of that option, may positively prefer to pursue it. But none of these are matters that we can dictate.

129. It is worth reflecting briefly on how this very messy and unsatisfactory state of affairs has arisen. It seems to be the product of three factors operating together:

(1) First, the basic route of challenge to a section 10 decision provided for by the legislation is by way of an out-of-country appeal, in circumstances where such an appeal does not, in cases like these, afford access to justice.

(2) Second, although the legislation as it stood before the 2014 Act allowed for an in-country appeal where a human rights claim had been made, that route was not available in these cases because the claim had to have been made before the decision was taken, and the Secretary of State served the section 10 notices without any prior warning, giving no opportunity to make a human rights claim

first. There may have been good reasons for her taking that course, though when we put the point to Ms Giovannetti her instructions did not enable her to say more than that there had been careful consideration by the Home Office of what was the best way of proceeding.16

(3) Third, although under the old legislation that problem could have been resolved by use of the Nirula work-around, the structural changes effected by the 2014 Act closed off that route. An in-country appeal is now only (arguably) available by appealing against a different decision, which inevitably leads to the complications discussed above.

It would be useless, even if we were in a position fairly to do so, to attribute blame for all this. I would only observe that it is a yet further illustration of the difficulty and complexity of the law in this area.

...

SUMMARY

158. I am conscious that the discussion and analysis in the previous 157 paragraphs is very elaborate. In case it is of assistance to practitioners and others I will give a short summary of my reasoning on the points of possible wider application raised by these appeals. But I emphasise that any summary of this kind carries the risk of being over-broad and omitting important subtleties, and on any point of difficulty it is necessary to go back to the detailed reasoning. Since I understand that the judgment is agreed by Floyd and Irwin LJJ I will refer to my conclusions as those of the Court:

(1) In deciding by what route a decision to remove someone on the basis that they cheated in a TOEIC test can be challenged, the starting-point is to establish whether the decision was made under the 2014 Act regime or its successor. (If it was made prior to 20 October 2014 it will fall under the old regime, and if it was made after 5 April 2015 it will fall under the new regime; in between those dates the position depends on the effect of the applicable commencement and transitional provisions.)

(2) If the decision falls under the old regime it will have been taken under section 10 of the 1999 Act in its unamended form. The person affected by the decision will generally have a right only to an out-of-country appeal, under section 82 of the 2002 Act, read with section 92 (1): they will not, except by unusual chance, have

a right to an in-country appeal under the "human rights claim" provision of section 92 (4), because they will not typically have made such a claim prior to the removal decision: see para. 15.

(3) What the Court holds in part (A) – see in particular paras. 72-98 – is that an out-of-country appeal is not an effective remedy where (a) it would be necessary for the appellant to give oral evidence on such an appeal and (b) facilities for him or her to do so by video-link from the country to which they will be removed are not realistically available. It accordingly holds, subject to (4) below, that persons against whom such a decision is made will be entitled to challenge the decision by way of judicial review; that is so whether or not their article 8 rights are engaged. In reaching that conclusion the Court follows the approach of the Supreme Court in Kiarie and Byndloss to what are substantially similar circumstances and distinguishes its previous decisions in Mehmood and Ali and Sood. The Court finds that both conditions were satisfied in the present cases and observes that condition (a) is likely to be satisfied in TOEIC cases generally (see para. 91) and that in typical cases condition (b) is likely to be satisfied also (see para. 90).

(4) Notwithstanding (3), the Court at para. 99-127 accepts that in principle permission to proceed by way of judicial review could be refused if the person in question could achieve an equivalent remedy by an in-country human rights appeal under the 2014 Act regime, subject to the Home Secretary's power to certify the claim as wholly unfounded. But such a remedy would only be equivalent if the three conditions identified at para. 116 above are satisfied, which they were not in these cases.

(5) Part (B) of the judgment concerns a challenge to the certification of a human rights claim in a particular case to which the 2014 Act regime applies. The Court finds that the certificate is liable to be quashed. The decision does not directly depend on the issue of whether the Appellant cheated in his TOEIC test, but the Court makes some observations about the appropriateness of certification where that is the determinative issue: see para. 156.

(6) The judgment also discusses the authorities on the extent to which the article 8 rights of students may be engaged by their removal prior to completion of their studies (see paras. 84-88) and the obligations of the Secretary of State to facilitate return in cases where a person who has been removed is successful in an out-of-country appeal (see para. 133).

Proxy Marriages & EU Law

Awuku v Secretary of State for the Home Department [2017] EWCA Civ 178 (23 March 2017)
http://www.bailii.org/ew/cases/EWCA/Civ/2017/178.html

The Court of Appeal held that the Tribunal was wrong in *Kareem* [2014] UKUT 24 (IAC) and *TA* [2014] UKUT 316 (IAC) and the validity of a marriage involving an EU national should be determined by the *lex loci celebrationis* (the law of the country in which it took place). There was simply no need to create a new rule of private international law requiring reference to the law of the State of the EU national.

Discussion

15. *In the law of England and Wales the general rule is that the formal validity of a marriage is governed by the law of the country where the marriage was celebrated ("the lex loci celebrationis") (Dicey, Morris and Collins on the Conflicts of Laws, 15th Ed., (2012), Rule 73). The editors of Dicey, Morris and Collins explain (at 17-004) that a marriage celebrated in the mode or according to the rites or ceremonies required by the law of the country where the marriage takes place is, as far as formal requisites go, valid. In general the law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted. (Sottomayor v De Barros (No.1) (1877) 3 P.D. 1, 5 (CA)) A marriage by proxy will be treated as valid in England if recognised by the local law, even if one of the parties is domiciled and resident in England and the power of attorney authorising the proxy to act is executed in England. The transaction is not contrary to public policy (Dicey, Morris and Collins 17-012). In Apt v Apt [1948] P. 83 the Court of Appeal upheld the decision of Lord Merriman P. at first instance ([1947] P. 127) where he stated (at p. 147):*

    "The celebration of marriage by proxy is a matter of the form of the ceremony or proceeding, and not an essential of the marriage; that there is nothing abhorrent to Christian ideas in the adoption of that form; and that, in the absence of legislation to the contrary, there is no doctrine of public policy which entitles me to hold that the ceremony, valid where it was performed, is not effective in this country to constitute a valid marriage."

16. *In CB (Validity of Marriage: proxy marriage) Brazil [2008] UKAIT 00080 the Upper Tribunal rejected a submission that different rules should be applied to the legal framework governing validity of marriage when the issue arose in the context of immigration law. The Tribunal reaffirmed that the formal validity of a marriage is governed by the lex loci celebrationis. It upheld the decision of the Immigration Judge that since the lex loci celebrationis, Brazilian law, recognised proxy marriages, the marriage of the appellant and his wife was valid under the law of England and Wales and, as a consequence, the relevant requirements of the EEA Regulations were met.*

17. *In Kareem, the Upper Tribunal has, by contrast, created a new private international rule for the purposes of EU law, referring to the law of the Member State of the EU national's nationality. In doing so it has displaced the domestic rule of private international law which would normally apply. The question for consideration in the present case is whether EU law requires such an approach.*

18. *The starting point is that the substantive law relating to marriage is outside EU competence. As Miss White QC points out, on behalf of the Secretary of State, save to the limited extent that recognition of marriages celebrated overseas could be the subject of family law measures concerning judicial co-operation in cross-border family cases adopted in accordance with the special legislative procedure set out in Article 81(3) TFEU, EU competence does not extend to the recognition of foreign marriage. No relevant measures have been adopted pursuant to that Article and there is, accordingly, no EU law applicable to the recognition of marriages. The formal validity of marriages is left to be decided by the application of domestic law principles including domestic law rules of private international law.*

19. *The Citizens Directive includes no definition of "spouse" and includes no express provision as to the means by which formal validity of a marriage is to be determined. There are, nevertheless, certain indications that the formal validity of a marriage is left to be determined by the law including the private international law of the host State. Thus Recital (28) provides that in order to guard against abuse of rights or fraud, notably marriages of convenience, Member States should have the possibility to adopt the necessary measures. To my mind, Recital (5) and Article 2(2)(b) also support the view that it is for the domestic law of the host State to determine whether the qualifications for a "family member" within Article 2(2) are met. These provisions acknowledge that it is the domestic law of the host Member State which will determine whether registered partnerships should be recognised. The fact that such specific provision is made for registered partnerships when none is made for marriage is explicable by the fact that not all Member States recognise registered partnerships whereas all recognise marriage. That these issues are left to the domestic law of the host Member State is not surprising. Questions of the formal validity of marriage and similar issues will often reflect considerations of public policy which may, most appropriately, be left to the domestic law of the host Member State.*

20. *This is also confirmed by the travaux preparatoires to which the advocate to the court, Miss Broadfoot, has referred us. The European Parliament in its report dated 23 January 2003 sought to make significant amendments to Articles 2 and 3 of the original Commission proposal (references OJ C 270 E, 25.9.2001, p.150). In particular, the European Parliament considered that EU free movement legislation needed to reflect and respect the diversity of family relationships that exist in modern society and to include same sex relationships. In due course the Council largely rejected these proposed amendments to Articles 2 and 3 (OJ C54 E, 2.3.2004, p12 and p28). In doing so it expressly rejected the notion that the home Member State (i.e. the Member State of nationality of the qualifying EU citizen) should determine who was a "spouse" or "partner". It did so in order to avoid creating difficulties in the host Member State through reverse discrimination by effectively requiring the host Member State to recognise certain relationships which were not recognised for its own citizens.*

21. *Furthermore, I consider that the reasoning by which the Upper Tribunal in Kareem arrived at its conclusions is flawed. In that case the Upper Tribunal took as its starting point the proposition that rights of free movement and residence stem directly from Union citizenship, which itself is derived from citizenship of a Member State. As a result, the rights of free movement and residence of a Union citizen are intrinsically linked to that person's nationality of a Member State. Furthermore, it is well established that under international law and EU law it is for each Member State to lay down the conditions for the acquisition and loss of nationality. (See, for example Case C-369/90 Micheletti [1992] ECR I-4239 at [10] and [14]). So much is uncontroversial. However, it does not follow that, because a person's rights of free movement and residence are linked in this way to nationality of a Member State, issues as to the marital status of his or her spouse or partner must also be governed by the law of his or her State of nationality. On the contrary, nationality and marital status are clearly distinguishable. Nationality is exclusively a matter for the law of the Member State concerned. Marital status and its recognition in any given case, by contrast, are matters in respect of which the Directive contemplates that different Member States may take different views. As a result, there is no need to defer to the law of the State of nationality of the EU national when determining the marital status of his or her spouse or partner for the purposes of the Citizens Directive.*

22. *Moreover, the alternative route by which the Upper Tribunal in Kareem arrived at its conclusion is also open to objection. I accept that if it is open to a host Member State to determine by its law, including its rules of private international law, whether an EU citizen had contracted a marriage, this could have an effect on freedom of movement and residence within the EU. A spouse would be able to move to a Member State which recognised the marriage but not to a Member State which did not. However, similar inequalities arise if the issue is determined by the law of the State of nationality of the EU national. Mr. Malik provided the following example. Let us assume that German law recognises proxy marriages in third states and that French law does not. In those circumstances, such spouses of German nationals would enjoy rights of free movement to and residence in the United Kingdom (and indeed in other EU States) while such spouses of French nationals would not. Whether marital status is determined by reference to the law of the home State or the law of the host State, it is at risk of being determined differently by different Member States. This is an inevitable consequence of the fact that the Citizens Directive does not employ an independent rule for determining marital status. Once again, it is not a reason for conferring the power to determine marital status on the law of the Member State of nationality of the qualifying EU national.*

23. *More fundamentally, I consider that in cases such as the present the application of the rules of private international law in the law of England and Wales would not, on any view, result in any incompatibility with EU law. The law of England and Wales recognises proxy marriage if valid by the lex loci celebrationis. Accordingly, a spouse of an EU national who has concluded such a marriage will qualify as a family member within Article 2 of the Directive. There is no threat to EU rights here. As a result, there was simply no reason for the Upper Tribunal in Kareem to create a new rule of private international law requiring reference to the law of the State of the EU national.*

Marriage of Convenience
Sadovska & Anor v Secretary of State for the Home Department (Scotland) [2017] UKSC 54 (26 July 2017)

The Supreme Court give guidance on the burden of proof in marriage of convenience cases
http://www.bailii.org/uk/cases/UKSC/2017/54.html

The law

20. It is of central importance in this case to consider the substantive law governing the respondent's decisions and what had therefore to be established in each case. It differs significantly as between the two appellants.

21. Ms Sadovska is an EEA national. Her rights are therefore governed by the Directive, which the 2006 Regulations were designed to implement in UK law. To the extent, if any, that the 2006 Regulations do not accurately transpose the requirements of the Directive, we have to give effect to the Directive rather than the Regulations and so it is appropriate to focus on the provisions of the Directive.

22. She has been living lawfully in the United Kingdom for a continuous period of more than five years. This means that, under article 16 of the Directive, she has the right of permanent residence here. None of the conditions attached to the right of residence of people who have been here for more than three months but less than five years, provided for in article 8 of the Directive, applies. Article 28.2 lays down the general rule that a host member state may not take an expulsion decision against a Union citizen who has the right of permanent residence "except on serious grounds of public policy or public security". However, Recital 28 to the Directive states that:

> *"To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, member states should have the possibility to adopt the necessary measures."*

This is therefore provided for in article 35, which is the crucial article in this case:

> *"Member states may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in articles 30 and 31."*

23. Article 30 requires that the person concerned be notified in writing of the decision and informed precisely and in full of the reason for it and where and within what time that person may lodge an appeal. Article 31 requires that the person have access to judicial and, where appropriate, administrative redress procedures to appeal against or seek review of any decision taken against them. These "shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which [it] is based. They shall ensure that the decision is not disproportionate ..."

24. A Communication from the Commission to the European Parliament and the Council on guidance for the better transposition and application of Directive 2004/38/EC, dated 2 July 2009, has this to say about marriages of convenience, at para 4.2:

> *"Recital 28 defines **marriages of convenience** for the purposes of the Directive as marriages contracted for the **sole** purpose of enjoying the right of free movement and*

> *residence under the Directive that someone would not have otherwise. A marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage. The quality of the relationship is immaterial to the application of Article 35."*

The definition in the first sentence is repeated in the Commission's more recent Handbook on addressing the issues of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, dated 26 September 2014. However, this goes on to explain that:

> *"the notion of 'sole purpose' should not be interpreted literally (as being the unique or exclusive purpose) but rather as meaning that the objective to obtain the right of entry and residence must be the* ***predominant purpose*** *of the abusive conduct."*

But it repeats that:

> *"On the other hand, a* ***marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage****, or indeed any other advantage (for example the right to a particular surname, location-related allowances, tax advantages or entitlement to social housing for married couples)."*

25. Mr Malik is in a different position from Ms Sadovska. As an over-stayer he is, as noted above, liable to be removed under section 10(1)(a) of the 1999 Act. However, had he succeeded in marrying Ms Sadovska, he would have become a "family member" within the meaning of article 2.2 of the Directive. Under article 7.2, this would bring with it the right of residence for more than three months, provided that Ms Sadovska satisfied one of the conditions in article 7.1(a), (b) or (c). As a "worker" she would satisfy condition (a). Once he had been living here lawfully for five years, he too would acquire a right of permanent residence under article 16.2. As with Ms Sadovska, of course, he would be liable to removal under article 35 if their marriage was one of convenience.

26. As they have not succeeded in marrying, Mr Malik is not a "family member" of an EU citizen. However, article 3.2 requires Member States to "facilitate" the entry and residence of certain other persons, who include "(b) the partner with whom the Union citizen has a durable relationship, duly attested". Article 3.2 also requires that "The host member state shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".

27. Finally, of course, both Ms Sadovska and Mr Malik have rights under the European Convention on Human Rights. Article 8.1 guarantees the right to respect for private and family life, although under article 8.2 interference is justified if it is in accordance with the law and "necessary in a democratic society" to achieve a legitimate aim. Article 12 guarantees the right of "men and women of marriageable age … to marry and to found a family, according to the national laws governing the exercise of [the] right".

Analysis

28. It is clear from the provisions of the Directive quoted above that Ms Sadovska has a right of permanent residence in the United Kingdom. As an EU citizen, under article 27.1, her freedom of movement can only be restricted on grounds of public policy, public security or public health. As a permanent resident, under article 28 she could only be removed if those grounds are serious. It is not suggested that she can be removed under article 28 on any of those grounds. She can therefore only be removed, under article 35, if it is established that she has entered, or attempted to enter, into a marriage of convenience. Furthermore, although

the Regulations permit the respondent to take steps on the basis of reasonable grounds to suspect that that is the case, Ms Sadovska is entitled to an appeal where the facts and circumstances must be fully investigated. That must mean, as held in Papajorgji, that the tribunal has to form its own view of the facts from the evidence presented. The respondent is seeking to take away established rights. One of the most basic rules of litigation is that he who asserts must prove. It was not for Ms Sadovska to establish that the relationship was a genuine and lasting one. It was for the respondent to establish that it was indeed a marriage of convenience.

29. For this purpose, "marriage of convenience" is a term of art. Although it is defined in the Directive and the 2009 Communication as a marriage the sole purpose of which is to gain rights of entry to and residence in the European Union, the 2014 Handbook suggests a more flexible approach, in which this must be the predominant purpose. It is not enough that the marriage may bring incidental immigration and other benefits if this is not its predominant purpose. Furthermore, except in cases of deceit by the non-EU national, this must be the purpose of them both. Clearly, a non-EU national may be guilty of abuse when the EU national is not, because she believes that it is a genuine relationship.

30. In the case of a person exercising EU law rights, the tribunal must also be satisfied that the removal would be a proportionate response to the abuse of rights established. So it would be one thing to find that the proposed marriage had been shown to be one of convenience, and therefore that it was right to prevent it, but quite another thing to find that expelling Ms Sadovska from the country where she had lived and worked for so long and had other family members living was a proportionate response to that.

31. The First-tier Tribunal did not analyse her rights in this way. It was quite simply incorrect to deploy the statement that "in immigration appeals the burden of proof is on the appellant", correct though it is in the generality of non-EU cases, in her case. She had established rights and it was for the respondent to prove that the quite narrow grounds existed for taking them away. Nor did the determination address the issue of proportionality. It is impossible for this court to conclude that, had the matter been approached in the right way, the decision would inevitably have been the same.

32. The position of Mr Malik is different, for he has no established rights, either in EU law or in non-EU immigration law. In order to benefit from the Directive, he would have to show that he has a "durable relationship" with Ms Sadovska. However, article 3.2 requires the respondent to justify any refusal of entry or residence in such cases. So if he can produce evidence of a "durable relationship" (a term which is not defined in the Directive), it would be for the respondent to show that it was not or that there were other good reasons to deny him entry.

33. It is not impossible that a tribunal, properly directing itself, would reach different conclusions in the case of these two appellants. But it is impossible for this court to conclude that, had the matter been approached in the right way, the decision relating to Mr Malik would inevitably have been the same.

34. It follows that the appeal must be allowed and the case remitted for a full re-hearing by the First-tier Tribunal. In seeking to establish its case, the respondent will no doubt concentrate on the interviews, the discrepancies between the appellants' accounts, and the gaps in Ms Sadovska's knowledge of Mr Malik's family, together with the sentence in their statement of 28 March that their thoughts of living together and marriage had not yet "manifested into action" (which on 28 March was strictly true in that they were not yet living together or married but they had given notice of intention to marry). But in considering those discrepancies, the circumstances in which the interviews took place and the statement was made must be borne fully in mind. Furthermore, there were many matters on which their accounts were consistent. It turns out, for example, that Ms Sadovska's mother does indeed live in Lithuania, as Mr Malik said in explaining why she was not there. There is also a considerable body of evidence which supports their claim to have been in a genuine relationship, dating back some time before they gave notice of intention to marry. Should the tribunal conclude that Mr Malik was delighted to find an EU national with whom he could form a relationship and who was willing to marry him, that does not necessarily mean that their marriage was a "marriage of convenience", still

less that Ms Sadovska was abusing her rights in entering into it. Their legal and their factual cases must be considered separately.

35. Having reached the firm conclusion that the case must be remitted to the First-tier Tribunal to be heard afresh, because a wrong approach was taken to the requirements of EU law in this case, it is unnecessary to consider whether the appellants' Convention rights add anything further to their claims. But for my part I would not accept their argument that, because their marriage was frustrated by the respondent's actions, their case should be approached as if they were married, which would, of course, enhance Mr Malik's claims. It must be permissible for the state to take steps to prevent sham marriages, although it is also incumbent on the state to show that the marriage would indeed be a sham.

Molina, R (On the Application Of) v The Secretary of State for the Home Department [2017] EWHC 1730 (Admin) (12 July 2017)

http://www.bailii.org/ew/cases/EWHC/Admin/2017/1730.html

In this Judicial Review Judge Grubb found that a marriage of convenience may exist even where a relationship is genuine if the sole aim was to gain an immigration advantage.

73. In short, therefore, a "marriage of convenience" may exist despite the fact that there is a genuine relationship and in the absence of any deception or fraud as to its existence. The focus is upon the intention of one or more of the parties and, in the present context, whether the sole aim is to gain an immigration advantage. Consequently, I reject Mr Jafar's submission that the Immigration Officer misunderstood what amounts to a "marriage of convenience" when it was concluded that despite having a genuine relationship, albeit one not akin to marriage, being satisfied that it was proposed to enter that marriage for an immigration advantage was consistent with the legal definition of a "marriage of convenience".

EU Law & EFMs: *Sala* overturned

Khan v Secretary of State for the Home Department & Anor [2017] EWCA Civ 1755 (09 November 2017)
http://www.bailii.org/ew/cases/EWCA/Civ/2017/1755.html

In *Khan* the Court of Appeal wrestled with the jurisprudential bombshell dropped by the UT in *Sala (EFMs: Right of Appeal) [2016] UKUT 0411 (IAC)* where it was found that Extended Family Members (EFMs) did not have a right of appeal under the 2006 Regulations as a decision of the SSHD did not concern a person's entitlement to be admitted to the United Kingdom or be issued with a residence card because the SSHD controlled whether an entitlement would come into existence (through the exercise of her discretion). *Sala* caused chaos and great difficulties for EFMs wishing to challenge decisions of the SSHD. In *Khan* the Court of Appeal held (§45) that a decision of the SSHD that someone was not an EFM did concern an entitlement and therefore there was a right of appeal under the 2006 Regulations. It is noteworthy that the 2016 Regulations (§2) exclude EFM decisions and that this amendment was made as a direct response to *Sala.* It is inevitable that there will be now a challenge to the 2016 Regulations, the *obiter* comments of Irwin LJ (§46) are worthy of note where he expresses the view that an appeal before a Tribunal is preferable to Judicial Review.

42. *Against that backdrop, I return to the principal point at issue, the meaning of the language in the Regulation: is the decision under consideration one which "concerns … an entitlement" to enter and to be granted a residence card.*

43. *As I have said, the essence of the decision by the Upper Tribunal was that this means an existing entitlement. They concluded that the decision by the Respondent in relation to a family member is whether that entitlement exists. The decision in relation to an EFM is whether, by the exercise of discretion (presumably, whether circumscribed or not) such entitlement should come into being. In their thinking, that distinction was decisive. The Secretary of State now adopts that position.*

44. *It was intriguing that neither counsel spent any length of time on this critical issue, since it depends on the interpretation of ordinary language. No authority was advanced as to the meaning of this phrase.*

45. *In my view, not only does the context favour the Appellant's interpretation (for the reasons set out above) but that is the more natural meaning of the words. An "entitlement" is subtly different from a "right". The natural meaning of the latter is something inherent and existing. The natural meaning of an "entitlement" is a benefit which is obtained or granted. Moreover, a decision which "concerns" an entitlement appears to me naturally to include a decision whether to grant such an entitlement. That is precisely what the Secretary of State must do in such a case as this.*

46. *Although it forms no part of my reasoning in reaching this conclusion, it appears to me that an appeal before a Tribunal is a preferable procedure in this context to judicial review. I have already indicated that the tool of judicial review has proved to be flexible, capable of being shaped to different levels of intensity and intrusive enquiry, depending on the matter in hand. However, the hearing of an appeal before a tribunal is probably somewhat better as a procedure for the intensive review of the facts required by Article 3(2) of the Directive and required on the part of the Secretary of State by Regulation 17(5).*

Family members of dual nationals

Lounes (Citizenship of the Union : Border checks : Judgment) [2017] EUECJ C-165/16 (14 November 2017)

http://www.bailii.org/eu/cases/EUECJ/2017/C16516.html

In this case a Spanish national came to the United Kingdom to study and then work. In 2009 the Spanish national became a British Citizen (whilst retaining her Spanish nationality). In 2013 she entered into a relationship with Mr Lounes, an Algerian national, whom she subsequently married in 2014. Mr Lounes was refused a residence card on the basis that §2 EEA Regs 2006 deems that dual nationals are not to be regarded as EEA nationals for the purpose for the Regulations. Following a challenge by way of Judicial Review a reference was made to the CJEU. Consideration was given to McCarthy (C□434/09, EU:C:2011:277) however in this case the Spanish national had exercised freedom of movement and had established a right to reside in the United Kingdom before becoming British. The CJEU held that Mr Lounes did not have a right to reside under Directive 2004/38 however he was eligible for a derived right of residence under Article 21(1) TFEU, on conditions which must not be stricter than those provided for by Directive 2004/38 for the grant of such a right to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national.

62 In view of all the foregoing, the answer to the question is that Directive 2004/38 must be interpreted as meaning that, in a situation in which a Union citizen (i) has exercised his freedom of movement by moving to and residing in a Member State other than that of which he is a national, under Article 7(1) or Article 16(1) of that directive, (ii) has then acquired the nationality of that Member State, while also retaining his nationality of origin, and (iii) several years later, has married a third-country national with whom he continues to reside in that Member State, that third-country national does not have a derived right of residence in the Member State in question on the basis of Directive 2004/38. The third-country national is however eligible for a derived right of residence under Article 21(1) TFEU, on conditions which must not be stricter than those provided for by Directive 2004/38 for the grant of such a right to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national.

Self-Employed persons

Gusa v Minister for Social Protection [2017] EUECJ C-442/16 (20 December 2017)

http://www.bailii.org/eu/cases/EUECJ/2017/C44216.html

In this reference from the Irish Court of Appeal the CJEU considered Article 7(3)(b) of Directive 2004/38/EC:

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

...

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a jobseeker with the relevant employment office;

The Appellant's claim for JSA had been refused on the basis that he no longer had a right to reside in Ireland after ceasing self-employment as a plasterer. The referring court questioned *inter alia* whether Article 7(3)(b) only applied to persons who had been employed rather than those who had previously worked on a self-employed basis. The CJEU found that Article 7(3)(b) must be interpreted as meaning that a national of a Member State retains the status of self-employed person for the purposes of Article 7(1)(a) of that directive where, after having lawfully resided in and worked as a self-employed person in another Member State for approximately four years, that national has ceased that activity, because of a duly recorded absence of work owing to reasons beyond his control, and has registered as a jobseeker with the relevant employment office of the latter Member State.

45 It follows from all of the foregoing that a person who has ceased to work in a self-employed capacity, because of an absence of work owing to reasons beyond his control, after having carried on that activity for more than one year, is, like a person who has involuntarily lost his job after being employed for that period, eligible for the protection afforded by Article 7(3)(b) of Directive 2004/38. As set out in that provision, that cessation of activity must be duly recorded.

46 Accordingly, the answer to the first question is that Article 7(3)(b) of Directive 2004/38 must be interpreted as meaning that a national of a Member State retains the status of self-employed person for the purposes of Article 7(1)(a) of that directive where, after having lawfully resided in and worked as a self-employed person in another Member State for approximately four years, that national has ceased that activity, because of a duly recorded absence of work owing to reasons beyond his control, and has registered as a jobseeker with the relevant employment office of the latter Member State.

Zambrano developments

Chavez-Vilchez and Others (Union citizenship - Article 20 TFEU - Access to social assistance and child benefit conditional on right of residence in a Member State : Judgment) [2017] EUECJ C-133/15 (10 May 2017)

http://www.bailii.org/eu/cases/EUECJ/2017/C13315.html

This case concerned the rejection of applications for social assistance and child benefit in the Netherlands by the third country national mothers of Dutch children. The applications had been rejected on the basis that the mothers did not have a right to reside in the Netherlands. Questions were referred to the CJEU in respect of Article 20 TFEU and whether it precluded the Member State from refusing a right to reside where there was the possibility that the EU national parent may be able to take over day-to-day care of the child.

On those grounds, the Court (Grand Chamber) hereby rules:

1. *Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a citizen of the European Union would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights conferred on him by that article if the child's third-country national parent were refused a right of residence in the Member State concerned, the fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.*

2. *Article 20 TFEU must be interpreted as not precluding a Member State from providing that the right of residence in its territory of a third-country national, who is a parent of a minor child that is a national of that Member State and who is responsible for the primary day-to-day care of that child, is subject to the requirement that the third-country national must provide evidence to prove that a refusal of a right of residence to the third-country national parent would deprive the child of the genuine enjoyment of the substance of the rights pertaining to the child's status as a Union citizen, by obliging the child to leave the territory of the European Union, as a whole. It is however for the competent authorities of the Member State concerned to undertake, on the basis of the evidence provided by the third-country national, the necessary enquiries in order to be able to assess, in the light of all the specific circumstances, whether a refusal would have such consequences.*

Patel v The Secretary of State for the Home Department [2017] EWCA Civ 2028 (13 December 2017)

http://www.bailii.org/ew/cases/EWCA/Civ/2017/2028.html

In *Patel* the Court of Appeal considered a number of *Zambrano* type Derivative Right of Residence claims in the light of the decision of the CJEU in *Chavez-Vilchez and Others v Raad van Bestuur van de Sociale Verbekeringsbank and Others (10 May 2017) (Case C-133/15) (Grand Chamber), [2017] 3 WLR 1326, [2017] 3 CMLR 35*. In *Chavez-Vilchez* the CJEU held that Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether an EU citizen child would be compelled to leave the territory of the EU the fact that the other parent, who is an EU citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. The CJEU set out what factors such an assessment must take into account. In *Patel* Irwin LJ concluded that, *'the decision in Chavez-Vilchez represents no departure from the principle of EU law laid down in Zambrano, although it does constitute a reminder that the principle must be applied with careful enquiry, paying attention to the relevant criteria and considerations, and focussing not on whether the EU citizen child (or dependant) can remain in legal theory, but whether they can do so in practice. There is no alteration in the test of compulsion.'* [§72] Irwin LJ went on to say [§74] that *Chavez-Vilchez* does not represent any kind of sea-change to the fundamental approach to be taken and that it does not mean that the English reported cases (such as Harrison, and Sanneh) are in any way diminished.

Conclusions

72. In my judgment, the decision in Chavez-Vilchez represents no departure from the principle of EU law laid down in Zambrano, although it does constitute a reminder that the principle must be applied with careful enquiry, paying attention to the relevant criteria and considerations, and focussing not on whether the EU citizen child (or dependant) can remain in legal theory, but whether they can do so in practice. There is no alteration in the test of compulsion.

73. The case must also be kept in context: there was no question in these cases that both parents would choose to remain together abroad. That was not the situation the CJEU was addressing.

74. It follows in my view that Chavez-Vilchez does not represent any kind of sea-change to the fundamental approach to be taken. It does not mean that English reported cases implementing Zambrano but pre-dating Chavez-Vilchez (such as Harrison, and Sanneh) hold diminished authority.

75. In both Shah and Bourouisa there is impressive evidence of the strength of family life, and of the determination of the British citizen mother (in each case) to stay with the family unit and move abroad, if the husband and father must leave. Every sensible person would wish to honour such an impulse. However, recognition of that does not alter the fact that however hard such a choice may be, it is a choice, not a necessity, not compulsion. In my judgment the evidence in each of these two cases is clear that were the British parent to remain, they would be able to care for the children concerned perfectly well. The child citizen would be under no compulsion to leave the EU.

76. Quite a number of years ago, Parliament chose to abrogate the historic approach that marriage to a British citizen would bring, in effect automatically, residence in Britain for the spouse. No such automatic consequence now follows, see s.6(2) of the British Nationality Act 1981 and s.2 of the Nationality, Immigration and Asylum Act 2002. Those who marry a British citizen and have children, without having (or acquiring) leave to remain, do so at the risk that they may be compelled to leave the country, facing the real quandary that arises for these families. The Zambrano principle cannot be regarded as a back-door route to residence by such non-EU citizen parents.

77. I would allow the Secretary of State's appeals in Shah and Bourouisa. In each case, it seems to me, the Tribunal started with the desirability of maintaining the family life, and jumped to the conclusion that there was the requisite compulsion on the child. In my view, that was an error. The correct approach would have been to ask is the situation of the child or children such that, if the non-EU citizen parent leaves, the British citizen will be unable to care for the child or children, so that the latter will be compelled to leave. In so doing, the Tribunal must pay regard to all the relevant circumstances indicated by the CJEU in Chavez-Vilchez, and in particular in paragraphs 70 to 72 quoted above.

78. I would wish to emphasise that consideration of the respect for family life (whether considered under Article 8 ECHR or Article 7 of the Charter), although a relevant factor, cannot be a trump card enabling a

court or tribunal to conclude that a child will be compelled to leave because Article 8 (or Article 7) are engaged and family life will be diminished by the departure of one parent. Family life will be diminished by the departure of one parent in the great majority of cases. The question remains whether, all things considered, the departure of the parent will mean the child will be compelled to follow.

79. In these two cases, the question of compulsion did not really even arise, in my view. If one parent left, each British parent would have been perfectly capable of looking after the child. There was no real evidence to the contrary. There would have been a loss of earnings, a diminution in material things and an important loss of two parents living together with their child, but as the evidence stood, it seems to me, there was no proper basis for a finding of compulsion. In Shah, a claim under Article 8 has already been rejected. In Bourouisa, it has not been made. That is a separate matter legally. I should not be understood to close off such a claim, in theory or in practice.

80. I turn to the case of Patel. Here, it seems to me that a number of the arguments advanced by the Appellant, with great respect to Mr Roe and Mr Pennington-Benton, were misconceived. I agree that the approach to such a case must be "nuanced", if by that it is meant that there must be a full enquiry into the facts, and full consideration of the detail. But if the implication is that the test for a dependent adult must be weaker than for a dependent child, I reject that. It must be obvious, as Mr Blundell submits, that the combination of the legal enshrinement of the best interests of the child and the legal, as well as moral, obligation of parents to care for their children, mean that such a distinction cannot be right.

81. I recognise the force of the submission that, if State provision in terms of medical or social services care is both a right of the dependent adult and in fact available, then the class of dependent adults who can demonstrate "compulsion" to follow a non-British carer abroad may be limited. I also recognise that devotion to and care of elderly, frail parents is to be applauded and praised, not condemned. It is clear that Mr Patel is to be praised for his admirable care of his parents. But I do not see any error in the legal approach taken by either the F-tT or the UT in this case. The question remains compulsion.

82. And it further seems to me that the evidence in this case was too equivocal to amount to compulsion, however one looked at the matter. There was absolutely no doubt as to the parents' devotion to their son, or his to them. Were he to leave to India, there was no doubt that the parents said they would follow, despite the findings below, but that really represented their cultural and individual commitment to each other. That, again, is choice not compulsion.

83. Objectively, the choice was, and presumably still is, a difficult choice. The evidence was there was no house existing and no extended family in India. Therefore that would mean, presumably, selling up in Britain and a transfer of resources to India. Part of the Appellant's case was that medical facilities would be more limited in India, as I have indicated above. However, if remaining in England, the parents will be faced with medical and social care support that is likely to be lesser in quality (and certainly more impersonal) than the care currently provided by their son. UTJ Hanson considered, on the evidence he heard, it was inevitable the parents would in fact remain. But even if that were wrong, this situation can in no way be regarded as one of compulsion to leave.

84. During the hearing, we asked the Secretary of State to consider in what circumstances compulsion might arise in respect of adult dependents of those without residence: if there were none, might the regulation so interpreted be a dead letter, forcing a different interpretation to preclude redundancy? Mr Blundell's response accepts that this category of cases might be very narrow. However, he did proffer examples. Where the family share a rare blood group, and blood transfusion or bone marrow transplants might be required, it might be arguable that the carer should remain. He also instanced a British adult citizen with severe autism, dependent for all his care on a third country national relative, where it would be intolerable for the identity of the carer to change. It is clear Mr Blundell was intending to give examples rather than an exhaustive survey. For myself, I would instance significant psychological dependence derived from any well-documented and recognised psychological condition, as a possible example. There may be more. The point is that the category exists, and there can be no argument that the regulation must have an expanded reading in order to avoid redundancy.

85. For those reasons, I would reject Ground 1 in the case of Patel.

86. As to Ground 2, it seems to me that the conclusion of UTJ Hanson that the Appellant's parents would remain may have been somewhat over-definite. It may have underestimated their strength of feeling about being cared for by their son, as opposed to being cared for by people who are as yet strangers to them. However, if there was an error, it was not material to his conclusions in the case. At the very least, the case represented a very difficult choice for the Appellant's parents. They were not obliged to leave in any sense. Hence, I would dismiss the appeal in Patel.

EEA deportation, Zambrano, public revulsion and remittal to UT

Secretary of State for the Home Department v Robinson (Jamaica) [2018] EWCA Civ 85 (02 February 2018)
http://www.bailii.org/ew/cases/EWCA/Civ/2018/85.html

§§48-53 look at materiality and remitted to the UT;
§§54-67 look at the Zambrano principle in deport cases in the light of the recent CJEU case law;
§§68-86 look at when past conduct alone and public revulsion can justify deportation in an EEA case.