



Upper Tribunal (IAC) Reported Cases May - August 2017

Here are the head notes of the reported cases for May - August 2017 (as of 4/9/17) in case you've missed them whilst you've been sunning yourself by the pool!

CS and Others (Proof of Foreign Law : India) [2017] UKUT 199 (IAC) (2 May 2017)

URL: <http://www.bailii.org/uk/cases/UKUT/IAC/2017/199.html>

The content of any material foreign law is a question of fact normally determined on the basis of expert evidence.

Eisa, R (on the application of) v Secretary of State for the Home Department (Dublin; Articles 27 and 17) [2017] UKUT 261 (IAC) (24 May 2017)

URL: <http://www.bailii.org/uk/cases/UKUT/IAC/2017/261.html>

(1) Judicial review is a remedy of sufficient flexibility to comply with Article 27(1) of Regulation 604/2013 (Dublin III).

(2) Since an applicant is allowed to remain while this review is being dealt with, there is a suspension of the 6 months within which transfer must be effected in accordance with Article 27(3) of Dublin III.

(3) There is no obligation on the Secretary of State to exercise the power under Article 17 to deal with a claim and, albeit a refusal to exercise the discretion under Article 17 is judicially reviewable, it would require wholly exceptional circumstances to justify any relief being granted if otherwise there was no bar to transfer.

MMK, R (on the application of) v Secretary of State for the Home Department (consent orders - legal effect - enforcement) [2017] UKUT 198 (IAC) (5 May 2017)

URL: <http://www.bailii.org/uk/cases/UKUT/IAC/2017/198.html>

(i) The commonly used forms of consent order do not expose either party to possible contempt action or other sanction.

(ii) The remedy for non-compliance with a consent order will normally be the initiation of a fresh judicial review claim

RM, R (on the application of) v Secretary of State for the Home Department (Dublin; Article 27(1); procedure) [2017] UKUT 260 (IAC) (11 May 2017)

URL: <http://www.bailii.org/uk/cases/UKUT/IAC/2017/260.html>

(1) The scope of a challenge to a transfer decision brought, pursuant to art. 27 of Regulation 604/13 (Dublin III), on the basis that the decision infringes the second subparagraph of art. 19(2) of Dublin III is limited to 'traditional' public law grounds.

(2) Section 15(5A) of the Tribunals, Court and Enforcement Act 2007 applies to applications for judicial review, in which the application for permission to bring such proceedings was received by the Upper Tribunal on, or after, 8 August 2016.

ZEI & Ors (Decision withdrawn - FtT Rule 17 – considerations : Palestine) (Rev 1) [2017] UKUT 292 (IAC) (8 May 2017)

URL: <http://www.bailii.org/uk/cases/UKUT/IAC/2017/292.html>

Rule 17 clearly envisages that in general the appeal is to be treated as withdrawn. It will continue only if a good reason is identified for allowing it to proceed despite being an appeal against a decision that will not have effect in any event. The appellant needs the opportunity to advance a case why he considers an appeal should not be treated as withdrawn, and the SSHD needs the opportunity to respond. The Tribunal has no power to require the Secretary of State to give (or even to have) a good reason for her decision.

The list below cannot and should not be regarded as a comprehensive account of all reasons that might be urged on judges, but we trust that as well as giving guidance on the arguments discussed the reasoning may be adapted to other cases.

- (i) The following are not likely to be considered good reasons:
- The parties wish the appeal to proceed.
 - The applicant is legally aided and if he has to appeal against a new decision, he will not (or will probably not) be legally aided because the legal aid regime has changed.
 - The withdrawal is for reasons the judge considers inappropriate is very unlikely to be a good reason to proceed. An example is that of a Presenting Officer who seeks adjournment of a hearing and when that is refused, withdraws the decision.
 - The witnesses are ready to be heard and can only with difficulty or expense be gathered again.
- (ii) The following are likely to be capable of being a good reason.
- The appeal regime has changed since the first decision, so that if a new decision is made in the same sense, the rights of appeal will be reduced.
 - Undue delay by the respondent.
 - The appeal turns on a pure point of law that the judge thinks that even after argument is certainly or almost certainly to be decided in the appellant's favour.
 - If there has already been a considerable delay in a decision the appellant is entitled to expect, the fact that children are affected.

AM, (a Child), R (on the application of) v Secretary of State for the Home Department (Dublin - Unaccompanied Children - Procedural Safeguards) [2017] UKUT 262 (IAC) (5 June 2017)

URL: <http://www.bailii.org/uk/cases/UKUT/IAC/2017/262.html>

- (i) Regulation 604/13/EU (the Dublin Regulation) occupies the field to which it applies and operates as a measure of supreme EU law therein.
- (ii) It is not open to the Secretary of State to unilaterally and selectively disapply certain provisions of the Dublin Regulation and its sister implementing Commission Regulation as this is contrary to EU law.
- (iii) The dilution and disapplication of the procedural fairness and kindred protections enshrined in the Dublin Regulation, the implementing Regulation, Article 8 ECHR and the common law are not justified on the grounds of expedition and humanitarian challenge.
- (iv) Any remedial order in this type of case should take into account the best interests of the child concerned and the need to accommodate child safeguarding checks and processes.

FT, R (on the application of) v Secretary of State for the Home Department ("rolling review"; challenging leave granted) [2017] UKUT 331 (IAC) (30 June 2017)

URL: <http://www.bailii.org/uk/cases/UKUT/IAC/2017/331.html>

The intrinsic undesirability of and the strong general presumption against allowing a "rolling review" in judicial review proceedings whereby the Upper Tribunal admits material evidence that has not been considered by the primary decision maker are important factors in considering an application to amend grounds to challenge a supplementary or new decision (see *R (Caroopen & Myrie) v SSHD* [2016] EWCA Civ 1307). However, the decision whether to allow amendments of the grounds of challenge is a case management decision taking account of all relevant considerations.

2. In applying the policy set out in the Competent Authority Guidance and the Discretionary Leave Guidance, the fact of the respondent having "mishandled" the case and the impact of that upon the applicant, are relevant/material considerations in determining the duration of leave to be granted to a Victim of Trafficking.
3. Where the respondent has regard to an earlier disengagement from treatment in considering the duration of leave to be granted, a relevant consideration is whether that disengagement from treatment was because of a failure to provide support as a VOT because of an earlier incorrect "conclusive grounds decision".

Nawaz, R (on the application of) v Secretary of State for the Home Department (ETS: review standard/evidential basis) [2017] UKUT 288 (IAC) (20 June 2017)

URL: <http://www.bailii.org/uk/cases/UKUT/IAC/2017/288.html>

- (a) Deception in ETS cases is not a question of precedent fact, except in particular circumstances, for example those in [Abbas \[2017\] EWHC 78 \(Admin\)](#).
- (b) There is no fundamental right to study in a foreign country; nor for children to be there with their would-be student parents; nor can a different standard of review fairly be applied in these cases to applicants with and without children.
- (c) It follows that the standard of review in all such cases is on ordinary judicial review principles, requiring fair consideration, bearing in mind both the potentially serious effects of deception findings in general, and the requirements of effective administration.
- (d) Oral or other evidence of an applicant's English-language skills or attainments is unlikely to have any decisive effect in judicial review proceedings on the fairness of the decision under challenge, for the reasons given in [Habib \(JR/1260/2016\) \[20\]](#), and those at [21].
- (e) Evidence obtained by use of the Look-up Tool, and subject to the human verification procedure, is an adequate basis for the Secretary of State's deception finding in these cases, in the light of [Flynn & another \[2008\] EWCA Crim 970 \[24 – 27\]](#), and the evidence of both Dr Harrison and Professor French.
- (f) The lack of visible note-taking by the human verifiers does not provide any ground of challenge to the decision as insufficiently transparent, where there has been an offer (whether accepted or not) to provide a copy of a voice recording for analysis.

ZMM (Article 15(c)) Libya CG [2017] UKUT 263 (IAC) (28 June 2017)

URL: <http://www.bailii.org/uk/cases/UKUT/IAC/2017/263.html>

The violence in Libya has reached such a high level that substantial grounds are shown for believing that a returning civilian would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to a threat to his life or person.

Awuah & Ors (Wasted Costs Orders - HOPOs - Tribunal Powers : Ghana) (Rev 1) [2017] UKFTT 555 (IAC) (13 July 2017)

URL: <http://www.bailii.org/uk/cases/UKUT/IAC/2017/555.html>

- (i) The First-tier Tribunal ("FtT") is not empowered to make a Wasted Costs Order ("WCO") against a Home Office Presenting Officer ("HOPO").
- (ii) The relationship of Secretary of State and HOPO is governed by the [Carltona](#) principle.
- (iii) The answerability of HOPOs to the tribunal is achieved through a range of judicial functions and duties.
- (iv) In every case where a WCO is in contemplation common law fairness requires that the respondent be alerted to this possibility, be apprised of the case against him and be given adequate time and opportunity to respond.
- (v) While expedition and summary decision making are desirable in WCO matters, the basic requirements of fairness to the respondent must always be respected.
- (vi) A causal nexus between the impugned conduct of the respondent and the costs unnecessarily incurred by the aggrieved party is an essential pre-condition of a WCO.
- (vii) The tribunal's "own motion" power to make a WCO is to be exercised with restraint.

Sivapatham (Appearance of Bias : Sri Lanka) [2017] UKUT 293 (IAC) (7 July 2017)

URL: <http://www.bailii.org/uk/cases/UKUT/IAC/2017/293.html>

- (i) Indications of a closed judicial mind, a pre-determined outcome, engage the appearance of bias principle and are likely to render a hearing unfair.
- (ii) Provisional or preliminary judicial views are permissible, provided that an open mind is maintained.
- (iii) An appellant does not require the permission of the tribunal to give evidence. This does not prevent the application of fair and sensible case management and, further, is subject to the doctrine of misuse of the tribunal's process.

TPN (FtT appeals – withdrawal) Vietnam [2017] UKUT 295 (IAC) (21 July 2017)

URL: <http://www.bailii.org/uk/cases/UKUT/IAC/2017/295.html>

- (i) The public law character of appeals to the FtT is reflected in the regulatory requirement governing the withdrawal of appeals that any proposed withdrawal of an appeal must contain the reasons for the course mooted and must be judicially scrutinised, per rule 17 of the FtT Rules and rule 17 of the Upper Tribunal Rules.
- (ii) Judicial evaluation of both the withdrawal of an appellant's appeal and the withdrawal of the Secretary of State's case or appeal is required.
- (iii) Every judicial determination of an appellant's proposal to withdraw an appeal or the Secretary of State's proposal to withdraw requires a brief outline of the reasons for the decision. The purpose of the judicial scrutiny is to ensure that the appeal is being properly and correctly withdrawn.
- (iv) Judicial scrutiny will normally result in the mooted withdrawal of the appeal being perfected by transmission of the notice to the parties required by Rule 17(iii). However, this will not occur automatically: for example where the proposed withdrawal lacks coherence or is based on a clear material misunderstanding or misconception.
- (v) The outcome of the judicial scrutiny should be briefly reasoned.
- (vi) Rule 29 of the FtT Rules is confined to the substantive determination of appeals.
- (vii) The power of the FtT to set aside a decision under Rule 32 is exercisable only by the FtT President and the Resident Judges.
- (viii) In cases where an unsuccessful appellant has a choice, best practice dictates that an application to set aside the impugned decision of the FtT under Rule 32 be first exhausted in advance of the lodgement of an application for permission to appeal to the Upper Tribunal. Where both species of challenge are lodged simultaneously, it will be sensible to assign them to the same Judge where feasible.

Arranz (EEA Regulations - deportation - test : Spain) [2017] UKUT 294 (IAC) (22 August 2017)

URL: <http://www.bailii.org/uk/cases/UKUT/IAC/2017/294.html>

- (i) The burden of proving that a person represents a genuine, present and sufficiently threat affecting one of the fundamental interests of society under Regulation 21(5)(c) of the EEA Regulations rests on the Secretary of State.
- (ii) The standard of proof is the balance of probabilities.
- (iii) Membership of an organisation proscribed under the laws of a foreign country does not without more satisfy the aforementioned test.
- (iv) The "Bouchereau" exception is no longer good law: CS (Morocco) applied

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