

Notes for No 8 Chambers Seminar [Wednesday 20th May 2015—at the Council House]

By Stephen Vokes [Head of Immigration, Asylum, and Human Rights team]

What is Fairness in Immigration Courts?

In these brief notes I want to deal with the question of fairness in some of its legal sense, because representatives often confuse the merits of a case with the extant legal position; hence the failure of appeal grounds to the Upper Tribunal; and the failure to understand Judicial Review processes. I want to discuss this issue by examining a number of cases in rather different contexts

Introduction

There are only two forms of fairness in legal proceedings, substantive unfairness due to a failure to follow a declared policy, and procedural unfairness.

A typical example in short form in relation to the legal position is the determination in **Marghia (procedural fairness) [2014] UKUT 366 (IAC)**. It is clear that irrationality challenges are set at a very high bar to succeed.

A rather more sophisticated examination of fairness and how there is no free standing duty as such can be found (in relation to Judicial Review matters) in **R (Patel [AKA Raval]) v SSHD IJR [2015] UKUT 77 (IAC)** where Upper Tribunal Judge O'Connor also discusses substantive unfairness.

The Upper Tribunal

Now a theme of the President Mr Justice McCloskey is the approach to procedural unfairness and see;

On procedure on appeal, and the need to identify error of law in a First Tier determination; MM (unfairness; E & R) Sudan [2014] UKUT 105 (IAC)

On Home Office behaviour in determining cases

Miah (interviewer's comments; disclosure; fairness) [2014] UKUT 515 (IAC)

On the duties of Applicant's in JR proceedings ; R (Bilal Mahmood) v SSHD (continuing duty to re-assess) IJR [2014] UKUT 439 (IAC)

[This is particularly important because the position of the SSHD can shift and because of the need for disclosure.]

On the question of adjournments

Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)

Fairness and Article 8 ECHR

I raise this topic because of the difference in assessment by different judges of the proportionality of the removal of appellants on public interest grounds (because of the need for an immigration control) against their family/private life Article 8 ECHR. As long as they correctly understand the legal framework in respect of the Rules, and indeed the exceptionality needed to succeed outside of the Rules (and see **R (Agyarko) & Others [2015] EWCA Civ 440, SSHD v SS (Congo) & others [2015] EWCA Civ 387**) then their assessments in a balancing act are for them to make providing major factors are taken into account; they do not have to be fair to the ordinary bystander. [There is a margin of error in assessment built in to the exercise of discretion.]