ILPA European Update September 2016

Dublin III and BREXIT

Between now and BREXIT

The purpose of this note is to provide a quick overview of the impact of BREXIT on the UK's participation in Dublin III. The concern is whether the UK could somehow use BREXIT to avoid its obligations under the 'take charge' provisions of Dublin III in particular articles 20 – 22 Dublin III.[1]

It is unlikely that the UK could find any way, lawfully, to cease to comply with its obligations under Dublin III (all of them) before one of three possible BREXIT related events occur:

1. The UK Government commences the procedure to exit the EU under Article 50 Treaty on European Union and it reaches an agreement with all the other Member States and EU institutions on the conditions of its departure before the end of two years from beginning the procedure;
2. The UK Government commences the exit procedure under Article 50 TEU, no agreement is reached, two years pass, no extension is granted and the UK is suddenly no longer a Member State or covered by any EU law;
3. The UK Government commences the exit procedure under Article 50 TEU, two years pass and there is no exit agreement in place and the negotiation period is extended (Dublin III would continue to apply until agreement on BREXIT would be achieved or no further extension to the negotiations is granted).

Until the UK actually ceases to be an EU Member State (either by negotiation or by chaotic departure after two years of negotiations) Dublin III will apply in the UK (unless Dublin III is repealed by the EU institutions). The Prime Minister does not appear to be in a hurry to start the exit procedure but the other EU Member States and the EU institutions want a quick start (and finish). In summer 2016 it was looking likely that the UK Prime Minister would start the procedure in January 2017 but in late summer the minister for the BREXIT negotiations, David Davis, was suggesting that the UK might leave from December 2018. Good luck to him.

Amending Dublin III

The European Commission has proposed some wide ranging changes to the Dublin system which would partially change its basis from the Member State of first arrival being responsible for the asylum seeker to a fair distribution mechanism which would allocated responsibility among the Member States for reception of asylum seekers on the basis of a

[1] The *ZAT* judgments and the work of SafePasssage and all the lawyers and advisors working on these cases is the context of this note.

distribution key.[2] The current draft of the proposed changes appear to retain and reinforce the current Dublin criteria of responsibility while at the same time inserting the new fair distribution key.

The proposal for Dublin IV also contains some provisions which could impact on the take-charge duties which are at the centre of various efforts to re-unite asylum seeker family members from the continent to the UK to join family already present there. First, the take charge provision, Article 19, is proposed to be made subject to an obligation that it would only come into effect after a responsibility determination procedure had been concluded. This would mean that in theory, stranded family members on the continent would have to submit to a Dublin responsibility determination procedure and complete it before requesting the UK take charge of them. However, if this responsibility determination procedure is sclerotic and does not work, then the issue which the Upper Tribunal considered in *ZAT*, the tension between the right to respect for family life and the application of Dublin III would be back on the table. However, for unaccompanied minors the Commission proposed Article 10 which provides that the Member State responsible shall be that where a family member of the unaccompanied minor is legally present, provided that it is in the best interests of the minor. Article 10(3) would provide, if adopted in the proposed form, that where an unaccompanied minor has a relative who is legally present in another Member State and where it is established, based on an individual examination, that the relative can take care of him or her, that Member State shall unite the minor with his or her relative and shall be the Member State responsible, provided that it is in the best interests of the minor.

The UK is much opposed to all the EU's proposals on relocation (160,000 asylum seekers are supposed to be being relocated from one Member State to another according to a distribution key agreed in September 2015 but this is taking a lot longer than anticipated) and has refused to participate, voluntarily in any of them. If the other Member States reach agreement on a fundamental change to Dublin III along the lines proposed they could adopt a new regulation. Then arguably the UK could opt out of that new Dublin IV. But according to the legal opinion which the UK agreed with in the second phase of the Common European Asylum System (CEAS), where the UK does not opt in to a new 're-cast' measure of the CEAS it remains bound by the preceding measure which it did opt into. Thus the UK remains bound by the Asylum Qualification and Procedures Directives in their 2004-5 forms. But it is not bound by the recasts of the Directives of 2011-13 as it specifically did not opt in. There might be an argument that if Dublin IV is fundamentally different from Dublins I – III it might no longer be a re-cast and the legal arguments about the UK's obligations to comply with the predecessor could be revisited. For the moment though, the Commission is calling the proposed new Dublin a 're-cast' so there would need to be a fight over whether or not it actually is a 're-cast' or something entirely new before anything else could happen.

The good news is that the negotiations on Dublin IV are going very, very slowly at the moment and could well take much longer than BREXIT.

After BREXIT

[2] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf visited 24 August 2016.

Would the UK want to continue to participate in Dublin III (or some form of Dublin) after BREXIT? The UK has been a big supporter of the Dublin system since the first convention was adopted in 1990. The argument that the UK has always used for its support of Dublin is that as a country on the western edge of the EU it receives most of its asylum seekers from other Member States. Thus in theory (if not in practice) the UK should be able to Dublin back most of the people who apply for asylum in the UK to other EU Member States. In fact, the European Commission has calculated that only about 3% of asylum seekers in the EU are ever actually transferred from one Member State to another under Dublin. Many more procedures are opened but they are abandoned for all sorts of reasons before the person is moved.

Two things might change the UK's mind about continuing participation in the Dublin system after BREXIT:

1. The system is transformed from one based on sending asylum seekers back to the first Member State through which they entered the EU to one based on fair distribution. The UK is unlikely to want to participate in such a new system which would result in more asylum seekers being allocated to the UK;
2. A serious reconsideration takes place about whether Dublin actually works to reduce the numbers of asylum seekers in the UK in any relevant way.

Dr Carolus Grutters, Radboud University, dug out these statistics for us about actual transfer rates relating to the UK:

The actual Dublin-OUT transfers based on a request by the UK to another Member State:

* to "Take charge" (regardless the legal basis) :
the number is: 252 (in 2014)
[compare this with the figures for Germany:2887 and France: 470]
(for 2015 there are no data available for the UK)

* to "Take charge based on art. 8 Dublin III" :
the number is: 0 (zero).
[compare this with the figures for Germany:5 and France:0)

The actual Dublin-IN transfers based on a request by another Member State to the UK

* to "take charge" (regardless the legal basis)
the number is : 69 (in 2014)
(for 2015 there are no data available (for the UK)
[compare this with the figures for Germany:1768 and France:1725)

* to "take charge (based on art. 8 Dublin III)"
the number is : 6
(for 2015 there are no data available (for the UK)
[compare this with the figures for Germany:64 and France:6)

In total in the 12 months up to June 2015 the UK received 25,771 asylum applications (according to its statistical agency).[3] This is a very small number out of the 1.2 million asylum applications in the EU in 2015. Whether the UK will consider that the Dublin system is worth the candle is a matter for the Government to think about. The fact that the system might change dramatically in a direction which the UK does not favour will of course be a factor.

Elspeth Guild, Kingsley Napley, 6 September 2016.

ILPA to Robert Goodwill MP, Minister of State for Immigration of 8 September 2016 re EEA applications

Robert Goodwill MP
Minister of State for Immigration
Home Office
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London SW1P 4DF

Email: privateoffice.external@homeoffice.gsi.gov.uk

Dear Minister

In common with many others, the Immigration Law Practitioners Association (ILPA) wishes to draw attention to the uncertain position of EEA nationals and their family members living in the UK following the result of the EU referendum on 23rd June 20164. We share the concerns set out in the Migration Observatory's report 'Here today, gone tomorrow?' as to the extent of the administrative challenge that would be faced by the Home Office if current free movement rights were to be removed, and up to three million EEA nationals were to need to apply to confirm their status under whatever transitional provisions are put in place5. Given the current uncertainty, it is unsurprising that EEA nationals are seeking now to protect their own immigration positions as best they can, and are applying in much increased numbers for Home Office documents to confirm rights of residence and

[3] https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2015/asylum visited 24 August 2016.

[4] The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations. ILPA commissioned a series of position papers on the immigration law implications of the EU referendum and these are available at http://www.ilpa.org.uk/pages/eu-referendum-position-papers.html

[5] 'Here today, gone tomorrow? The status of EU citizens already living in the UK', Migration Observatory 3 August 2016 (http://www.migrationobservatory.ox.ac.uk/commentary/here-today-gone-tomorrow-status-eu-citizens-already-living-uk>)

permanent residence in the UK. Immigration lawyers are likely to recommend this course of action to many clients, depending on their circumstances.

ILPA members are currently assisting with numerous EEA applications, and are very experienced with the relevant application procedures. There are a number of longstanding problems with the way these applications are processed and decided which are being exacerbated by the upsurge in applications, as well as some new ones that are emerging. We consider that application numbers are only going to grow, and that these significant issues should be addressed now.

We are writing to set out a number of the most pressing problems and to request a meeting with the Home Office to discuss how these can be addressed. We should urge that a pragmatic approach be taken toward decision-making, in particular as to the issue of comprehensive sickness insurance.

We have seen recent reports in the press that the Home Office is running a trial of online permanent residence applications with a 'group of 20 corporate clients', but these reports give very few details as to the scope of applications that are covered under the trial, or the extent to which it will solve any of the problems that we describe[6].

We are copying this letter to the Department for Exiting the EU. We set out below the details of the relevant EU law requirements in summary, and in general as interpreted by the Home Office/UK government (without thereby indicating ILPA's endorsement of these interpretations).

Background

The government statement on the status of EU nationals in the UK issued on 11 July 2016 provided that 'EU nationals who have lived continuously and lawfully in the UK for at least 5 years automatically have a permanent right to reside'[7].

'Continuously and lawfully' in this context means continuous residence in accordance with EU free movement law (as interpreted by the UK government and transposed in domestic legislation). Broadly, this means that EU nationals (and their family members) need to have met certain conditions (commonly termed 'exercised Treaty rights') in accordance with the Citizens' Directive 2004/38/EC[8] (or predecessor European Community laws) and other relevant EU law, as transposed in the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). Until an EEA national has acquired permanent residence), they are required to meet the conditions for a right of residence if they wish to count time towards

[6] 'Boom in residence requests spurs secret online registration', Financial Times, 31 August 2016

[7] UK government statement on the status of EU nationals in the UK, 11 July 2016 (https://www.gov.uk/government/news/statement-the-status-of-eu-nationals-in-the-uk)

[8] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

obtaining permanent residence. It is not the case that mere residence constitutes lawful residence[9].

Until the Brexit vote very many EEA nationals living in the UK have had no contact with the Home Office or knowledge/awareness of these requirements for 'lawful residence'. EEA nationals are able to enter and leave the UK without a requirement for a visa. They are not required to register with the Home Office and are able to work and access services on production of a passport/national ID card. In practice then, the only EEA nationals who have had to demonstrate that they are exercising Treaty rights in the UK are those whose non-EEA family members have sought to join or remain with them in the UK, those who have sought to claim benefits, or those who have been subject to exclusion or expulsion on the grounds of criminal conduct. The vast majority have just lived in the UK.

Those who have been required to show they have a right to reside will have had to satisfy the requirements of the **Home Office's approach to meeting and evidencing EU requirements.** Those requirements are complicated and in some cases contested, particularly as regards periods of time spent not working or being self-employed. **From January 2015, a new set of application forms was introduced. These forms are much longer than the previous forms, and request voluminous amounts of information** (the current EEA(PR) form is 85 pages long). One month later, a new suite of Modernised Guidance on EEA nationals was issued. These documents set out in detail what the Home Office expects to see. They include very extensive documentation requirements, and also controversial guidelines for caseworkers such as a 'minimum income threshold' in relation to genuine and effective work. While the relevant application forms are not mandatory, many EEA nationals and their family members using them are unaware of this, and find the forms extremely difficult to follow. It should also be noted that the Home Office requires original documents to be submitted with all applications, including those dating back many years in some cases, as well as original passports or other national ID.

In our experience, the extent of documentation submitted by applicants, the complexity of the relevant legal framework (often supplemented by case law), and the lack of sufficient Home Office experienced staff in the relevant caseworking teams, means that EEA residence document applications are rarely processed quickly and are often subject to administrative error and/or poor decision making. This situation also leads to unnecessary appeals, which are time consuming and costly for appellants and the Home Office.

Current problems

Practical problems in demonstrating previous exercise of Treaty rights

[9] For a brief summary of the key rights of residence under EU law, see: ILPA EU Referendum position paper 3: Rights of entry and residence, Steve Peers, University of Essex (http://www.ilpa.org.uk/resource/32143/eu-referendum-position-paper-3-rights-of-entry-and-residence)

In most cases the Home Office requires an applicant for permanent residence to show that they have exercised Treaty rights continuously for five years (through the submission of a raft of original documents). For people who have lived in the UK for many years and who acquired permanent residence years ago, but have since not worked, this can be extremely difficult. **They never anticipated the need to confirm their residence rights and are now finding it very difficult to collate the relevant documents.** Employers or educational institutions may no longer exist. Bank accounts may be closed, HMRC records may not date back far enough. Records of self-employment may have been destroyed long since. Of particular concern are the elderly and others who cannot start exercising Treaty rights again, perhaps due to a health condition which stops them from working and means that they are unable to obtain comprehensive sickness insurance (see below).

Not exercising of Treaty rights (as required by the UK government)

The key issue here is the lack of awareness, in particular about comprehensive sickness insurance for persons who are seeking to rely on any time spent as self-sufficient or as a student. There is a pressing need for the government to change its stance on comprehensive sickness insurance.

The default position is that, if an EEA national was not in employed or self-employed work for any period of time, they must have had comprehensive sickness insurance in place for them and any family members (and thus exercise Treaty rights as a self-sufficient person, or if studying, a student). There is some provision for an EEA national to exercise Treaty rights as a jobseeker, or to retain worker status following cessation of work (which requires them to have registered as unemployed at a jobcentre), with particular regard for those who have left employment due to pregnancy, but all of these provisions have conditions[10]. There is also some provision for those who cease work due to ill health, accident or involuntary unemployment, but again there are stringent conditions that must be met. The position is more restrictive for those who cease self-employment: they can only retain that status if they are temporarily unable to pursue their activity as a self-employed person as the result of an illness or accident.

These problems affect thousands of people. A typical example might be the **EU citizen spouse of a British citizen who stopped working for several years to look after their children**, other examples include previous PhD students now working in highly specialist scientific roles who never had comprehensive sickness insurance). Very many EU citizens will have had **gaps between jobs where they have not registered with the local jobcentre**. The issues of comprehensive sickness insurance, retention of worker status and job-seeking are also long-contested. In relation to comprehensive sickness insurance, the Home Office does not accept that the European Commission's position that NHS provision

[10] Citizens' Directive 2004 38/EC, art 7; *R v Immigration Appeal Tribunal, ex p Antonissen* Case C-292/89; Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 6; *Saint Prix v Secretary of State for Work and Pensions* Case C-507/12

counts as comprehensive sickness insurance[11]. However, the UK also does not have an insurance system which allows people to insure themselves comprehensively and indeed, people who are 'ordinarily resident' in the UK are entitled to use the NHS[12]. In other words, European nationals have not generally had any difficulty in accessing the NHS and were therefore often unaware of the provisions required by the Home Office to hold sickness insurance if they were not employed or self-employed. There are also significant problems where a person has a pre-existing medical condition and is unable to obtain or renew health insurance. This is not, in our experience, confined to age-related conditions: a client is unable to obtain insurance due to a diagnosis of a breast cancer which is now in remission.

Other problems reported relating to meeting conditions for an EU right of residence include:

- **EEA nationals who have been living in the UK with another (working) EEA national as their unmarried partner, but who have not worked themselves for one or more extended periods**. If they have not obtained a residence card as an extended family member, they will not be able to benefit from any derived right of residence from their working partner
- **A restrictive approach being taken on low earnings**, including by the Passport Office in dealing with passport applications for children of EEA nationals who had acquired permanent residence in the UK prior to their birth
- **A restrictive approach being taken on A8 nationals who were not registered for periods under the Workers Registration Scheme** (in some cases the approach appears to be in contravention of the decision of the Upper Tribunal (Administrative Appeals Chamber) in *TG v Secretary of State for Work and Pensions* (PC) [2015] UKUT 50 (AAC) that the extension of the scheme on and after 1 May 2009 was unlawful; this decision is under appeal to the Court of Appeal, with the hearing listed for February 2017. It is, for the time being, good law)

Appointment and processing delays/problems

The increase in numbers of EEA applications has led to the following problems/exacerbated of existing problems:

- **Lack of availability of same day registration certificate (EEA(Qualified Person)) appointments**, which can only be processed at the Croydon Premium Services Centre
- **Increase in time for processing applications and for the return of passports in EEA applications**, including for permanent residence (which cannot be submitted at any Premium Service Centre). Prior to the Brexit vote, the process for urgent return of passports was taking two to three weeks. It is now taking one to two months

[11] 'Commission asks the UK to uphold EU citizens' rights, European Commission Press Release, 26 April 2012 (http://europa.eu/rapid/press-release_IP-12-417_en.htm)

[12] Guidance on implementing the overseas visitor hospital charging regulations 2015, Department of Health, para 18 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496967/lawfully-resident-uk.pdf)

(which is in excess of the 'usual' ten days stated on the Home Office's return of passport tool)[13]. EEA nationals often need to travel for work or personal reasons, and **those who do not have a national ID card (which are not issued by all EEA states[14]) are not able to travel while the Home Office has their passport**. The Home Office does not permit copy documents to be provided in the first instance. For third country national family members, delays in processing residence card applications (which, under the Citizens' Directive, should take a maximum of six months) can take them over the expiry date of their EEA Family Permit visa as the Home Office will now keep their passports until the application is processed in full

- The longstanding difficulty of delays in processing times of residence card applications, coupled with **delays within/incorrect information being given out by the Home Office's Employers Checking Service**, means that third country national **family members are continuing to face suspension or dismissal from their jobs as they are unable to provide to employers evidence of their right to work in the UK**. This is despite the inapplicability of the regime to family members of EEA nationals, who are able to work in the UK by right under EU law. This was previously raised by ILPA in its response to the Office of the Independent Chief Inspector of Borders and Immigration's inspection into the efficiency of effectiveness of the Home Office action against illegal working[15], but the **situation has got much worse since the introduction of biometrics on 6 April 2015** which has added an additional stage in the process, with its own further delays. The same problem arises in relation to the right to rent provisions. One ILPA member gives the recent examples of one of their third country national family member clients being threatened with redundancy and another client coming very close to being refused a tenancy due to delays in the processing of EEA applications/returning documents.
- There are still instances of applications for permanent residence submitted by third country national family members being refused, but no residence card issued, where the applicant has not sufficiently evidenced that the EEA national has exercised Treaty rights continuously for five years, but the Home Office does accept that the EEA national is currently exercising Treaty rights. Also, in these cases, the applicant is receiving a refusal notice which states incorrectly that they must leave the UK.

Uncertainty and discrimination on the part of employers and landlords (hiring/retaining and letting)

One further risk following the Brexit vote is that **landlords and employers will start to take an (unlawfully) cautious approach to employing and letting private property to**

[13] https://www.gov.uk/visa-documents-returned

[14] National ID cards are not currently issued by Denmark, Iceland, Norway and the UK

[15] ILPA response to the Office of the Independent Chief Inspector of Borders and Immigration's inspection into the efficiency of effectiveness of the Home Office action against illegal working http://www.ilpa.org.uk/resources.php/30344/ilpa-to-independent-chief-inspector-of-borders-and-immigration-re-inspection-into-illegal-working-14 (see in particular the case studies at Appendix B to the response, from p 7)

EEA nationals/their family members. One member reports that they were recently approached by a Greek national who was fired during her probationary period in a new job, a few days after the vote, and who was convinced that this was purely based on her nationality.

Suggested solutions

ILPA suggests the Government should immediately take practical steps in order to honour its commitment to protect the rights of EEA nationals currently in the UK and to deal efficiently and effectively with the current upsurge in applications, which could include:

- Increasing the availability of EEA(QP) appointments at the Croydon Premium Service Centre and rolling out the service to other Premium Service Centres across the UK (perhaps starting with Liverpool, which is the location for EEA caseworking teams)
- Making Premium Service Centre appointments available for those applying for permanent residence and their family members, particularly those applying on the basis of a continuous period of five years' employment (whose applications will often be more straightforward than others). Premium Service Centres handle various categories of applications for indefinite leave to remain currently, including those based on ten years' long residence in the UK, and permanent residence applications are in practical terms comparable to indefinite leave to remain applications
- Removing the condition for EEA nationals and their family members to hold private comprehensive sickness insurance while in the UK in order to have a right of residence as a self-sufficient person or student
- Removing the need for original ID documents to be submitted with each application. The Home Office should consider accepting certified or notarised copies, or arrange for originals to be seen at a Post Office
- Considering special arrangements for retired EEA nationals, to ease the administrative burden when they apply for permanent residence documents.

Our suggested solutions pertain to the situation at the moment and not to longer term solutions or larger policy decisions about EEA nationals and what their status should be in the future. Our evidence of 7 September 2016 to British Future's inquiry into the status of EU nationals in the UK is available on our website, and sets out in detail our views on the relevant issues that will need to considered in relation to a post-Brexit settlement, as well as our recommendations for the minimum protections that should be guaranteed. We would note that the comprehensive sickness insurance problems, in particular, are going to mean that, for example, spouses and partners of British citizens, with very many years residence, are unlikely to fit neatly into any settlement based solely on those whom the Home Office consider to be exercising Treaty rights.

ILPA reiterates its request for a meeting with the Home Office to discuss these or related points.

Yours sincerely

Adrian Berry
Chair
ILPA

cc David Davis MP, Secretary of State for Exiting the European Union

European case law update September 2016

Secretary of State for the Home Department v Franco Vomero [2016] UKSC 49

Background

The Respondent is an Italian national who has lived in the UK since 1987, when he married a UK national. He had five children with his wife and cared for them. The marriage broke down in 1998.

The Respondent committed a number of criminal offences between 1987 and 1999. In 2001 he was found guilty of manslaughter and was sentenced to eight years' imprisonment. He was released in 2006.

The SSHD made a decision to deport Mr Vomero under the regulations 19(3)(b) and 21 of the Immigration (European Economic Area) Regulations 2006 (articles 27 and 28 of Directive 2004/38/EC).

Mr Vomero's appeal in the IAT was ultimately successful. The SSHD's appeal to the Court of Appeal against the IAT decision was unsuccessful.

The Supreme Court granted permission for the SSHD to appeal but stayed the hearing until the CJEU made decisions on Onuekwere (Case C-378/12) and MG (Case C-400/12).

In Onuekwere, the CJEU confirmed that a period of imprisonment cannot count towards the 5 years' continuous 'lawful' residence necessary to acquire permanent residence. Mr Vomero had therefore not acquired a right of permanent residence when the SSHD made the deportation decision.

Mr Vomero's position is that the technical acquisition of permanent residence is irrelevant, and that he may acquire a right to enhanced protection from expulsion under article 28(3)(a) without 5 years' lawful residence.

Judgment

The majority of the Supreme Court justices favoured Mr Vomero's submission that a right to permanent residence is not necessary for enhanced protection. However, a minority regarded the position as unclear, the alternative position being that the protections found in article 28 are progressive.

The Supreme Court referred the following question to the CJEU:

(1) Whether enhanced protection under article 28(3)(a) depends upon the possession of a right of permanent residence within article 16 and article 28(2) of the Directive.

If the answer to this question is no, the Supreme Court refers two further questions:

(2) Whether the period of residence for the previous ten years, to which article 28(3)(a) refers, is
    (a) A simple calendar period looking back from the relevant date (here that of the decision to deport), including in it any periods of absence or imprisonment,
    (b) A potentially non-continuous period, derived by looking back from the relevant date and adding together period(s) when the relevant person was not absent or in prison, to arrive, if possible, at a total of ten years' previous residence.

(3) What the true relationship is between the ten-year residence test to which article 28(3)(a) refers and the overall assessment of an integrative link.

MS v Secretary of State for Work and Pensions (IS) (Residence and presence conditions: right to reside) [2016] UKUT 348 (AAC) (21 July 2016)

Background

The Claimant is a Polish national born on 5 August 1994. Her brother, who lived in the UK, was appointed her legal guardian by a court order in Poland dated 20 May 2008. The Claimant came to the UK on 1 June 2008 to join him.

On 24 June 2015 the Claimant made a claim for income support on the basis she was under 21 and had the care of her child who was born on 24 March 2015. The SSWP refused the claim on 17 July 2015 on the basis that the Claimant did not have a right to reside in the UK.

The FtT dismissed the Claimant's appeal.

Judgment

It was accepted that the Claimant's guardian was a worker and therefore both he and his 'direct descendants' had a right to reside in the UK.

The UT found, however, that the Claimant was not a 'direct descendant' of her brother. A guardianship order did not extinguish the prior relationship the Claimant held with her parents, but conferred rights and responsibilities.

The court left open the question of whether the Claimant could be an 'other family member' under article 3(2)(a).

R (X) v SSHD [2016] EWHC 1997 (Admin)

Background

The Claimant was a Romanian national born in 1968. He was sentenced in Romania in 2004 to 12 years' imprisonment for a murder committed in December 1989, but was released in 2008 on conditions. He left Romania in 2009 and came to the UK as a student.

The SSHD made a deportation decision and detained the Claimant. The Claimant lodged an appeal against this decision on 6 May 2015 and he was granted bail on 21 July 2015. The appeal was allowed in January 2016. The SSHD's application for permission to appeal was refused by both the FtT and the UT.

The Claimant sought an interim order to prevent his removal from the UK prior to the hearing of his appeal. A stay on removal was granted by Ouseley J on 14 May 2015.

On the same day, the Claimant issued a judicial review challenging his detention on the following three bases:

(1) His detention, apparently under regulation 24(1) of the EEA Regulations, infringed the principles of EU law and domestic law,
(2) There was a real risk of serious irreversible harm if the Claimant were to be removed to Romania, notwithstanding the SSHD's certification that his deportation would not be unlawful,
(3) The SSHD's certification policy and practice were unlawful as contrary to EU law.

The Claimant sought an order quashing the certification decision of 23 April 2015, a declaration that he had been unlawfully detained since 23 March 2015 and damages, including aggravated damages.

On 18 June 2015 Philippa Whipple QC granted permission on the papers and directed expedition. She granted interim relief to the same effect of the order of Ouseley J, but did not order the Claimant's release from detention, holding that the existence of the FtT appeal was relevant to detention which was a matter separate from the JR.

Judgment

The court held that the SSHD had failed to apply 'anxious scrutiny' in her certification decision, and in particular the issues the Respondent might face in Romania. He is a recovering alcoholic, suffered from depression, anxiety and ARBI giving rise to impairment of his cognitive ability, and had been homeless in Romania. His strong community ties here had been overwhelmingly beneficial to him.

Although there had been a power to detain the Claimant on 24 March 2015 under regulation 24(1), there was no rational basis for concluding that detention was justified by risk of re-offending or risk of absconsion. The only reason given by the SSHD was that he had been convicted of murder and sentenced to 12 years' imprisonment, and that fact of itself did not offer justification that there was a real risk of absconsion. The SSHD's conclusion on risk of absconsion was that he did not have close enough ties to make it likely he would stay in one place. However, there was nothing identified which justified this assumption.

After the deportation order was made on 23 April 2015, the power to detain the Claimant changed to that under regulation 24(3). Again, it remained the case that there was no reasonable basis for a conclusion that risks of re-offending and absconding which would justify detention.

The court concluded that the policy in force in April 2015 concerning the exercise of power under regulation 24AA was unlawful (with consideration given to the Court of Appeal's decision in *R (on the application of Kiarie) v Secretary of State for the Home Department; R (on the application of Byndloss) v Secretary of State for the Home Department* [2015] EWCA Civ 1020), that the certification by the Home Secretary under that regulation was unlawful, and that X's detention during the period 23 March to 23 July 2015 inclusive constituted an unlawful detention for which the Home Office is responsible.

R (Benjamin) v SSHD [2016] EWHC 1626 (Admin)

Background

The Claimants sought JR of the SSHD's refusal to issue an EEA family permit to enable Mrs Benjamin to enter and reside in the UK with her husband and their children. Mr Benjamin and the children are British citizens, but Mrs Benjamin is a Kenyan national. The family had previously been living in France.

The Claimants' position is that Mr Benjamin had been exercising free movement rights in France and was continuing to do so in moving back to the UK.

The Defendant, having initially refused the application due to lack of evidence of Mr Benjamin exercising Treaty rights in France, ultimately issued the family permit on 17 July 2014 after a review.

However, the Claimants sought quashing orders, declarations of unlawfulness and damages for breaches of EU law for refusing Mrs Benjamin an EEA family permit on 15 November 2013 and to refuse her entry clearance at Calais on 15 and 27 December 2013.

Judgment

Ground 1: Surinder Singh and regulation 9 of the 2006 regulations

The onus rested on the Claimants to establish they were entitled to exercise a *Surinder Singh* right of residence and they had not provided sufficient evidence to do so. The court concluded it was not unlawful for the SSHD to refuse the application.

Ground 2: McCarthy v SSHD and the requirement for a visa

This ground was related to the refusal to allow Mrs Benjamin to enter the UK on 15 and 27 December 2013: the Claimants' case was that it was unlawful to require Mrs Benjamin to obtain a visa or establish she was exercising EU freedom of movement rights.

However, the court held that while McCarthy establishes that it is unlawful for the Defendant to insist on the possession of an EEA family permit by a family member of a UK citizen seeking to enter the UK, where that family member holds a valid residence card under Article 10 of the Directive, it remains lawful for the Defendant to determine, before granting entry, whether the family member in question in fact fulfils the conditions for entry provided by EU law.

Ground 3: delay

This ground related to the 10 hour decision-making process of 27 December 2013, after which Mrs Benjamin was refused entry to the UK. The immigration officers had been faced with a complex *Surinder Singh* claim and had conducted a detailed and comprehensive interview with the Claimants as well as considering all the evidence. The time taken was not unreasonable or unlawful.

R (Shehu) v SSHD (Citizens Directive: no suspensive appeals) IJR [2016] UKUT 287 (IAC)

Background

The Claimant was an Albanian citizen born on 27 May 1995. The SSHD made removal directions against him on 7 July 2015. The Claimant challenged those removal directions being maintained whilst he had an appeal pending against the refusal of an EEA residence card.

The removal directions had initially been made on the basis that the Claimant was an overstayer, before refusing his residence card application on the basis the SSHD was not satisfied he was in a 'durable relationship' with an EEA citizen or that the EEA citizen was a qualified person.

Although the EEA decision was appealable, the question was whether the appeal had suspensive effect. The Claimants submitted that the Court of Appeal's judgment in *Ahmed* [2016] EWCA Civ 303 (upholding *Bilal Ahmed* (EEA/s 10 appeal rights: effect (IJR) [2015] UKUT 436 (IAC)) ought to be treated as *per incuriam* as it did not have the full text of article 31 before it.

Judgment

The UT found that it was proposed to remove the Claimant under the general power to remove persons without leave. The required redress procedure not make it necessary to treat EEA appeals as suspensive, as under article 31(4) arrangements could be made for allowing the Claimant to submit his defence in person.

R (Ait-Rabah) v SSHD [2016] EWHC 1099 (Admin)

Background

The Applicant, Mr Aziz Ait-Rabah, was an Algerian citizen born in June 1988. His partner, Ms Veronika Marcincinova is a Slovakian citizen born in May 1990. The couple got to know each other over the internet and first met in person on 3 February 2015.

Ms Marcincinova came to the UK in June 2015 and initially resided in Feltham, West London with the Applicant's cousin.

The Applicant applied for and was granted a 6 month visit visa on 27 September 2015. He used that visa between that date and January 2016. On 11 January 2016 he returned to the UK, on that occasion with Ms Marcincinova. He entered relying on his visitor visa.

Later in January the couple gave notice of their intention to marry at Hillingdon Registry Office. The Registrar referred the marriage to the SSHD who decided to investigate it.

On 10 March 2016 the Claimant and Ms Marcincinova were interviewed by the SSHD. Immediately afterwards, Mr Ait-Rabah was served with a notice of immigration decision indicating his leave to enter had been revoked. He was immediately detained and had been so ever since.

The Claimant challenged the decision to revoke his leave to enter and to declare him an illegal entrant on the following four bases:

1. The Claimant did not enter the UK by deception and his detention since 10 March has been unlawful,
2. The decision-making process was flawed by procedural impropriety, as the interview was conducted in breach of Home Office policy, was not conducted under caution and the decision to detain was insufficiently reasoned,
3. The Claimant had made an application for a residence card as an unmarried partner of an EEA national on 9 March 2016 and the decision to detain could not lawfully be made without proper consideration of that application,
4. The Claimant's detention was in breach of Article 5 ECHR: it was arbitrary, not carried out in good faith, he had not been properly informed of the reasons for his detention and he had not been able to challenge the lawfulness of it 'speedily'.

In response, the SSHD submitted:

- The Claimant had provided information in his interview sufficient to demonstrate his entry had been secured by deception, and that in any case it is plain he was not entering the UK as a visitor on 11 January but in order to marry Ms Marcincinova,
- The procedure was not flawed: it was not a criminal arrest and therefore PACE 1984 does not apply,
- Detention was lawful because there was no reason to doubt the SSHD would be able to remove the Claimant within a reasonable period',
- Although there is an outstanding application the relationship was neither genuine nor durable, but what was contemplated was a marriage of convenience,
- There is a significant factual dispute about the conduct of the marriage interview, but regardless, it remains open to the Claimant to bring a claim for misfeasance in public office. Further, the conduct of the interview did not impact on the ultimate decision to detain which was made by a different officer,

- Article 5 adds nothing to the common law argument.

Judgment

The court held that it was clear that the Claimant's real intention was to make his home in the UK when he arrived in Luton airport. Had he given an honest answer to the question 'how long are you going to stay in the UK' his entry would have been refused. The SSHD was correct in the conclusion that he had obtained entry by deception.

Further, although the couple had been asked about their sexual relationship (in contravention of the Home Office guidance), this question was arguably pertinent. Even if the interviewing officer had been rude, sneering and aggressive, the decision to detain was not made by the interviewing officer.

The court held that it is not clear whether a caution was required but even if it was not, it does not invalidate the decision. If a caution were required and not given, the answers given in the interview would have to be examined with care rather than disregarded. There is no dispute that the answers were accurate.

The decisions to revoke leave identified the proper powers and grounds for detention, despite drafting errors.

Although the outstanding application has not yet been determined, the absence of a decision on that application does not invalidate the decision under challenge.

Finally, the court held that the Article 5 argument added nothing to the challenge under domestic law.

Catherine Jaquiss
Chambers of CJ Algar
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Update: EU Immigration and Asylum Law:
5 September 2016

Steve Peers, University of Essex

[developments since March update in ***bold/italics/underline***]

1. Asylum

Adopted measures (UK opt in to all except 11 and 14-15; Ireland opt in to all except 4, 11 and 14-15).

1. Decision 2000/596/EC on European refugee fund (OJ 2000 L 252/12)
2. Regulation 2725/2000 on Eurodac (OJ 2000 L 316/1)
3. Directive 2001/55 on temporary protection (OJ 2001 L 212/12)
Regulation 407/2002 implementing Eurodac Regulation (OJ 2002 L 62/1)
4. Directive 2003/9 on reception conditions (OJ 2003 L 31/18)
5. Dublin II Regulation 343/2003 (OJ 2003 L 50/1)
Commission Reg. 1560/2003 implementing Dublin II (OJ 2003 L 222/3)
6. Directive 2004/83 on refugee/subsid. protection qualification (OJ 2004 L 304/12)
7. Decision on second European Refugee Fund (OJ 2004 L 2004 L 252/12)
8. Directive 2005/85 on asylum procedures (OJ 2005 L 326/13)
9. Eur. Refugee Fund (OJ 2007 L 144/1) – amended OJ 2010 L 129/1, OJ 2012 L 92/1
10. Reg 439/2010 on European Asylum Support Office (OJ 2010 L 132/11)
11. Revised qualification Directive 2011/95 (OJ 2011 L 337/9) – deadline Dec. 2013
12. Reg. 603/2013: revised Eurodac Reg (OJ 2013 L 180/1) – deadline July 2015
13. Reg. 604/2013: revised Dublin Reg (OJ 2013 L 180/31) – applied from 1 Jan. 2014
14. Revised procedures Directive 2013/32 (OJ 2013 L 180/60) – deadline July 2015
15. Revised reception Directive 2013/33 (OJ 2013 L 180/96) – deadline July 2015
16. Asylum and migration fund – general rules (OJ 2014 L 150/112)
17. Asylum and migration fund (OJ 2014 L 150/168)
18. Decision on relocation of asylum-seekers (OJ 2015 L 239/146)
19. Decision on relocation of asylum-seekers (OJ 2015 L 248/80)

Proposed measures

1. Amendment to Dublin III on unaccompanied minors: COM (2014) 382, 26 June 2014; Council and EP negotiating
2. Regulation amending Dublin III Regulation re relocation of asylum-seekers (COM (2015) 450, 9 Sep 2015)
3. Regulation on common list of 'safe countries of origin' (COM (2015) 452, 9 Sep 2015): ***EP has adopted position***
4. Regulation creating EU Asylum Agency (COM (2016) 271, 4 May 2016)
5. Regulation recasting Eurodac Regulation (COM (2016) 272, 4 May 2016)
6. Regulation replacing Dublin III Regulation (COM (2016) 270, 4 May 2016)
7. Regulation on resettlement (COM (2016) 468, 13 July 2016)
8. Regulation on procedures (COM (2016) 467, 13 July 2016)
9. Regulation replacing qualification Directive (COM (2016) 466, 13 July 2016)
10. Directive recasting reception conditions Directive (COM (2016) 465, 13 July 2016)

Comment: The Commission has proposed a complete overhaul of EU asylum law to implement the principles in the EU/Turkey refugee deal and to harmonise law nearly fully across the EU. Discussion has only just started in the Council and EP.

2. Legal Migration

Adopted measures

1. Reg. 1030/2002 on residence permit format (OJ 2002 L 157/1) *[UK opt in]*
- amended by Reg. 330/2008 (OJ 2008 L 115/1)
2. Reg. 859/2003 on 3rd-country nationals' social security (OJ 2003 L 124/1) *[UK, Ir opt in]*
3. Directive 2003/86 on family reunion (OJ 2003 L 251/12)
- challenge to validity of parts of the Directive decided in favour of the Council (Case C-540/03 *EP* v *Council* [2006] ECR I-5769)
4. Long-term residents Directive 2003/109 (OJ 2004 L 16/44)
5. Directive 2004/114 on migration of third-country students, pupils, trainees & volunteers (OJ 2004 L 375/12)
6. Directive 2005/71 on admission of researchers (OJ 2005 L 289/15)
7. Recommendation on admission of researchers (OJ 2005 L 289/26)
8. Decision on asylum and immigration information exchange (OJ 2006 L 283/40) *[UK, Ire opt in]*
9. Decision on European integration Fund (OJ 2007 L 168/18) *[UK, Ire opt in]*
10. Directive 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment ('Blue Card' directive) (OJ 2009 L 155/17)
11. Reg. 1231/2010 extending Reg. 883/2004 on social security for EU citizens to third-country nationals who move within the EU (OJ 2010 L 344/1) – *[Ire opt-in]*
12. Directive 2011/55 on long-term resident status for refugees and persons with subsidiary protection: OJ 2011 L 132/1
13. Directive 2011/98 on single permit and common set of rights for workers (OJ 2011 L 343/1)
14. Directive 2014/36 on admission of seasonal workers (OJ 2014 L 94/375) – deadline 30 Sep. 2016
15. Directive 2014/66 on admission of intra-corporate transferees (OJ 2014 L 157/1) – deadline 29 Nov. 2016
16. Directive 2016/801 on admission of students, researchers and others (OJ 2016 L 132/21) – deadline 23 May 2018

Proposed measures

1. Directive replacing Blue Card Directive (COM (2016) 378, 7 June 2016)
2. Regulation amending residence permit format Regulation (COM (2016) 434, 30 June 2016)

3. Borders and Visas

Adopted measures [UK & Ire have opted out of all measures except UK opt in to 1, 3]

1. Reg. 1683/95 on common visa format (OJ 1995 L 164/1)
- amended by Reg. 334/2002 (OJ 2002 L 53/7)
- amended by Reg. 856/2008, OJ 2008 L 235/1
2. Reg. 539/2001 establishing visa list (OJ 2001 L 81/1)
- amended by Reg. 2414/2001 moving Romania to 'white list' (OJ 2001 L 327/1)
- amended by Reg. 453/2003 moving Ecuador to 'black list' (OJ 2003 L 69/10)
- amended by Reg. 851/2005 on reciprocity for visas (OJ 2005 L 141/3)
- amended by Reg. 1932/2006 (OJ 2006 L 405/23)
- amended by Reg 1244/2009 lifting visa requirement for some Western Balkan countries (OJ 2009 L 336/1)
- amended by Reg 1091/2010 lifting visa requirement for other Western Balkan countries (OJ 2010 L 329/1)
- amended by Reg 1211/2010 lifting visa requirement for Taiwan (OJ 2010 L 339/6)
- amended by Reg 1289/2013 (OJ 2013 L 347/74)
- amended by Reg. 259/2014, OJ 2014 L 105/9, lifting visa requirement for Moldova
- amended by Reg. 509/2014, OJ 2014 L 149/67
3. Reg. 333/2002 on visa stickers for persons coming from unrecognised entities (OJ 2002 L 53/4)
4. Reg. 693/2003 on FTD and FRTD (OJ 2003 L 99/8)
5. Reg. 694/2003 on format for FTD and FRTD (OJ 2003 L 99/15)
6. Decision establishing Visa Information System (VIS) (OJ 2004 L 213/5)
7. Reg. 2007/2004 establishing External Borders Agency (OJ 2004 L 349/1)
- amended by Reg. 863/2007 on border guard teams (OJ 2007 L 199/30)
- amended by Reg. 1168/2011, adopted Oct. 2011 (OJ 2011 L 304/1)
8. Reg. 2252/2004 on biometric passports (OJ 2004 L 385/1)
- amended by Reg. 444/2009 on biometric passports (OJ 2009 L 142/1)
9. Recommendation on visa issuing for researchers (OJ 2005 L 289/23)
10. Reg. 562/2006, borders code: OJ 2006 L 105/1
- amended by Reg. 296/2008, OJ 2008 L 97/60
- amended by Reg. 81/2009, regarding use of the VIS (OJ 2009 L 35/56)
- amended by Reg. 610/2013 (OJ 2013 L 182/1)
- amended by Reg. 1051/2013 (OJ 2013 L 295/1)
11. Two decisions on transit through new Member States, Switzerland (OJ 2006 L 167) - see implementation information, OJ 2006 C 251/20
12. Reg 1931/2006 on local border traffic at external borders (OJ 2006 L 405/1)
- amended by Reg. 1342/2011 (OJ 2011 L 347/41)
13. Decision establishing European Borders Fund (OJ 2007 L 144)
14. Decisions on transit through Romania, Bulgaria, Switzerland (OJ 2008 L 161/30 and L 162/27)
15. Reg. 767/2008 establishing Visa Information System (OJ 2008 L 218/60); third-pillar VIS Decision (OJ 2008 L 218/129)
16. Reg. 810/2009 on visa code (OJ 2009 L 243/1)
- amended by Reg. 154/2012 (OJ 2012 L 58/3)
17. Reg. 265/2010 on long-stay visas code (OJ 2010 L 85/1)
18. Reg. 1077/2011 establishing agency to manage VIS, SIS and Eurodac (OJ 2011 L 286/1)
19. Decision on travel documents (OJ 2011 L 287/9)
20. Reg.1053/2013 on Schengen evaluation (OJ 2013 L 295/27)
21. Reg.1052/2013 establishing Eurosur (OJ 2013 L 295/11)
22. Regulation 656/2014 on maritime surveillance operations (OJ 2014 L 189/93)

23. Decision on transit as regards Croatia and Cyprus (OJ 2014 L 157/23)
24. Borders and visa fund (OJ 2014 L 150/143)
25. Regulation 2016/399 codifying Schengen Borders Code ***(OJ 2016 L 77/1)***

Proposed measures [UK, Ire opt out of all]

1. Regulation establishing entry-exit system (COM (2013) 95, 27 Feb. 2013), ***revised (COM (2016) 194, 6 April 2016)*** – under discussion in Council

2. Regulation amending borders code re: entry-exit system (COM (2013) 96, 27 Feb. 2013), ***revised (COM (2016) 196, April 2016)*** - under discussion in Council

3. Regulation recasting visa code, March 2014 (COM (2014) 164, 1 April 2014) - ***Council and EP negotiating***

4. Regulation establishing touring visa, March 2014 (COM (2014) 163, 1 April 2014) - under discussion in Council and EP

5. Regulation amending Schengen Borders Code (COM (2015) 670, 15 Dec 2015) – ***Council and EP negotiating***

6. Regulation creating new Borders and Coast Guard Agency (COM (2015) 668, 15 Dec 2015) – ***agreed, to be adopted Sep 2016***

7.Reg amending visa list Reg to waive visas for Georgia (COM (2016) 142, 9 Mar 2016)

8. Reg amending visa list Reg to waive visas for Ukraine (COM (2016) 236, 20 April 2016)

9. Reg amending visa list Reg as regards safeguard clause (COM (2016) 290, 4 May 2016)

10.Reg amending visa list Reg to waive visas for Kosovo (COM (2016) 279, 4 May 2016)

11. Reg amending visa list Reg to waive visas for Turkey (COM (2016) 277, 4 May 2016)

Comments: The Schengen Borders Code will soon have new rules on checking everyone who crosses the external border in databases. The new agency replacing Frontex will be operational shortly. The next big issue is the revised 'smart borders' proposals, which are being fast-tracked (1-3 above). The proposals to drop visa requirements are controversial in the Council (and the EP, as regards Turkey); the Council and EP are already discussing the revised safeguard clause proposal, which should facilitate agreement on most of these.

4. Irregular Migration

Adopted measures [UK opt-in to all except 7, 12, 13, 17, 20, 21]

1. Dir. 2001/40 on mutual recognition of expulsion decisions (OJ 2001 L 149/34)

2. Directive 2001/51 on carrier sanctions (OJ 2001 L 187/45); implement 11.2.03
3. Regulation 2424/2001 on funding SIS II (OJ 2001 L 328/4)
4. Decision 2001/886/JHA on funding SIS II (OJ 2001 L 328/1)
5. Framework Decision on trafficking in persons (OJ 2002 L 203/1)
6. Directive & Framework Decision on facilitation of illegal entry and residence (OJ 2002 L 328)
7. Directive 2003/110 on transit for expulsion by air (OJ 2003 L 321/26)
8. Conclusions on transit via land for expulsion—adopted 22 Dec. 2003 by Council
9. Reg. 378/2004 on procedure for amendments to Sirene manual: (OJ 2004 L 64)
10. Reg. 377/2004 on ILO network (OJ 2004 L 64/1)
11. Decision on costs of expulsion (OJ 2004 L 60/55)
12. Dir. 2004/81 on res. permits for trafficking victims (OJ 2004 L 261/19)
13. Reg. 871/2004 on new functionalities for SIS (OJ 2004 L 162/29)
14. Directive 2004/82 on transmission of passenger data (OJ 2004 L 261/64)
15. Decision on joint flights for expulsion (OJ 2004 L 261/28)
16. Decision on early warning system (OJ 2005 L 83/48)
17. Regulation 1987/2006 establishing SIS II (OJ 2006 L 381/4)
18. Regulation 1988/2006 on SIS II, amending Reg. 2424/2001 (OJ 2006 L 411/1)
19. Decision on European return programme **(**OJ 2007 L 144**)**
20. Directive 2008/115 (Returns Directive) (OJ 2008 L 348/98)
21. Directive 2009/52 on sanctions for employers of irregular migrants (OJ 2009 L 168/24)
22. Reg. 493/2011 amending Regulation on immigration liaison officers (OJ 2011 L 141/13)
23. Directive 2011/36 on trafficking in persons (OJ 2011 L 101/1)

5. External treaties

Readmission

- Hong Kong *[UK opt in]* (OJ 2004 L 17/23): in force 1.3.04 (OJ 2004 L 64/38)
- Macao - *[UK opt in]* (OJ 2004 L 143/97); in force 1.6.2004
- Sri Lanka *[UK opt in]* (OJ 2005 L 124/43); in force 1.5.2005
- Albania – *[UK opt in]* (OJ 2005 L 124); in force 1.5.2006
- Russia – *[UK opt in]* OJ 2007 L 129 – in force 1.6. 2007
- Ukraine, Serbia, Montenegro, Bosnia, Macedonia and Moldova – *[UK opt in]* OJ 2007 L 332 and 334 – in force 1 Jan. 2008
- Pakistan – concluded, Sep 2010 (OJ 2010 L 287/50) – in force 1 Dec. 2010
- Georgia (OJ 2011 L 52) – in force 1 March 2011
- negotiations approved with Morocco, Algeria, Turkey and China – agreed with Turkey, Jan. 2011; agreement with Turkey signed, June 2012 (COM (2012) 239); in force 1 Oct. 2014
- Turkey extended readmission treaty to third-country nationals in June 2016
- agreement with Cape Verde (OJ 2013 L 281) – concluded Oct. 2013; in force 1 Dec. 2014
- treaty with Armenia concluded, Oct. 2013 (OJ 2013 L 289) – in force 1 Jan. 2014
- treaty with Azerbaijan signed, Nov. 2013; in force 1 Sept. 2014
- Council approved mandate to negotiate with Belarus, Feb. 2011

Other external treaties

- EC/Norway/Iceland re: Dublin Convention: in force 1 March 2001; Protocol in force 1.5.06

- EC/Swiss free movement of persons: concluded 28.2.02 (OJ 2002 L 114); into force 1.6.02
- EC & Switzerland re Schengen, Dublin: applied from Dec. 2008
- 'Approved Destination Status' treaty with China: (OJ 2004 L 83/12); in force 1.5.2004
- Dublin II treaty with Denmark: in force, 1 April 2006 (OJ 2006 L 66/38)
- visa facilitation agreement with Russia: in force 1.6.2007 (OJ 2007 L 129)
- visa facilitation agreements with Ukraine, Serbia, Montenegro, Bosnia, Macedonia, Albania and Moldova: OJ 2007 L 332 and 334 – in force 1 Jan. 2008
- visa facilitation agreement with Georgia: concluded, Jan. 2011
- visa facilitation agreement with Cape Verde (OJ 2013 L 281) – in force 1 Dec. 2014
- visa abolition treaties agreed with six micro-states (Mauritius, Antigua/Barbuda, Barbados, Seychelles, St. Kitts and Nevis and Bahamas): proposals to sign and conclude treaties - COM (2009) 48, 49, 50, 52, 53 and 55, 12 Feb. 2009 – treaties signed and provisionally in force, May 2009, concluded Nov. 2009
- two visa waiver treaties with Brazil agreed – in force 2011 and 2012
- Council mandate to renegotiate visa facilitation treaties with Russia, Ukraine, Moldova, April 2011; new treaties with Ukraine and Moldova in force 1 July 2013
- treaty with Armenia concluded, Oct. 2013 (OJ 2013 L 289) – in force 1 Jan. 2014
- treaty with Azerbaijan signed, Nov. 2013; in force 1 Sept. 2014
- Council mandate to negotiate visa facilitation treaty with Belarus, Feb. 2011
- proposal to negotiate with Morocco – approved by Council, Dec. 2013

Case Law Update: EU Immigration and Asylum Law
5 September 2016

Steve Peers, University of Essex

Asylum

Decided references from national courts:

Dublin II and III

Case C-19/08 *Petrosian* - 29 Jan. 2009
Cases C-411/10 & C-493/10 *NS and ME* - judgment 21 Dec. 2011
Case C-620/10 *Kastrati* - Swedish reference - judgment 3 May 2012
Case C-245/11 *K* - reference from Austrian court - judgment 6 Nov. 2012
Case C-528/11 *Halaf* – judgment 30 May 2013
Case C-648/11 *MA* - judgment 6 June 2013
Case C-4/11 *Puid* - judgment 14 Nov. 2013
Case C-394/12 *Abdullahi* – judgment 10 Dec. 2013
Case C-695/15 PPU Mirza - judgment 17 Mar 2016
Case C-63/15 Ghezelbash - judgment 7 June 2016
Case C-155/15 Karim - judgment 7 June 2016

Qualification Directive

Case C-465/07 *Elgafaji* - 17 Feb. 2009
Cases C-175/08 to C-179/08 *Abdulla and others* – cessation: judgment 2 March 2010
Case C-31/09 *Bolbol* – exclusion of Palestinians – judgment 17 June 2010
Cases C-57/09 and C-101/09 *B and D* – exclusion – judgment 9 Nov. 2010
Joined Cases C-71/11 *Y* and C-99/11 *Z* - religious persecution – judgment 5 Sep. 2012
Case C-277/11 *MM* – procedural rights - judgment 22 Nov. 2012
Case C-364/11 *El Kott* – exclusion of Palestinians - judgment 19 Dec. 2012
Cases C-199/12 to C-201/12 *X, Y and Z* - judgment 7 Nov. 2013
Case C-285/12 *Diakite* – subsidiary protection – judgment 30 Jan. 2014
Case C-604/12 *HN* - subsidiary protection - judgment 8 May 2014
Case C-481/13 *Qurbani* – Article 31 Refugee Convention - judgment 17 July 2014
Cases C-148/13 to C-150/13 *A, B and C* **-** judgment 2 Dec. 2014
Case C-542/13 *M'Bodj* **-** judgment 18 Dec. 2014
Case C-562/13 *Abdida* **-** judgment 18 Dec. 2014
Case C-472/13 *Shepherd* - judgment 26 Feb 2015
Case C-373/13 *T* - judgment 24 June 2015
Cases C-443/14 to C-445/14, *Alo and others* - judgment 1 March 2016

Asylum procedures

Case C-69/10 *Samba Diouf* - judgment 28 July 2011
Case C-175/11 *H.I.D.* – judgment 31 Jan. 2013
Case C-239/14 *Tall* - judgment 17 Dec 2015

Reception conditions

Case C-179/11 *CIMADE and GISTI* - judgment 27 Sep. 2012
Case C-79/13 *Saciri and others* - judgment 27 Feb. 2014
Case C-601/15 PPU *J.N.* – judgment 15 Feb 2016

Pending cases:

Case C-560/14, *MM, reference* from Irish court; ***opinion 3 May 2016***
Case C-573/14, *Lounani*, reference from Belgian court on qualification Directive; ***opinion 31 May 2016***
Case C-429/15 *Danqua*, reference on qualification Directive; ***opinion 29 June 2016***
Case C-528/15 *Al Chodor*, reference on Dublin III Regulation; ***hearing 14 July 2016***
Case C-643/15 *Slovakia v Council*, challenge to relocation Decision
Case C-647/15 *Hungary v Council*, challenge to relocation Decision
Case C-18/16 *K*, reference on reception conditions Directive from Dutch court
Case C-60/16 Khir Amayry, reference on Dublin III Reg from Swedish court
Case C-212/16 Shiri, reference on Dublin III Reg
Case C-348/16 Sacko, various asylum law
Case C-353/16 MP, reference on qualification Directive
Case C-360/16 Hasan, reference on Dublin III Reg
Case C-391/16 M, reference on qualification Directive

Legal migration

Decided references from national courts:

Case C-578/08 *Chakroun* - family reunion Directive – judgment 4 March 2010
Case C-247/09 *Xhymshiti* - social security - judgment 18 Nov. 2010
Case C-508/10 *Commission v Netherlands* - long-term residents' - judgment 26 April 2012
Case C-571/10 *Kamberaj* - long-term residents' directive - judgment 24 April 2012
Case C-15/11 *Sommer* – students' Directive - judgment 21 June 2012
Case C-502/10 *Singh* - long-term residents' directive - judgment 18 Oct. 2012
Case C-138/13 *Dogan* - family reunion directive; judgment 10 July 2014
Case C-338/13 *Noorzai* - family reunion Directive; judgment 17 July 2014
Case C-469/13 *Tahir* - long-term residents Directive - judgment 17 July 2014
Case C-491/13 *Ben Alaya* - students' directive; judgment 11 Sep. 2014
Case C-579/13 *P and S* - long-term residents' directive; judgment 4 June 2015
Case C-153/14 *K and A* - family reunion Directive; judgment 9 July 2015
Case C-309/14, *CGIL and IMCA* - long-term residents' Directive; judgment 2 Sep 2015
Case C-558/14, Khachab - family reunion directive - judgment 21 April 2016

Pending cases:

Case C-465/14, *Wieland and H. Rothwangl* - social security Regulation; opinion Feb 2016
Case C-544/15 *Fahimian*, reference on students' Directive; ***hearing Sep. 2016***
Visas/Borders

Decided annulment actions:

C-257/01 *Commission* v *Council* (challenge to Regs. 789/2001 and 790/2001), judgment of 18 Jan. 2005, upholding validity of Regs.
Cases C-77/05 and C-137/05 *UK* v *Council* (validity of Border Agency Regulation and passport Regulation); judgment against UK, 18 Dec 2007
Case C-482/08 *UK v Council* (annulment of decision on police access to VIS, due to UK non-participation); judgment against UK, 26 Oct. 2010
Case C-355/10 *EP v Council* (annulment of measure implementing Borders Code) - judgment 5 Sep. 2012
Case C-88/14 *Commission v EP & Council* – validity of visa list – judgment July 2015
Case C-44/14 *Spain v EP & Council* – validity of Eurosur Reg – judgment 8 Sep 2015

Decided national court references:

Case C-241/05 *Bot* - freedom to travel - judgment 4 Oct. 2006
Case C-139/08 *Kqiku* - transit legislation - judgment 2 April 2009
Cases C-261/08 *Zurita Garcia* and C-348/08 *Choque Cabrera* - Borders Code - judgment 22 Oct 2009
Cases C-188/10 and C-189/10 *Melki and Abdeli* - internal borders - judgment 22 June 2010
Case C-430/10 *Gaydarov* - Borders Code – judgment 17 Nov. 2011
Case C-83/12 *Vo* - visa code - judgment 10 April 2012
Case C-606/10 *Association Nationale d'Assistance aux Frontières pour les Etrangers* - Borders Code – judgment 14 June 2012
Case C-278/12 PPU *Adil* - Borders Code - judgment 19 July 2012
Case C-23/12 *Zakaria* – Borders Code – judgment 17 Jan. 2013
Case C-254/11 *Shomodi* - border traffic Regulation - judgment 21 March 2013
Case C-291/12 *Schwarz* - validity of passports Regulation; judgment 17 Oct. 2013
Case C-84/12 *Koushkaki* - visa code - judgment 19 Dec. 2013
Case C-139/13 *Commission v Belgium* - breach of passports Reg; judgment 13 Feb. 2014
Case C-575/12 *Air Baltic* - borders code, visa code; judgment 4 Sep. 2014
Case C-101/13 *U* - passports Regulation; judgment Nov. 2014
Cases C-446/12 to C-449/12 *Willems and others* - passports regulation; judgment 16 April 2015

Pending cases:

Case C-9/16 *A*, reference on Schengen Borders Code
Case C-17/16 *El Dakkak*, reference on Schengen Borders Code
Case C-346/16 C, reference on Schengen borders code
Case C-403/16 El-Hassani, reference on visa code

Irregular migration

Decided cases (all concern Returns Directive):

Case C-357/09 PPU *Kadzoev*, judgment 30 Nov 2009
Case C-61/11 PPU *El Dridl Hassen* - judgment 28 April 2011
Case C-329/11 *Achughbabian* - judgment 6 Dec. 2011
Case C-430/11 *Sagor* - judgment 6 Dec. 2012
Case C-522/11 *Mbaye* - order 21 Mar. 2013
Case C-534/11 *Arslan* - judgment 30 May 2013
Case C-383/13 PPU *G and R* - judgment 10 Sep. 2013
Case C-297/12 *Filev & Osmani* - (entry bans) – judgment 19 Sep. 2013
Case C-146/14 PPU *Mahdi*; judgment 5 June 2014
Case C-189/13 *Da Silva*; judgment July 2014
Case C-473/13 *Bero*; judgment 17 July 2014
Case C-474/13 *Pham*; judgment 17 July 2014
Case C-514/13 *Bouzalmate*; judgment 17 July 2014
Case C-166/13 *Mukarubega;* judgment 5 Nov. 2014
Case C-249/13 *Boujlida*; judgment 11 Dec. 2014
Case C-38/14 *Zaizoune*; judgment 23 April 2015
Case C-554/13 *Zh and O*; judgment 11 June 2015
Case C-290/14 *Celaj*; judgment 1 Oct 2015
Case C-47/15 Affum - judgment 7 June 2016

Pending (all concern Returns Directive):

Case C-82/16 K, reference from Belgian court
Case C-181/16 Gnandi, reference from Belgian court
Case C-184/16 Petrea
Case C-199/16 Nianga, reference from Belgian court
Case C-225/16 Ouhrami

Comments: The CJEU has expanded asylum-seekers' right to challenge the application of the Dublin rules. Key pending cases concern detailed aspects of the Returns Directive and a number of important asylum law points.