ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

ILPA Response to the Independent Chief Inspector of Borders and Immigration for the inspection on learning from litigation

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 nongovernmental organisations. ILPA provides this written information further to an oral briefing for the inspection team. We are happy to provide further information on request.

We understand that the inspection will examine how efficiently and effectively the Home Office uses outcomes and lessons learned from litigation against its decisions and that it will focus on how those outcomes and lessons learned are developed, disseminated, and used to drive improvement and learning. We further understand that the inspection will concentrate on the areas of judicial review and private law claims.

These are matters which have been of concern to ILPA for a very long time and indeed more broadly than in the areas of judicial review and private law claims. They are not only matters of efficiency and effectiveness but of adherence to the rule of law. The Home Office is required to follow precedent. It is bound by the judgments of the courts and must give effect to them, not only in the instant case but in all cases for which the judgment is a precedent.

We append hereto extracts from the ILPA paper for the September 2016 Home Office National Asylum Stakeholder Forum Strategic Engagement Group on the Rule of Law, extracts from which were also appended to ILPA's evidence to the enquiry on country of origin information. The paper incorporates Alison Harvey's paper *The UK Border Agency and the Rule of Law* for the 21 July 2009 Immigration Advisory Service conference and includes references to ILPA's 30 September 2009 Submission to Joint Committee on Human Rights (implementation of Strasbourg Judgments and Declarations of Incompatibility and includes references to ILPA's 22 October 2010 evidence to the Joint Committee on Human Rights for its *Review of the Government's response to judgments identifying breaches of human rights in*

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the UK and ILPA's submission to Joint Committee on Human Rights on implementation of Strasbourg Judgments and Declarations of Incompatibility.[1]

All these deal with the topics under investigation and all are relevant.

It is important to be aware that at issue are not only judgments of the courts, but also cases that the Home Office has settled. Some judicial reviews are settled at the pre-action protocol stage, others subsequent to issue and still others after permission has been granted. Only a very small number proceed to a full hearing. An effective and efficient system involves the Home Office learning from the matters raised in cases it decides to concede, whether at the pre-action protocol stage, after a judicial review is issued, as well as those where the courts find against it. Indeed those cases it concedes are likely to be those where it sees itself as most at fault and most in need of changing its approach.

Similarly for private law claims it decides to settle. It is difficult for an outside organisation to judge of the way in which the Home Office learns from private law claims it settles as most are settled 'without prejudice' and the claimant is made subject to a gagging agreement or confidentiality order that prevents them from talking about the settlement. The apparent objective is to avoid adverse publicity. This started in the lead up to the 2015 election and has become a blanket approach. It means that there is less awareness of breaches and that practice does not change. A focus on such cases is therefore of particular relevance to the investigation.

1. **Do you have any evidence and/or examples of positive learning by the Home Office following your clients' litigation action against its decisions? What awareness do you have of the Home Office's internal feedback mechanisms in the litigation field?**

Yes.

There can be effective negotiation and settlement. Whether this happens depends on the solicitor from the Government Legal Department and the counsel involved in the case: whether the Government Legal Department lawyer involved is proactive and whether the barrister gives clear, realistic and robust advice at an early stage. Where this happens, the Home Office can take a realistic view and settling before costs escalate on both sides. It would be useful for the Chief Inspector to with Government Legal Department lawyers and counsel who appear for the Home Office for their perspectives.

There are Government Legal Department lawyers who are good at not leaving it until the week before the hearing when costs have escalated to settle a claim. Others will fight even a very week case in a way that exacerbates the wrong to the client and evidences no wish by the Home Office institutionally to learn from mistakes.

We also identify phases when the Home Office is more open to negotiation and phases when everything seems to be hard fought. For example, the Home Office approach in litigation on the detained fast-track hardened following the suspension of the process.

[1] Both available from http://www.ilpa.org.uk/pages/parliamentary-briefings-other-than-bills.html

We identify an attitude in parts of the Home Office that if everything is fought then depending on the judge and the quality of representation (if any) on the other side, at least some cases will be decided in the Home Office's favour and therefore it is worth fighting even the weaker ones.

In 2003 there was litigation about disputed minors, challenging the poor practice at Oakington detention centre of immigration officers simply making a visual assessment of age in applying the policy not to detain children. Both judicial reviews and civil claims were brought. The judicial reviews resulted in a change in policy in 2005 where the current policy of needing *Merton*-compliant[2] assessments and evidence came from. Forty civil claims for children who had been wrongly detained were dealt with by negotiated settlement all in one go.

It is important to maintain improved practice. For a while, many fewer children were detained but there has recently been litigation about immigration officers making a visual assessment of age.

The settlement of the challenges to the detained fast-track is an example of both positive and negative practice. For a while, it looked as though that the Home Office would adopt a constructive approach and there was a point at which there were wholehearted attempts to resolve matters. This subsequently changed for no reason that was clearly articulated.

The case of *PA*[3] on the detention of pregnant women was also a positive example. In this case the government agreed to settle claims on a systemic basis and to review its policy. Although this took place in combination with political pressure, ILPA's advocacy during the Immigration Act 2016, the starting point for the Home Office was recognising that is policy could not continue.[4] Stephanie will send the consent order.

The litigation on the detention of children in families is also a positive example. There were many civil claims and the judicial review case of *Suppiah,*[5] which kept the issue alive. Again, ultimately a political solution was found.

2. Do you have any evidence and/or examples of the Home Office failing to learn from your clients' litigation against its decisions? What awareness do you have of the Home Office's internal feedback mechanisms in the litigation field?

Yes.

There have been persistent failures and the Home Office continues not to learn the lessons of cases brought against it, including cases where a breach of Article 3 of the European

[2] *R (B) v Mayor and Burgesses of the London Borough of Merton* [2003] EWHC 1689, although the term is used more broadly to denote a lawful age assessment in the light of all the case law.
[3] CO/1978/2014
[4] The *PA* litigation and the detained fast track litigation were negotiated by Catherine McGahey of 1 Harcourt Buildingss.
[5] *R (Reetha Suppiah) et ors v Secretary of State for the Home Department and Interveners* [2011] EWHC 2 (Admin)

Convention on Human Rights was found, not once, but repeatedly. [6] The first case was brought in 2011.[7] We are aware that claims continue to settle.

We generally see two types of claim for compensation for unlawful detention brought on *'Hardial Singh'* grounds[8] and there has been no reduction in these kinds of cases:

a) The person cannot be documented;
b) The person is pursuing proceedings against deportation and is detained during these proceedings.

These cases often involve a judge determining at what point detention became unreasonable. The impression is that the Home Office seeks to push detention as far as possible and tries to justify the reasonableness of detention with future litigation in mind, rather than applying a presumption of liberty as required by its policies.[9]

There have been quite a few cases brought where applicants have won their appeal against deportation but the Home Office has continued to detain while it appeals to the Upper Tribunal. The determination of the First-tier Tribunal binds the Home Office in the case until such time as the decision is overturned and as such it is not reasonable to continue to detain in these circumstances (see Annex).

Some factual scenarios are common. In documenting a person for travel, it should be clear after the Home Office has approached an embassy two or three times and has not received any assistance in documenting the person that there is no longer a reasonable prospect of removal and, since detention is against removal,[10] that detention is now unlawful. In these cases, it is our experience that the Home Office delays. A person may be interviewed by an embassy and not receive any information for a month, then the Home Office takes a month to organise another interview. The Home Office has a duty to act with reasonable diligence but does not do so.

In cases where the Home Office does not manage to get a travel document from the embassy, it then frequently asserts that the person is from another country. Sometimes there is a basis for this in the immigration history, but there have been cases where an official has simply spoken to the applicant and said that they thought his/her accent sounded as though it were that of a person from a specified country and then the Home Office has embarked on a whole new travel documentation process. Again the impression is of judgements being made about the length of detention that can be defended, rather than the application of a presumption of liberty.

The current Home Office *Adults at Risk* policy[11] is itself an indication that the Home Office is not learning from litigation brought against it: although the policy is intended to ensure a high threshold for detention, in practice the Home Office appears to be seeking not to apply

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[6] *R (BA) v SSHD* [2011] EWHC 2748 (Admin); *R (HA) v SSHD* [2012] EWHC 979 (Admin); *R (D) v SSHD* [2012] EWHC 2501; *R (MD) v SSHD* [2014] EWHC 2249 (Admin).
[7] *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin) (5 August 2011).
[8] *R(Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB).
[9] Enforcement Instructions and Guidance, Chapter 55.1.
[10] Immigration Act 1971 Schedule 2, paragraph 16(2).
[11] *Adults at risk in immigration detention,* 26 August 2016, https://www.gov.uk/government/publications/adults-at-risk-in-immigration-detention

a higher threshold but rather one that results in a reduction of protection from detention for adults at risk.[12]

The history of litigation on rules 34 and 35 of the Detention Centre Rules (SI 2001/238) is also in point. There was no learning from *D and K* [2006] EWHC 980 (Admin) on the application of these rules. The systemic failures continued, see *R (EO, RA, CE, OE and RAN) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin) and *R(Detention Action) v SSHD* [2014] EWHC 2245 (Admin) and the subsequent suspension of the detained fast track.

There was a brief increase in the numbers of Rule 35 reports and in the numbers of releases following Rule 35 reports during the detained asylum casework litigation: *R (TH, ZA and MNK) v Secretary of State for the Home Department* [2016] EWCA Civ 815. The percentage of persons released following a rule 35 report increased from 9% to 50%. Then the Home Office stated the increase during the litigation to have resulted from an abuse of the rule 34/35 process by lawyers and clients. It made the same statement about the risk of abuse in the *Adults at Risk*[13] policy. Having reached a point where practice was beginning to improve for the first time, the compass of improvements was narrowed by claims of abuse. These problems continue

We have seen no reduction in the number of clients who need to bring claims for compensation for unlawful detention and there is no reason to think that all those who could bring such claims get legal advice and do so.

We provided information in our June 2017 submissions to the inspectorate for the inspections of asylum casework and on country of origin information, which is relevant to this matter and we draw upon it here.

In 2016, the First-tier Tribunal overturned Home Office decisions on asylum claims in 41% of the 12,304 appeals brought before it by applicants.

Year	Number of appeals determined[14]	% Determined appeals allowed	% Determined appeals withdrawn	% Determined appeals dismissed
2016	12,304	41	5	54
2015	9,224	35	5	60
2014	6,178	28	5	66
2013	8,325	25	7	68
2012	8,285	27	7	66
2011	10,597	26	6	67
2010	14,723	27	4	68
2009	12,813	29	4	67
2008	9,209	23	5	72
2007	12,395	22	5	73

[12] Home Office Enforcement Instructions and Guidance Chapter 55.10 as in force August 2016.
[13] Op.cit.
[14] Source: UK Visas and Immigration, *Immigration Statistics, October to December 2016*, Asylum Data Tables Volume 4, Table as_14: Asylum appeal applications and determinations, by country of nationality and sex, at: https://www.gov.uk/government/statistics/immigration-statistics-october-to-december-2016 (percentages calculated)

High proportions of Home Office decisions were overturned by the Tribunal: Eritrea (75%) Sudan (58%), Libya (49%), Afghanistan (49%), Sri Lanka (47%), Iran (44%), Ethiopia (44%) and Uganda (44%).

The proportion of asylum appeals allowed almost doubled in ten years, from 22% in 2007 to 41% in 2016.

Whilst the proportion of Home Office decisions overturned at appeal during the first quarter of 2017 appears to have decreased (35% of the 5205 appeals determined), this could be explained by the high proportion of Eritrean appeals that were withdrawn (51%) rather than determined and allowed by the Tribunal (33%).[15] There were high rates of success at appeal for asylum applicants from Libya (63%), Somalia (56%), Afghanistan (52%), Sri Lanka (47%), Syria (46%), Sudan (45%), Iran (43%) and the Democratic Republic of Congo (40%).

We highlighted the case of Eritrea. In December 2014 over 85% of Eritrean asylum claims were being allowed by the UK.[16] The Chief Inspector's Independent Advisory Group on Country Information was highly critical of the Home Office guidance issued in March 2017.The percentage of applications from Eritreans granted asylum fell to 48% by June 2016 but success rates on appeal rose correspondingly.[17] In 2016, 75% appeals against negative decisions by the Home Office in Eritrean cases were overturned by the Tribunal. A further 15% of appeals brought were withdrawn. The success rate makes clear that Tribunal judges were not accepting the Home Office approach to country of origin information until a successful challenge in *MST and others (Disclosure – restrictions – implied undertaking) Eritrea* [2016] UKUT 00337 (IAC)[18] resulted in, in the first quarter of 2017, 51% of Eritrean appeals being withdrawn, while 33% of those heard by the Tribunal succeeded.[19] Despite overwhelming evidence, it took a tribunal determination for the Home Office to accept that its approach could not stand.

We also highlighted the concession in *LC (Albania) v Secretary of State for the Home Department* [2017] EWCA Civ 351.[20] that the Secretary of State had, unlawfully, continued to rely on the 2009 Country Guidance case of *MK (Lesbians) Albania CG* [2009] UKAIT 00036 despite an Order by the Court of Appeal setting that determination aside in October 2011. It was not until 8 December 2016 that the Upper Tribunal amended the Country Guidance list on its website with a note next to *MK* "Removed from list 08.12.16 in view of the Court of Appeal decision dated 10.10.11." Only following that did the Home Office amend its guidance, some five years afrer making the concession. Those refused on the basis of *MK* may well have grounds for a fresh claim but some will already have been removed.

As described in our evidence on country of origin information, the Home Office is required to provide unpublished documents to which reference is made in its reasons for refusal letters to the

[15] UK Visas and Immigration, *Immigration Statistics, January to March 2017*, Asylum Data Tables Volume 4, Table as_14_g: Asylum appeal applications and determinations, by country of nationality, at: https://www.gov.uk/government/statistics/immigration-statistics-january-to-march-2017-data-tables

[16] See https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2014/immigration-statistics-october-to-december-2014

[17] https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2016/asylum

[18] https://tribunalsdecisions.service.gov.uk/utiac/2016-ukut-337

[19] UK Visas and Immigration, *Immigration Statistics, January to March 2017*, Asylum Data Tables Volume 4, Table as_14_g: Asylum appeal applications and determinations, by country of nationality, at: https://www.gov.uk/government/statistics/immigration-statistics-january-to-march-2017-data-tables

[20] https://www.no5.com/news-and-publications/news/1575-lc-albania-home-office-concedes-unlawful-use-of-country-guidance-on-albania-since-october-2011/

other party and to the Tribunal.[21]The Home Office has recently been criticised by the Court of Appeal for not producing information known to it, even though that was information published on the Home Office's Country of Origin information web page, in *UB (Sri Lanka)* [2017] EWCA Civ 85.[22] In that case the point was made that this obligation had been identified in previous judgment:

> *16. In my view there was the clearest obligation on the Secretary of State to serve relevant material and ensure it was before the Tribunals at both levels. In AA (Afghanistan) v SSHD [2007] EWCA Civ 12, Keene LJ made the point clear beyond doubt:*
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> "27. [It was submitted by the appellant that] the attention of the adjudicator should have been drawn by the Secretary of State's representative to the policy on interviewing unaccompanied minors, so as to avoid him being misled: see *R v Special Adjudicator, ex parte Kerrouche* [1997] Imm AR 610.
>
> 28. As a matter of law, that is right. The Secretary of State should draw relevant parts of his policy to the adjudicator's attention. Merely because those policy documents are publicly available in print or on a website is not enough: where issues of risk of persecution are involved, a decision to return a person or not to his country of origin should not depend on the diligence of that person's representatives."
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> *17. The point was reinforced by Lord Wilson in Mandalia v SSHD [2015] 1 WLR 4546 [2015] UKSC 59. Lord Wilson referred to the judgment of Keene LJ in AA (Afghanistan) and re-emphasised the obligation:*
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> "irrespective of whether the specialist judge might reasonably be expected himself to have been aware of it, the Home Office presenting officer clearly failed to discharge his duty to draw it to the tribunal's attention as policy of the agency which was at least arguably relevant to Mr Mandalia's appeal." (paragraph 19)"

3. Do you have any case studies to support your answers to 1) and/or 2)?

See response to question two. To summarise, the cases on which we rely are:
AA (Afghanistan) v SSHD [2007] EWCA Civ 12
R (BA) v SSHD [2011] EWHC 2748 (Admin);
R (D) v SSHD [2012] EWHC 2501;
D and K [2006] EWHC 980 (Admin)
R(Detention Action) v SSHD [2014] EWHC 2245 (Admin)
R (EO, RA, CE, OE and RAN) v Secretary of State for the Home Department [2013] EWHC 1236 (Admin)
R (HA) v SSHD [2012] EWHC 979 (Admin);
R v Special Adjudicator, ex parte Kerrouche [1997] Imm AR 610
LC (Albania) v Secretary of State for the Home Department [2017] EWCA Civ 351*R (MD) v SSHD* [2014] EWHC 2249 (Admin);

[21] Rule 24(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604 (L. 31).
[22] http://www.bailii.org/ew/cases/EWCA/Civ/2017/85.html

Mandalia v SSHD [2015] 1 WLR 454,6 [2015] UKSC 59
MK (Lesbians) Albania CG [2009] UKAIT 00036
MST and others (Disclosure – restrictions – implied undertaking) Eritrea [2016] UKUT 00337 (IAC)
R (TH, ZA and MNK) v Secretary of State for the Home Department [2016] EWCA Civ 815.
UB (Sri Lanka) [2017] EWCA Civ 85

We further rely, as per the annex, on
R (Baiai v Secretary of State for the Home Department [2008] 3 WLR 549, UKHL 53 – and the challenge CO/2346/2009 brought by JCWI and the AIRE Centre.
Metock v Ireland C-127/08 ECJ

4. How willing do you find the Home Office (and/or Government Legal Department acting on their behalf) to engage in constructive argument and consideration outside of the formal hearing setting? (i.e. willingness to come to a compromise agreement before incurring the cost of a full hearing)?

It can take a long time for the Government Legal Department to engage at the initial stage. Representatives who give the department a lot of time to respond to pre-action letters report that it usually asks for more time. We know that the Government Legal Department struggles to get hold of the papers it needs from the Home Office and to take instructions from its client. In general, it is difficult to get anything out of the department for the first six months after a claim has been made; it is not in a position to engage during this period.

The Government Legal Department does, frequently settle claims once it engages. Where there is a relatively strong claim and the person has leave, one firm estimates that it achieves settlement in 90% of the cases.

The case may not settle until quite far into the litigation process, however. Settlement can happen at all stages of the process, but it is often left to the last minute to settle and it may not be until the door of the courtroom is reached that a reasonable offer is made.

Private law claims

Very often claimants ask for the Home Office to admit liability and apologise. Often the most important thing for a client is recognition by the Home Office that what it did was wrong. Instead, the Home Office simply makes a part 36 offer or conditional offer. A part 36 offer means that there is not usually an opportunity for a client to sit face to face and receive an apology. The Home Office very rarely admits liability or apologises, both of which are important in terms of institutional learning, accountability and for clients, who often only seek an admission that they have been wronged. Clients generally feel that even when the Home Office settled it does so begrudgingly, without any real recognition that it has done wrong.

Even when the Home Office makes a financial offer, it rarely makes any admissions and rarely apologises. One firm that handles a large number of such claims indicates that it has never had a case where a client has received such as face-to-face apology.

If a part 36 offer is made, lawyers have to consider the risks of proceeding.

One firm that does a large number of such cases tries to obtain orders in directions that place the burden on the Home Office of justifying not having a settlement meeting. It seeks directions that, where the Home Office refuses to have a settlement meeting, it provide a witness statement explaining why. In one case, the Home Office agreed to have a settlement meeting if the case was not settled in time but it was settled in time.

Home Office procedure militates against a settlement meeting. This is because authority to settle a claim must be obtained from a higher level. It can take weeks for the Home Office to agree a sum that it can offer, in which circumstances negotiating around a table cannot be effective.

Settlement negotiations are not always constructive. More often than not, a Part 36[23] offer is made with little or no justification for the sum of money offered.

We are seeing an increasing practice at the moment of the Home Office making conditional offers, affecting people who do not have immigration status to the extent that it appears to be a blanket approach. If a person has no application pending, the Home Office states that it will only pay the sum offered if the individual leaves the UK and proves that they have done so. If the person has a pending application, the offer is made conditional on their succeeding in their claim or leaving the UK if they lose their claim.

Offering a without prejudice settlement conditional on leaving UK is unconstitutional and unenforceable. If the Home Office were adopting a position where it only agreed to pay money if the client left the jurisdiction then this would be unconstitutional: not compensating the individual for their loss but putting them under pressure to abandon legal remedies. If the offer depended upon solicitors having to confirm that the client had departed the jurisdiction then it would not be enforceable.

The courts have not yet looked this at because in some of the cases affected, the amount of money awarded meant that the conditional offer was not a relevant factor for the judge to consider. The practice will mean, however, that more cases will go to court because they cannot be settled. Making an offer conditional on a person leaving the UK may suggest that the Home Office does not accept responsibility for its unlawful conduct.

A District Judge has ruled in one case that conditional offers are not part 36 offers but the Home Office response to one counsel on this was 'it is just one case'. We anticipate that the Home Office will continue to make these offers until a legal challenge prevents it from doing so. This new approach has emerged since the litigation on the detained fast track. It is our understanding that Government Legal Department lawyers do not like it and we suggest that the inspection team speak to the Government Legal Department to get the perspective of lawyers there.

[23] Part 36 of the Civil Procedure Rules.

One barrister received a letter from the Home Office explaining the rationale for conditional offers but it was not referred to in court and the Home Office did not consent to it being disclosed.

One solicitor specialising in this area writes:

> *From a personal perspective as a litigator, it is much more pleasant to bring a private law compensation claim against the Government Legal Department than a public law claim. These are dealt with by different teams.*

Judicial review

Within the civil claim process, a solicitor can pick up the phone and have a pleasant conversation with the representative at the Government Legal Department while in judicial review work, there is a lot of pressure for the Government Legal Department aggressively to defend a case, because the judicial review will additionally have an immigration element to it, challenging removal or certification, and the Home Office priority is to remove persons. In judicial review, there is often very little constructive negotiation and the position is entrenched at every stage. Once again, however, it very much depends on the particular Government Legal Department lawyer and counsel instructed.

The Home Office will settle a judicial review for tactical or strategic reasons if the facts are strong and likely to lead to a ruling against it. There is not a cooperative approach as in the civil context and alternative dispute resolution does not play a part. The Home Office resists narrowing the issues. It does not serve witness evidence to explain on what basis the decision was made. It does not offer the decision-maker up for cross-examination. The decision-maker is not held accountable within the process.

We thought that the detained fast-track litigation and the litigation on pregnant women, described in response to question 1 above as positive, might mark a sea change, but there is now a hardening of approach. Consultation meetings with Freedom from Torture, the Helen Bamber Foundation and Medical Justice on improvements to detention have ended. While the National Asylum Stakeholder Forum Detention working group has restarted after a hiatus it has not to date been not an effective forum.

The Home Office had previously agreed that anyone identified as a *prima facie* survivor of torture by Freedom from Torture or the Helen Bamber Foundation would be released and the operational guidance under the *Adults at Risk* policy[24] but it is not clear whether the Home Office is still operating this safeguard, or how. Its importance as a safeguard was identified in *D and K* [2006] EWHC 980 (Admin) and in *R(Detention Action) v SSHD* [2014] EWHC 2245 (Admin) .

It is our experience that the Home Office rarely changes it policy without a court judgment that has the effect of requiring it to do so.

[24] Adults at risk in immigration detention, v 2.0, 6 December 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/574970/adults-at-risk-policy-guidance_v2_0.pdf

In recent cases, instead of agreeing a consent order, the Home Office saves money by withdrawing the claim and asking the court to refuse permission. This is cost shifting onto the courts with the judge spending time considering the case when it only costs £100 to lodge a consent order.

5. How well prepared are the Home Office (and/or Government Legal Department acting on their behalf) when presenting their cases at any stage of the process – paper permission stage, oral permission stage and substantive hearing stage?

Private law claims

During the initial stages of a claim, for the first six months, it is difficult to get anything from the Government Legal Department for the reasons described above. Resources may be a problem.

When the Department starts to engage, the level of preparation varies, which may be down to individual lawyers or case loads.

When the Home Office receives a detailed letter of claim, it eventually gets advice from counsel then instructions on whether in principle the Home Office will settle and then for how much. An offer in settlement has to go through layers of bureaucratic approval and if the amount is above a certain level, it has to go to the Treasury.

A good case can often settle at the pre-action stage in private law claims. This may be the case even where the claim form has been issued protectively, as the response is often to the letter before claim.

If working with a government legal department lawyer doing a conscientious job and willing to extend the time to respond to more than three months, it may be possible to settle more rapidly. Cases often settle very late, however, which causes costs to escalate and wastes court time.

Trials are well prepared because the Government Legal Department has had to comply with directions from the court. The Civil Procedure Rules as it provides for directions about disclosure, witness statements, exchange of reports etc., spread out over months. It means that the Home Office cannot spring surprises: its case is known because it has had to plead it.

Judicial reviews

Someone at the Home Office, not in the specialist judicial review unit, deals with the pre-action stage in judicial reviews. Either there is no or the response to the pre-action protocol letter comes from the Home Office caseworking unit. In a detention case for example, this is likely to be a rehashed detention review and thus it is not meaningful. There is a need to get someone able to give good early legal advice and obtain instructions from someone with authority to make decisions at this stage.

The following article from the Law Society Gazette[25]: indicates moves to shift work to the lowest possible grade:

> ***Immigration Litigation Transformation Board***
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> *The Home Office, in partnership with GLD and Her Majesty's Courts & Tribunal Service (HMCTS) colleagues, is leading on a programme of activity to improve and transform the way in which immigration litigation is handled. The key objective is to drive down costs within appeals and litigation, in particular, reduce the cost by improving processes and becoming more digital, increasing the speed in the system and up-skilling Home Ofce staff to ensure that work is done at the lowest possible grade.*
>
> *There are a number of projects working towards achieving this which are monitored through the monthly Litigation Transformation Board comprising HO and GLD colleagues.*
> *So far the programme has piloted drafting grounds in-house for non complex cases, delivered a new case management system for litigation operations in the Home Ofce, promoted e-mail and e-fax for pre-action protocols and designed an allocation system for the Administrative Court cases which builds on the changes made to the allocation process for Upper Tribunal cases which were implemented in 2016.*

Allocating work to the lowest grade fee earner/official is, in our view, unlikely to do much, if anything, to save costs.

We do not usually get a sensible response pre-action, especially on judicial review, even in an open and shut case whereas in prison law, for example, the government will often concede at that stage. There are no costs implications if the government concedes at the pre-action stage.

The Home Office and Government Legal Department take points that they have already lost; and they rarely provide evidence.

As to taking points that it has already lost, the Home Office continues to argue that it is not unlawful to fail properly to carry out an assessment under rule 34 of the Detention Centre Rules (SI 2001/238). This was argued by the Home Office unsuccessfully in *R (EO & Ors) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin) (17 May 2013), then again in *R (DK) v Secretary of State for the Home Department [2014] EWHC 3257 (Admin) (10 October 2014)*. But the Home Office continued to advance the argument, for example in *R (Cham) v Secretary of State for the Home Department (Rev 1)* [2016] EWHC 1345 (Admin) (17 June 2016).

The Home Office has taken the position that there is no responsibility on the Secretary of State as far as breaches of Article 3 of the European Convention on Human Rights are concerned, because the Secretary of State relies on medical practitioners on the ground. This is wrong as a matter of law: the Secretary of State has public law duties and, moreover, is responsible for the contracts. This emerges clearly from *GB v Home Office* [2015] EWHC 819 (QB)on the non-delegable nature of the duty and *R (TH, ZA and MNK) v Secretary of State for the Home Department* [2016] EWCA Civ 815, the litigation on detained asylum

[25] https://www.lawgazette.co.uk/in-house/government-seeks-to-cut-costs-of-immigration-litigation-work/5061746.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016 (see p.15)

casework, but it is continues to be argued, most recently *ASK v The Secretary of State for the Home Department* [2017] EWHC 196 (Admin) (09 February 2017) where the findings of fact in the case point toward an acceptance of a delegation.

In judicial reviews before the Upper Tribunal, sometimes the Home Office does not even file grounds of defence but turns up at the Tribunal with a skeleton argument.

The case of *R(Babbagev Secretary of State for the Home Department* [2016] EWHC 148 (Admin) (01 February 2016)[26] at: illustrates problema with the preparation and presentation of cases. See in particular paragraphs five-26 on the Secretary of State's approach to evidence and disclosure.

General
Often counsel for the Secretary of State has inadequate instructions in court. This is linked to the concerns above about making arguments up on the hoof. Some will ask to take instructions from the Home Office but others will make up on their feet what the policy means when this should be a Home Office decision.

6. Do you notice any general trends within the Home Office decisions (for example, the incorrect paragraph of the Immigration Rules being consistently referred to or the same case-law being incorrectly applied)? If so, are there certain trends for certain case types?

Please see ILPA's evidence to the inspections by the Chief Inspector of asylum casework and of country of origin information.

In detention cases, the Home Office:

- fails to make adequate enquiry;
- fails to apply policy;
- fails to ensure that the person making decisions on detention or the person presenting the case is kept informed of developments in the immigration case/the condition of the detainee;
- failure to properly assess likely duration of detention and to properly apply *Hardial Singh*[27] principles.

Even if in principle the Home Office accepts rulings and does not seek to reverse them, it does not have in place systems that would allow it to change entrenched practice resulting from the overriding imperative to enforce removal. Once an individual is in detention, this momentum is very hard to alter. For example, detention reviews are formulaic and repetitive and do not properly address changes in the case. There is a disjunct between the person who reviews detention and the caseworker.

We refer the Chief Inspector to the report for the Shaw review of the welfare of vulnerable persons in detention[28] by Jeremy Johnson of the Article 3 case law, discussed in response to

[26] http://www.bailii.org/ew/cases/EWHC/Admin/2016/148.html
[27] *R(Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB).

question 2 above, for an example of systemic failure. Mr Johnson says that he does not know whether there are more cases than those reported. We are aware that cases in which Article 3 has been pleaded that have subsequently settled, usually 'without prejudice and subject to gagging clauses. Mr Johnson identifies that the cases are evidence of systemic problems. This was not taken on board in detention practice/policy until after the Shaw review and even afterward, the response has been inadequate.

In cases where someone has made a late claim for protection after being detained, the assumption on the part of the Home Office is that this is to frustrate removal. Where there are indicators of trafficking, or where the person or a support organisation has raised trafficking, it may be seen from the Home Office file obtained following a subject access request that the Home Office considered trafficking or made a reasonable grounds decision but there was no positive enquiry, it simply based its consideration on the information and immigration history on file; it did not interview that person to explore the trafficking allegation. This is incompatible with the UK's duties under Article 4 of the European Convention on Human Rights. There appears to be no concern to ensure that the person is protected.

The Home Office regularly fails to comply with its duty under section 149 of the Equality Act 2010 to conduct an equality impact assessment. It did not do so for the detained fast-track, although Ouseley, J did not deal with this point in *R(Detention Action) v SSHD* [2014] EWHC 2245 (Admin) .). It did not do so when it abandoned the detained fast track and put in place detained asylum casework. And it failed to do it once again with the introduction of the *Adults at Risk* policy. [29]

7. Is there anything else you consider relevant?

See ILPA's evidence to the inspection on country of origin information. We wrote therein

> *"It is not acceptable for a representative, be they lawyer or Home Office, to go in and argue a case without having regard to precedent: decided cases on the point from higher courts, and drawing attention to decided cases from courts at the same level. That is as true the morning after judgment is given in the case as it is two months later. Lawyers have to stay up all night and rewrite skeleton arguments in the light of judgments given on the eve of their case. The Home Office has an equal duty not to make decisions on the basis of out-of-date evidence simply because it is difficult to keep up with rapid change.*
>
> *If some information is not put out centrally then the only possible approach is anarchic with no common foundation for the submissions of Presenting Officers.*

We see those representing the Home Office put forward their case or evidence that is inconsistent with what the Home Office has said in other cases. The impression is of lawyers finding arguments that might work in the individual case rather than putting forward a Home Office position on any point. This is the case even where the issue is the construction of Home Office policies where it is necessary for casework at first instance that the Home Office have a consistent position. For example, in detention policy, chapter

[28] 14 January 2016, https://www.gov.uk/government/publications/review-into-the-welfare-in-detention-of-vulnerable-persons

[29] *Adults at risk in immigration detention,* 26 August 2016, https://www.gov.uk/government/publications/adults-at-risk-in-immigration-detention

55.10, there are a lot of inconsistent judgments because the Home Office puts forward different arguments about what it meant in different cases.

One barrister instructed by the Home Office has commented on the difference between work done for the Home Office and that done for other government departments, indicating that instructions from the Home Office may amount to "see the case off" and counsel is left to muddle through.

It would be helpful for the inquiry to examine the way in which decisions, orders and notes on decisions and orders, of the courts and tribunals are circulated within the Home Office. Are they circulated? By whom? To whom are they sent? Presenting Officers only? Or first-instance decision-makers also?

See the Annex for further examples of ILPA's concerns.

Adrian Berry

Chair

ILPA

3 July 2017

ANNEX: ILPA PAPER FOR STRATEGIC ENGAGMENT GROUP 7 NOVEMBER 2016 (EXTRACTS)

RULE OF LAW

The points that follow do not purport to be an exhaustive description of the components of the rule of law. For that, see Tom Bingham's masterly *The Rule of Law*. Instead they are aspects of the rule of law on which it is suggested that there is a very high degree of agreement but where the courts have on occasion (sometimes on many occasions) found the Home Office wanting. This is a version of the paper presented at the Strategic Engagement Group on 21 September but has been updated, including with subsequent developments (to 7 November 2016).
Alison Harvey

1. **Case law and statute are both binding expressions of the law.**

2. **The judgment of the court is binding not only in the instant case but in cases that turn on the same points of law.**

3. **Where a case is conceded by a party on the basis that a particular interpretation of the law is correct, the terms of the concession bind the party in other cases that turn on the same question of interpretation of the law.**

4. **A party cannot argue that the law means one thing in one case, and argue that it means something different in another case where the same point is at issue.**

5. **The judgment of the court binds from the moment it is given, including where permission to appeal is given on the spot. A party that considers that problems would arise from the judgment's having immediate effect must address arguments on the point to the judge and ask for a stay.**

6. **Parties have a duty to the court and should not bring cases they know to have no prospects of success or that they have not examined to verify whether or not they have any prospect of success.**

7. **A party must draw to the attention of the court authorities (cases) which are against it, as well as those in its favour.**

8. **A party has a duty of candour. The duty is to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. Documents must be disclosed insofar as that disclosure is necessary for fairly and justly disposing of a specific issue.**

9. **Parties must comply with orders of the court.**

10. **A party must not act in an oppressive manner.**

DETAIL

What follows concentrates on examples from the past two years. For earlier examples see

- ILPA's 30 September 2009 Submission to Joint Committee on Human Rights (implementation of Strasbourg Judgments and Declarations of Incompatibility;
- 22 October 2010 evidence to the Joint Committee on Human Rights for its *Review of the Government's response to judgments identifying breaches of human rights in the UK*, Submission to Joint Committee on Human Rights (implementation of Strasbourg Judgments and Declarations of Incompatibility) [30]
- Alison Harvey's paper *The UK Border Agency and the Rule of Law* for the 21 July 2009 Immigration Advisory Service conference, appended hereto. Lin Homer, the then Chief Executive of the UK Border Agency, also presented a paper at that conference but the paper was not circulated.

See also The Bingham Centre for the Rule of Law's meeting report of its meeting on the Immigration Bill 2015 and the rule of law of 20 October 2015[31] at which Alison Harvey, Dr Hugo Storey of the Upper Tribunal, Professor Elspeth Guild and Caroline Robinson of Focus on Labour Exploitation all presented papers.

1. Case law and statute are both binding expressions of the law

Detained fast track

Following one of the judgements in the detained fast track *Detention Action* litigation were handed to detainees

> *You may be aware of the ongoing Detention Action litigation which challenged the legality of the Fast-track rules for appeal in the fast track process. The judgment in that case has been handed down on Friday and makes a provisional finding that the fast track rules are unlawful.*

The finding was not provisional, but the law. The law might have changed if a higher court disagreed, but between the first judgment being given and the appeal, the judgment represented the current state of the law.

[…]

[30] Both available from http://www.ilpa.org.uk/pages/parliamentary-briefings-other-than-bills.html
[31] http://www.biicl.org/documents/817_20_october_2015_appg_meeting_report_v_2.pdf?showdocument=1

The Immigration (European Economic Area) Regulations 2016 (SI 2016/1052)

These regulations were laid on 3 November 2016. Paragraph 26 states

> **26.**—(1) The misuse of a right to reside occurs where a person—
>
> (a)observes the requirements of these Regulations in circumstances which do not achieve the purpose of these Regulations (as determined by reference to Council Directive 2004/38/EC(**1**) and the EU Treaties); and
>
> (b)intends to obtain an advantage from these Regulations by engaging in conduct which artificially creates the conditions required to satisfy the criteria set out in these Regulations.
>
> (2) Such misuse includes attempting to enter the United Kingdom within 12 months of being removed under regulation 23(6)(a), where the person attempting to do so is unable to provide evidence that, upon re-entry to the United Kingdom, the conditions for a right to reside, other than the initial right of residence under regulation 13, will be met.
>
> (3) The Secretary of State may take an EEA decision on the grounds of misuse of rights where there are reasonable grounds to suspect the misuse of a right to reside and it is proportionate to do so.
>
> (4) Where, as a result of paragraph (2), the removal of a person under regulation 23(6)(a) may prevent that person from returning to the United Kingdom during the 12 month period following removal, during that 12 month period the person who was removed may apply to the Secretary of State to have the effect of paragraph (2) set aside on the grounds that there has been a material change in the circumstances which justified that person's removal under regulation 23(6)(a).
>
> (5) An application under paragraph (4) may only be made whilst the applicant is outside the United Kingdom.
>
> (6) This regulation may not be invoked systematically.'

This appears to be at odds with the judgment of the Court of Justice of the European Communities in *Akrich* (Case C-109/01). In that case a British-Moroccan couple had admitted to working in Ireland to trigger a future residence right in the UK. The court found that 'motives […] are of no account as regards his right to enter and reside in the territory […] provided that he there pursues or wishes to pursue an effective and genuine activity'. It held:

> ***Where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State.***

It is one thing to rely on one possible interpretation of a case. It is another to put forward a proposition that appears contrary to settled and binding caselaw and this appears to be an example of the Home Office overstepping that mark, although of course at the time of writing the matter has not been tested in the courts.

2. The judgment of the court is binding not only in the instant case but in cases that turn on the same points of law.

Failing to follow Country Guidance cases

Failing to follow Country Guidance cases and making refusal decisions (and/or adverse fresh claim decisions) on which the Home Office cannot sensibly hope to succeed in the light of those country guidance cases. Failing to withdraw appeals or refusals which turn on the same point. Sri Lanka and Eritrea are good examples. Currently the success rate on appeal in Eritrean cases is over 80%.

***Immigration curfews: R(Gedi) v Secretary of State for Home Department* [2016] EWCA Civ 409 (17 May 2016)**

The case of *R (Gedi) v Secretary of State of the Home Department* [2015] EWHC 2786 (Admin) (Edis J), [2016] EWCA Civ 409, [2016] 4 WLR 93 (CA) has established that a large number of immigration curfews are unlawful. In that case, Mr Gedi was released on bail by the First-tier Tribunal but was not subject to an immigration curfew. His bail conditions included a residence requirement and a requirement that he cooperate with electronic monitoring.

He was subsequently subject to an immigration curfew.

The Government advanced a number of arguments to justify the curfew and all were rejected:

(1) Initially the Government sought to justify the curfew on the basis that anyone who was subject to a bail condition requiring them to cooperate with electronic monitoring could as an incident to such monitoring be subject to a curfew under s.36 of the Asylum and Immigration (treatment of Claimants etc) Act 2004. This argument was rejected at first instance, Edis J who held that tagging was a means of detecting whether a person was or was not in their residence, not as a means of imposing a curfew (§25, §48):

> *It appears to me that a requirement to co-operate with monitoring under section 36 means only that the person subject to it must ensure that he facilitates the functioning and use of equipment which will show whether he is at a given address at certain times. Any power to require him to be there at those times must have its origin elsewhere*.

The Court of Appeal accepted the finding (see e.g §36).

(2) Secondly the Government argued that the curfew had been validly imposed under Schedule 3 para 2(5) as a condition of residence. There were two problems with this argument.

a. Firstly, during early periods of the Claimant's release (albeit not later periods), the Claimant was subject to bail and a person cannot be subject to both bail and conditions under Schedule 3 para. 2(5) as the premise of bail is that a person is detained and the premised of Schedule 3 para 2(5) is that a person is not detained but is liable to be so: see *R (Algeria) v Secretary of State for the Home Department* [2015] 3 WLR 1031 at §30.

b. Secondly, as the Court of Appeal held, a residence condition under Schedule 3 para 2(5) does not authorise the imposition of a curfew. Leveson P and Gross LJ stated: *"we simply do not accept that a right to impose a "restriction as to residence" under paragraph 2(5) of Schedule 3 to the 1971 Act necessarily incorporates a right to impose a curfew."* (§34).

The consequence of these findings is that unless bail conditions expressly include curfew conditions, a curfew will be unlawful. The Court of Appeal left open whether a curfew could lawfully be imposed as a condition of bail granted by the First-tier Tribunal or Chief Immigration Officer under paragraph 22(2) of Schedule 2 to the IA 1972.

Edis J in *Gedi* held that a curfew constitutes a false imprisonment at common law. This was not subject to appeal. The Court of Appeal stated it was not considering the matter. In subsequent cases the Secretary of State is asking the court to depart from Edis J's finding in *Gedi*.

There are dozens of cases that we know of in which curfews were continued even after the Court of Appeal's judgment in *Gedi*. Interim injunctions have been granted in a number of such cases, requiring the curfew to be lifted in each case. In one case the Secretary of State purported to make a fresh decision to justify the curfew under the Chief Immigration Officer bail power under Schedule 2 para. 22 of the IA 1971 shortly before an interim injunction hearing. Collins J granted the interim injunction notwithstanding this attempt to justify the curfew. The Secretary of State has conceded that para. 22(2) did not provide lawful authority for the curfew as the Claimant was not released on bail.

In another case a curfew was re-imposed at the end of October 2016 after the Claimant's residence restriction was purportedly converted to a bail condition. The Claimant was served with a letter upon reporting to the Home Office reporting centre stating that he had been "nominally detained" and released on bail subject to bail conditions that included a curfew. One effect of this would be to deny the Claimant the opportunity of a bail hearing before the First-Tier Tribunal and denying him the opportunity to apply to the FTT for discharge or variation of the bail conditions: see *R (AR) v SSHD* [2016] EWCA Civ 807 at §20. A new interim injunction has been granted, the judge holding that the new curfew was contrary to the injunction granted by Judge Grubb and holding that the Claimant had an arguable case that his purported detention and release on bail were unlawful and ineffective.

3. Where a case is conceded by a party on the basis that a particular interpretation of the law is correct, the terms of the concession bind the party in other cases that turn on the same question of interpretation of the law

See the cases above, where the Home Office has conceded. There is thus often less supervision of the court, although sometimes a concession is made in the course of litigation (for example acknowledging that refusals which suggested that the test in "deport first, appeal later" cases was that removal re appeal would one of a risk of 'serious irreverisible harm' rather than that there was a risk of a breach of human rights (*Kiarie and Byndloss [2015]* EWCA 1020*).* Although the *Kiarie* case is being appealed, that point is now agreed between the parties.

4. A party cannot argue that the law means one thing in one case, and argue that it means something different in another case

***WK v Secretary of State for the Home Department*, C4/2015/3883 Dublin Italy cases (hearing March 2015)**

The Secretary of State continues to set removal directions for returns to Italy, despite individuals having outstanding claims before the Court of Appeal which were being/had been stayed behind *MS & Others*.

In this case removal directions were stayed by Beatson LJ, further to an application notice being filed with the Court of Appeal. Lord Justice Beatson sets out in the reasons of the order that:

> *…the decision of the Secretary of State to have a policy in respect of first instance proceedings has enabled those advising the Secretary of State that giving the Court of Appeal time to consider whether a case discloses MS grounds before setting removal directions would reduce by an unspecified period the time during which the Secretary of State might successfully effect an applicant's removal to Italy under the Dublin arrangements because the six month period prescribed by the Dublin arrangements is not suspended. The consequence will be that individuals will have to apply for stays of removal and the court will have to consider them.*

Such applications put a burden on the Court of Appeal and for this reason an urgent expedited hearing was listed to consider the treatment of the cases before the Court of Appeal stayed behind *MS and Others* and the application of Article 20(1)(e) of the Dublin regulation.

Home Office decision-makers and presenting officers should be presenting a consistent position and differences should be resolved as soon as possible. For this reason it is extremely problematic when no guidance is available on a point. The most striking example was the case of *Metock* (C-127/08), where it took many months to produce guidance on the correct approach to family members of EEA nationals. ILPA members were relying on an internal Home Office note to staff in posts overseas which had been leaked to us and acknowledged to be the instruction to which staff were working.

Many will recall the *ZO(Somalia) [2009] EWCA 442* case on whether those whose fresh claim for asylum had been outstanding for more than a year had permission to work. Despite the lead case, the Home Office continued to refuse others permission to work, forcing them to bring a judicial review and make an application to the court to obtain permission to work. This conduct was criticised by judges. Quite apart from anything else this places a strain on the legal aid and court budgets.

5. The judgment of the court binds from the moment it is given, including where permission to appeal is given on the spot. A party that considers that problems would arise from the judgment's having immediate effect must address arguments on the point to the judge and ask for a stay

See above. It is possible to ask for a short adjournment to deal with the effects of a judgment, but the court is unlikely to be sympathetic where the case was known to the party, as cases will be to the Secretary of State, and the outcome was always going to be clear cut, one way or the other. Representatives frequently sit through the night reworking skeleton arguments because a judgment has been given that means the arguments put no longer work.

6. Parties have a duty to the court and should not bring cases they know to be hopeless or that they have not examined to verify whether or not they are hopeless

The Upper Tribunal has been very critical of the Home Office for a failure to be selective in the appealing. Resisting even a hopeless challenge can draw on the legal aid and court budgets.

***MR (permission to appeal: Tribunal's approach) Brazil* [2015] UKUT 00029 (IAC)**

On behalf of the Secretary of State, the application for permission to appeal was launched on a wing and a prayer. It was manifestly devoid of any substance or merit ….

VV (grounds of appeal) [2016] UKUT 53 (IAC) (13 November 2015)

Headnote

(1) An application for permission to appeal on the grounds of inadequacy of reasoning in the decision of the First-tier Tribunal must generally demonstrate by reference to the material and arguments placed before that Tribunal that

(a) the matter involved a substantial issue between the parties at first instance and

(b) that the Tribunal either failed to deal with that matter at all, or gave reasons on that point which are so unclear that they may well conceal an error of law.

(2) Given that parties are under a duty to help further the overriding objective and to co-operate with the Upper Tribunal, those drafting grounds of appeal

(a) should proceed on the basis that decisions of the First-tier Tribunal are to be read fairly and as a whole and without excessive legalism;

(b) should not seek to argue that a particular consideration was not taken into account by the Tribunal when it can be seen from the decision read fairly and as a whole that it was (and the real disagreement is with the Tribunal's assessment of the evidence or the merits); and
(c) should not challenge the adequacy of the reasons given by the First-tier Tribunal without demonstrating how the principles in (1) above have been breached, by reference to the materials placed before that Tribunal and the important or substantial issues which it was asked to determine in that particular case.

(3) Where permission to appeal is granted, an Appellant should review whether the grounds of appeal are genuinely arguable in the light of any response from the Respondent to the appeal. Whether or not the original grounds are pursued, it is generally inappropriate to seek to raise new grounds of appeal close to the date of the hearing if, for example, that would cause unfairness to a Respondent or result in the hearing being adjourned.

The text of the judgment says

Unless practitioners considering grounds of appeal adhere to established legal requirements for demonstrating inadequate reasoning, and more generally on what may qualify as an error of law, there is a real likelihood of appeals to the Upper Tribunal being pursued without any genuine legal merit. That would represent an improper use of the Tribunal's limited resources and generally extend the time for which litigants would have to wait before their cases can be determined.

We should also refer to another matter. In this case, and in others, we have observed the Secretary of State obtaining permission to appeal on grounds which are not pursued at the hearing in the Upper Tribunal, because it is eventually acknowledged that they are unarguable. Plainly an Appellant should review the arguability of grounds of appeal, for example in the light of any response from the Respondent to the appeal. An Appellant should not continue to pursue points which are not properly arguable. But where points are abandoned, there is a tendency then to seek to rely upon a skeleton argument, served only just before or even on the day of the hearing, so as to advance one or more new arguments not previously notified either to the other party or to the Tribunal. Raising new points in this manner plainly can cause unfairness to the opposing party and, if so, the Upper Tribunal may well refuse to allow the new point to be argued. That is even more likely to be the case where a new point could not fairly be dealt with without adjourning the hearing so that the opposing party has a proper opportunity to deal with it. The resources of this Tribunal are finite and have to be allocated fairly and proportionately as between all cases before it and not wasted. These are important considerations which those who draft, or advise upon, grounds of appeal must keep well in mind.

In this case it appears to us that those launching or pursuing the appeal cannot have applied basic principles on what an Appellant needs to demonstrate in order to establish an error of law.

***Greenwood (No. 2)* [2015] UKUT 00629 (IAC)**

The Upper Tribunal has the impression that the Secretary of State, as a matter of routine, applies for permission to appeal in every deportation appeal in which the appellant succeeds before the FtT. Furthermore, the grounds of appeal are frequently formulated in bland and formulaic terms.

See also

***R (on the application of Santos) v Secretary of State for the Home Department* [2016] EWHC 609 (Admin)**

This was a case on an application for an EEA residence card. Four years delay (cards must be issued as soon as possible and in any event within six months). As well as Mr Santos' suffering and that of his family, the Home Office misinformed his employers that he did not have permission to work and thereby deprived him of employment. Unlawful detention meant he could not repay a loan and ruined his credit history A defence filed by the Home Office was "inaccurate and misleading" in no less than 10 different ways.

It appeared that the Home Office was asking for a "totally without merit certificate" in all cases where a judicial review was brought against it. The bail summary was "inaccurate and misleading". The EU law damages total of £59,470 included lost earnings of £34,470 (the period of unlawful detention was separately compensated in the unlawful detention damages award) and also £25,000 of exemplary damages because of the "outrageous, oppressive and unconstitutional manner" in which the Home Office had behaved:

> *a sustained and deliberate refusal to give effect to the Claimant's EU rights, over several years, during which time the Defendant displayed a blatant disregard for the law.*

On the breach of EU law, the judge, Mrs Justice Laing, held that the Home Office had acted in an "outrageous, oppressive and unconstitutional manner" and to have displayed "a blatant disregard for the law."

7. A party must draw to the attention of the court authorities (cases) which are against it, as well as those in its favour

Some Home Office representatives are failing to assist the tribunal by producing relevant case law and making submissions which are consistent with it: advocates are supposed to be there to assist the tribunal, which means making submissions which are realistic and based on a correct understanding of the law as it is, not the law as they would like it to be. An example is the frequency with which the Secretary of State continues to advance arguments inconsistent with *Chikwamba* [2008] UKHL 40 (circumstances in which a person should, or should not, be required to return to the country of origin to make a fresh application).

8. **A party has a duty of candour. The duty is to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. Documents must be disclosed insofar as that disclosure is necessary for fairly and justly disposing of a specific issue**

[…]

9. Parties must comply with orders of the court

Failure to comply with orders of the court and/or undertakings given to the court, in particular to do certain things (make a fresh decision etc) within a specific period.
Both times that a Minister of the Crown has been found in contempt of court this has been in immigration cases.

***M v Home Office* [1994] 1 AC 377**
M was deported in alleged breach of an undertaking by the Home Secretary's counsel not to remove him, and was not returned in breach of a court order to return him. The Home Secretary argued that the mandatory interim injunction against him (as an officer of the Crown) had been made without jurisdiction. The House of Lords held that although the Crown's immunity from injunctions

had been preserved by the Crown Proceedings Act 1947, the Courts have jurisdiction to grant mandatory interim injunctions in judicial review against officers of the Crown. While the Crown cannot be held in contempt of court, a minister exercising his/her power on behalf of the Crown can be.

In 2012 Judge Barry Cotter QC found that the then Home Secretary was in contempt of court for not abiding by an undertaking given to release a man (Mr Lamari) from a UK Detention Centre by a specified date.

11. A party must not act in an oppressive manner.

[…]

APPENDIX

The UK Border Agency and the law

Alison Harvey, General Secretary, ILPA for Immigration Advisory Service Conference 21 July 2009.

Does the UK Border Agency respect the rule of law? I suggest that the evidence suggests that shortcomings are sufficiently widespread as to call into question the UK Border Agency's respect for the rule of law. The law is something that happens to other people – your clients, and you, their representatives. How many of you have sat up all night following a House of Lords judgment because you have to go into court and argue on the basis of it the following morning? That is the rule of law, not taking months to think about it, as the UK Border Agency seems to suggest it can do. It is open to the UK Border Agency to appeal a decision with which it does not agree. It is open to the Government of the day to go to parliament to seek to reverse a decision of the courts that it does not like. It is not, I suggest, open to the UK Border Agency not to comply with the law.

I would cite:

- Failure to give effect to the judgments of the courts in a timely manner or, in some cases, at all
- Being economical with the information provided to courts and tribunals
- Failure to ensure consistency of approach – conceding one case on a particular point, only to decide and/or fight another on the same point
- Secret and unpublished instructions, including unlawful instructions.
- Reliance on Operational Guidance Notes which are treated as country guidance for the purpose of cases such as *RN (Zimbabwe)* and as policy instructions for the purposes of prohibiting their scrutiny by those appointed to provide independent scrutiny of such information
- Failure to respect principles of fairness and as to the conduct of legal proceedings.
- Failure to respect provisions of the general law, for example as pertaining to data protection and defamation. I am talking of course, of the Home Office press releases.

[…]

These give rise to the following questions:

- Does the Agency perceive a difference between statute law and the judgments of the courts in terms of whether they must be followed?
- What is the Agency's understanding of precedent - e.g. if the Agency concedes a case/pays damages on the basis that it should not have done what it did to the individual in the

particular case does this affect the Agency's view of whether it can do the same thing to someone else?

- When a court judgment says that the Agency is doing something unlawful, what delay does the Agency consider acceptable in complying with the judgment.
- When the Agency loses a court case for how long does it consider it is reasonable for it to continue doing what it has always done while its lawyers consider the judgment?
- How can it be said that the Agency is considering a judgment when e.g. its Presenting Officers are going into court and putting forward an interpretation (or different interpretations of that judgment) or caseowners making a decision (or different decisions) on the basis of that judgment?
- When the Agency considers that there is a scope for creating a new legal precedent on a point, does it consider that it can start to act as though that precedent had been created in determining cases? Is this affected by whether there is a case before the Court or a gleam in somebody's eye.

All those questions, and all the points I am going to make, have been put to the UK Border Agency by ILPA. You can find the relevant letters in your ILPA mailings.

I am going to draw, insofar as time permits, on the cases of *Metock v Ireland* ECJ C-127/08 , *R (Baiai et ors)v SSHD* [2008] UKHL 53, *RN (Zimbabwe*) [2008] UKAIT 00083 CG , *R (Abdi) et ors* [2008] EWHC 3166 (Admin) judicial review of removals, case of *X v SSHD* X v SSHD CO/9617/2008 (Administrative Court), EU registration certificates and residence cards, UK Border Agency press releases, failure to publish guidance to make good my points. To these my audience will be able to add many of their own examples, such as *Z0 (Somalia)* [2009] EWCA Civ 442 on permission to work.

The implications for the Legal Aid budget of having to embark on litigation again and again to win a point you have already won are all too obvious. We are accused of using too great a share of the Legal Aid budget, but we have to fight the same case again and again.

As legal representatives, our recourse is

- Raising the matter on appeal
- Judicial review
- Claims for damages

There are other things that can and should be tried – publicity, statements in parliament, freedom of information requests. If the UK Border Agency does not respect the rule of law, it can at times feel a very lonely endeavour to try to use the law to challenge it. But, as my examples illustrate, it is possible to have some success, and in the long run we shall have success.

1. EU registration certificates and residence cards

[…]

2. *Metock v Ireland* C-127/08 ECJ

The decision of the European Court of Justice in *Metock v Ireland* is dated 25 July 2008.

Ireland issueD a press release promising compliance the following day and produces new statutory instrument on 31 July 2008: the European Communities (Free Movement of Persons) (Amendment) Regulations 2008 (Statutory Instrument No.310 of 2008).

UK Border Agency sent me an email on 17 December 2008 saying that it issued guidance the week before. This was placed on the FCOs internal website. I was told that

> *"Amendments have been made to European Casework Instructions chapters 1, 2 and 5 as these were, in small part, affected in small sections by the judgment http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/. Chapter 3 of the ECIs and the relevant Entry Clearance Guidance on the UKVisas website will be updated shortly to reflect these amendments."*

This despite repeated requests from ILPA for a response by the UK Border Agency to the case. And between July and December affected cases were being decided and were being argued by Presenting Officers before the Courts and the Tribunal. Was this anarchy, or were they argued on the basis of unpublished guidance. We know that some of it was anarchy because we have examples of different Presenting Officers, in different courts, taking different approaches.

3. ***Baiai* [2008] UKHL 53**

The decision in *Baiai* is dated 30 July 2008.

The House of Lords held:

> *"It is plain that a fee fixed at a level which a needy applicant cannot afford may impair the essence of the right to marry which is in issue. A fee of £295 (£590 for a couple both subject to immigration control) could be expected to have that effect."* (para 30 per Lord Bingham)

Yet nothing was done. The AIRE Centre and the Joint Council for the Welfare of Immigrants brought a challenge by way of judicial review (CO/2346/2009). They produced a claim form, grounds of claim and wrote a letter.

Silber J's consent order is dated 7 April 2009, it states:

> "..the parties agreeing that, in the light of the decision of the House of Lords in *R (Baiai v Secretary of State for the Home Department* [2008] 3 WLR 549, to charge a fee of £295 to applicants for permission to marry in the United Kingdom (under section 19(3)(b) of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 is *ultra vires* insofar as it infringes the rights under ECHR Article 12 of a needy applicant"

And on 9 April fees were suspended. That should have been done, could have been done on 30 July 2008.

What of the blanket prohibition on the right to marry without such a certificate and the exception for the Anglican church? The House of Lords said

> *"…subject to the discretionary compassionate exception, the scheme imposes a blanket prohibition on exercise of the right to marry by all in the specified categories, irrespective of whether their proposed marriages are marriages of convenience or whether they are not. This is a disproportionate interference with exercise of the right to marry".* (para 31 per Lord Bingham)

If you look at the UK Border Agency website (I looked at it yesterday) http://www.ukba.homeoffice.gov.uk/visitingtheuk/gettingmarried/certificateofapproval/ it refers only to the judgment of the Court of Appeal. It retains the exception for the Anglican church.

4. *RN (Zimbabwe)*) [2008] UKAIT 00083 CG

On 14 April 2009 ILPA wrote to the then Home Secretary to protest at the handling of cases following *RN (Zimbabwe)*. See the ILPA mailing document 09.05.04.

The Minister of State for Borders and Immigration replied on 26 May 2009, see ILPA mailing document 09.06.02.

We continue to take the view that the Court of Appeal was misled.

5. Judicial review of removal

[…]

6. *R(Abdi & Ors) v SSHD* [2008] EWHC 3166 (Admin)

[…]

7. Guidance

[…]

8. UK Border Agency press releases

[…]

***9. Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40**

[…]

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