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The Laws of Evidence in Immigration Investigations

This information sheet discusses the recent judgment of the Upper Tribunal in *Elsakhawy (immigration officers: PACE)* [2018] UKUT 86 (IAC) and considers how it will affect the position of those subject to investigation by immigration officers.

The case before the Upper Tribunal

The Appellant was an Egyptian national who had married a Polish national and had thus applied for leave to remain as the spouse of an EEA National exercising Treaty Rights in the United Kingdom. The Appellant stated that he was encountered whilst staying with a friend, early in the morning by two immigration officers. The Appellant was asleep at the time, and he was woken up by the officers, who abruptly asked him many questions about his immigration status. Bewildered and intimidated, the Appellant maintained he could not fully understand the questions. He was not offered the services of an interpreter.

The Appellant was not given a criminal caution, and believed that it was mandatory for him to co-operate with the immigration officers. Therefore, despite the lack of interpreter and no access to legal advice, he answered questions willingly. He also stated that the immigration officers had behaved inappropriately, aggressively and in an intimidating manner.

The Appellant's lawyers argued that the Police and Criminal Evidence Act 1984 ('PACE') ought to apply. Resultantly, since the Appellant was not allowed an interpreter, was not allowed to speak to his lawyer, make a contemporaneous note and record of the interview or offered an opportunity to read back and sign the officers' notes, the evidence should be inadmissible.

The approach of the Upper Tribunal

The Upper Tribunal's official headnote states that the Home Office guidance to immigration officers is essentially correct. There is a distinction between administrative enquiries and criminal enquiries. Even though immigration officers have a power of arrest – both criminal and administrative – alongside investigative powers, this does not require them to give a “criminal” caution when investigating someone they have a

genuine suspicion of entering into a sham marriage. The headnote goes on to state:

“Section 78 of PACE, which gives a criminal court power to refuse to allow evidence which, if admitted, would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it, has little to say about the task facing a Tribunal, in civil proceedings under the EEA Regulations.”

Therefore, it is the position of the Upper Tribunal that PACE cannot apply when the intention of the investigation is not to prosecute the subject of the investigation. Since, in this instance, the Appellant was questioned with the intention of removing him, PACE did not have anything to say to the fairness of admitting the immigration officers' evidence. That is not to say that immigration officers are given *carte blanche*, at paragraph 149, the Upper Tribunal went on to hold:

“Plainly, a grossly abusive set of failures may incline the Tribunal, in such proceedings, to the view that – for its purposes – admission of the evidence would be inappropriate; for example, if admission would be seen as endorsing highly problematic behaviour on the part of immigration officers.”

However, in this instance, the Upper Tribunal did not find the Appellant's claims that the immigration officers had behaved inappropriately, aggressively and in an intimidating manner, credible.

What this means for Appellants

Those who are at risk of being placed in detention or removed as a result of being encountered by immigration officers should be aware of their rights. Individuals ought to be aware that they are entitled to refuse to show an immigration officer their belongings and/or admit their entry to any relevant premises. There is a risk that taking such an approach will necessitate the delivery of a “criminal” caution, or even their arrest. However, at this stage, PACE protections will apply to them and they will have the right to an interpreter and/or legal advice. In some circumstances, this may be more desirable than agreeing to an interview on the spot which is not subject to the PACE safeguards.

Since PACE does not apply to administrative investigations, individuals should also realise that any evidence obtained in such investigations cannot be used to support a later prosecution, as they will not comply with the PACE requirements.

Further Reading

The code of conduct that immigration officers must follow when conducting enforcement visits can be accessed at:

<https://www.gov.uk/government/publications/the-immigration-pace-codes-of-practice-direction-2013>

The full text of the judgment discussed in this information sheet can be accessed at:

<https://tribunalsdecisions.service.gov.uk/utiac/2018-ukut-86>