Immigration Team Legal Bulletin

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Upper Tribunal Decisions

FURTHER GUIDANCE AFTER *PANKINA*

FA and AA (PBS effect of Pankina) Nigeria [2010] UKUT 304 (IAC)
and
CDS (PBS: "available" Article 8) Brazil [2010] UKUT 305 (IAC)

These cases were both heard on 23 July 2010 by the same panel. In these decisions the Upper Tribunal gives further guidance on how Pankina v Secretary of State for the Home Department [2010] EWCA Civ 719[1] will be interpreted and takes a sensible approach to the Points Based System.

FA and AA concerns the question of whether Pankina is limited to the application of the "three-month rule" or whether it established more generally that guidance does not have the same force of law as the Immigration Rules. The Upper Tribunal found unequivocally that guidance is subordinate to the Rules. The headnote states:

> *"The effect of the decision of the Court of Appeal in Pankina is not limited to the 'three-month rule' in relation to evidence of funds. Policy Guidance does not have the status of Immigration Rules for the purposes of immigration appeals."*

The Secretary of State submitted that Pankina should be confined to the application of the three-month rule without developing the argument or citing any supporting dicta from the decision itself. Considering the rather cynical position adopted by the Secretary of State in this case, the Tribunal has averted a lot of uncertainty and unnecessary cost. The Tribunal is to be commended for clarifying its approach to Pankina so quickly. It is to be hoped that the Tribunal takes a similarly pro-active stance in the future to quickly promulgate definitive decisions that make clear the approach it intends to take with regard to the guidance of the higher courts.

In this case, the clarification was needed to correct a plain absurdity. The Policy Guidance advises that only bank accounts in the name of the principal applicant or her parents are acceptable for showing adequate funds under Tier 4 (General) Student Migrant. Whether this guidance was intended to preclude financially independent, married adults from succeeding under Tier 4 or whether the guidance was drafted in ignorance of the real world was not part of the submissions by the Secretary of State in this case.

The evidence was clear that the principal Appellant, a postgraduate student applying under Tier 4, had shown that adequate funds were available to her through her husband's bank account. Records showed payment from that account to the university and there was no serious contention that the funds were inadequate.

CDS, the other case heard on 23 July, goes even further with regard to what constitutes availability of funds for the purposes of the PBS. As in FA and AA, it was found that the Immigration Judge of the First-Tier Tribunal had erred by treating the Policy Guidance on a par with the Immigration Rules.

The headnote states:

> "*1. Funds are "available" to a claimant at the material time if they belong to a third party but that party is shown to be willing to deploy them to support the claimant for the purpose contemplated.*
>
> *2. Article 8 does not give an Immigration Judge a free-standing liberty to depart from the Immigration Rules, and it is unlikely that a person will be able to show an article 8 right by coming to the UK for temporary purposes. But a person who is admitted to follow a course that has not yet ended may build up a private life that deserves respect, and the public interest in removal before the end of the course may be reduced where there are ample financial resources available."*

The Tribunal noted further that

> *"[13]...The need for Immigration Rules to have unambiguous provisions preventing recourse to financial assistance from other persons, if that is what is intended, was spelt out in Mahad v ECO [2009] UKSC 16 [2010] 1 WLR 48 at [26] to [30]...[14]Accordingly, we are satisfied on the facts of this case that the appellant had sufficient funds "available" to her to meet the objective requirements of Appendix C at the relevant time. The word "available" can not be read restrictively to mean "available to her with no assistance from any other person save a parent or guardian", by reference to the Policy Guidance, and neither can such a requirement be imported by the reference in the Immigration Rules to proving maintenance by relevant documents."*

[For more background on Mahad click here]

Incidental to the above finding, the Tribunal also came to the interesting conclusion that not only does the Policy Guidance not carry the force of law of the Immigration Rules but that, with regard to Article 8, *"[22]...Even central requirements (of the Immigration Rules) are not determinative if the countervailing claim is of sufficient weight."* Albeit littered with qualifications, the Tribunal makes clear that even temporary migrants build a private life in the UK and the minutiae of the Rules need to be considered in the context of the facts:

[1] For comment on Pankina, see GCN Immigration Bulletin July 2010

"[19]... people who have been admitted on a course of study at a recognised UK institution for higher education, are likely to build up a relevant connection with the course, the institution, an educational sequence for the ultimate professional qualification sought, as well as social ties during the period of study. Cumulatively this may amount to private life that deserves respect because the person has been admitted for this purpose, the purpose remains unfilled, and discretionary factors such as mis-representation or criminal conduct have not provided grounds for refusal of extension or curtailment of stay."

PROPORTIONALITY IN AUTOMATIC DEPORTATION APPEALS

RG (Automatic deport – Section 33(2)(a) exception) Nepal [2010] UKUT 273 (IAC)
and
MK (deportation – foreign criminal – public interest) Gambia [2010] UKUT 281 (IAC)

These decisions both address s. 32(5) UK Borders Act 2007. RG is another example of the Upper Tribunal making clear its approach to guidance from higher courts, in this case The European Court of Human Rights. The headnote reads:

"1. *When considering the automatic deportation provision in s. 32(5) UK Borders Act 2007, and the exemption at s.33(2)(a) relating to the claimant's private and family life (Article 8 ECHR), the Tribunal must give careful consideration to the factors set out at paragraphs 70-73 of Maslov v Austria [2009] INLR 47 ECHR.*

2. Particular care is required in relation to the consideration of the Article 8 ECHR impact on those who were lawfully resident in the UK at the time when the offence was committed."

This guidance seems straightforward. The Tribunal accepted that the Panel of the AIT that heard his appeal had erred when it *"compartmentalised the family life between the various members rather than seeing it as a whole."*[2] The Appellant, despite living in the UK for only 4 years, had never lived independently of his parents. The Tribunal observed at 21: *"It is difficult to see why those unbroken links and continuing concern by the family for the welfare of the son does not constitute family life."*

The Tribunal quotes paragraphs 70-73 of Maslov and emphasises that *"...the... criteria (that are spelled out in the Boultif[3] and Üner[4] judgments) ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities."*

On this basis, Article 8 must be weighed against the propensity of the appellant to commit crimes. Consideration of whether deportation on any basis is disproportionate should take into account not only the seriousness of the offence that invoked s. 32(5), but should cover all the circumstances of an appellant's personal characteristics and family situation.

In MK the Tribunal laid emphasis on a different aspect of consideration. While RG provides guidance on a nuanced consideration of Article 8 where deportation is automatic, MK makes clear that there is no finding to be made about whether an automatic deportation is in the public interest. The headnote states:

"(1) In automatic deportations made under s.32 (5) of the UK Borders Act 2007 the respondent's executive responsibility for the public interest in determining whether deportation is conducive to the public good has been superseded by Parliament's assessment of where the public interest lies in relation to those deemed to be foreign criminals within s.32(1)-(3). In consequence the respondent's view of the public interest has no relevance to an automatic deportation.

(2) In such cases by virtue of s32(4) it is not open to an appellant to argue that his deportation is not conducive to the public good nor is it necessary for the respondent to argue that it is.

(3) The seriousness of an offence and the public interest are factors of considerable importance when carrying out the balancing exercise in article 8. As Parliament has now determined where the public interest lies in cases of automatic deportation, that factor must be taken into account together with the Tribunal's own assessment of the seriousness of the offence. The gravity of criminal offending will normally be clear from the facts and nature of the offence, the views expressed by the sentencing judge and, importantly, the actual sentence."

While this seems to make appeals against automatic deportation that much more difficult, this case simply provides clarification without laying down any further principles. The main point to be taken is that submissions in automatic deportation appeals should be focussed on proportionality.

Further, in this case it was found that the approach of the Tribunal at first instance was correct. MK had difficult facts in that while the sentence that triggered s. 32(5) was his first sentence of imprisonment as an adult, he had been detained after conviction for offences as a minor and had several minor convictions after that. He was sentenced to four years' imprisonment after pleading guilty to two counts of possession with intent to supply Class A drugs. It was found that the First-Tier Tribunal had not erred in finding that the future risk of offending as evidenced by his history did not outweigh the establishment of his private and family life after long residence in the UK. Clearly, even difficult facts need not be fatal to an appeal against deportation even where the 'public interest' indicates that deportation is appropriate.

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[2] Paragraph 19 of the determination
[3] Boultif v Switzerland - 54273/00 [2001] ECHR 497 (2 August 2001)
[4] UNER v. THE NETHERLANDS - 46410/99 [2006] ECHR 873 (18 October 2006)

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