



Neutral Citation Number: [2024] EWHC 3205 (Admin)

Case No: AC-LON-001587

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12th December 2024

Before :

MR JUSTICE DOVE

Between :

ABW

Claimant

- and -

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Defendant

Shu Shin Luh and Rosa Polaschek (instructed by Leigh Day) for the Claimant
Alan Payne KC, Sian Reeves and Rajkiran Arhestey and (instructed by Government Legal
Department) for the Defendant

Hearing dates: 20th November 2024

Approved Judgment

This judgment was handed down remotely at 14:00pm on 12th December 2024 by circulation to the parties or their representatives by email and by release to the National Archive

Mr Justice Dove:

1. The preliminary issue which it is necessary to determine in this case is the question of whether, on either a mandatory or a discretionary basis, this case ought to be transferred from the High Court to the Upper Tribunal Immigration and Asylum Chamber (“UTIAC”). The claimant in this case is a national of Trinidad and Tobago who was referred on 28th May 2023 to the National Referral Mechanism (“NRM”) for those who are suspected to be a victim of trafficking. On 14th August 2023 the defendant made a positive decision that there were reasonable grounds to believe that the claimant is a victim of trafficking. This is the first stage of the NRM process. Stage two is the consideration of whether there are conclusive grounds to believe that the claimant is a victim of trafficking. In the meantime a person who has received a reasonable grounds decision is entitled to a range of therapeutic, emotional and practical support to recover from the effects of having been trafficked (referred to from now on as “recovery support”).
2. On 12th March 2024 the defendant issued a Public Order Disqualification (“POD”) decision using the power contained in section 63 of the Nationality and Borders Act 2022. The principal effect of making such a decision is that it brings to an end the claimant’s entitlement to recovery support. The claimant applied for permission to apply for judicial review in relation to that decision, and on 14th June 2024 this was granted, along with interim relief reinstating the claimant’s recovery support pending the determination of the claim. A further reasonable grounds decision was made in relation to the claimant on 22nd July 2024 arising out of another separate referral. Thereafter, the defendant made a second POD decision in respect of this further reasonable grounds decision. This second decision was then withdrawn, leading to the defendant making a third POD decision on 11th October 2024.
3. The defendant advised the claimant that the POD decision made on 12th March 2024 was to be treated as withdrawn in the light of these events, and so the parties agreed to reconfigure the proceedings to address the most recent POD decision. This will involve making necessary adjustments to pleadings and identifying the directions required to bring the case to a hearing. The consequences included turning the hearing on the 20th to 21st November 2024 from a substantive hearing into a case management hearing. At the hearing outstanding questions to be addressed included the issues raised as to whether this case should be transferred to UTIAC on a mandatory or discretionary basis. Other orders were considered during the course of the hearing. The final outstanding matter which is the subject of this reserved judgment is the jurisdictional question which has already been set out above.
4. It is important to note that the defendant is neutral in relation to this issue and did not have a view as to whether the case should be transferred or not. Nonetheless, Mr Payne KC made submissions to the court acting as, in effect, a “devil’s advocate” and exploring the points which might be ranged against the submissions of Ms Luh, who on behalf of the claimant argued that there was not a mandatory requirement that the case should be transferred to UTIAC, and that I should not exercise my discretion to do so either. I am very grateful to counsel for the extremely helpful submissions that I received, and also to their teams for the careful preparation of the papers which enabled an efficient hearing. Following the hearing, and at my invitation, both parties submitted very useful notes in relation to their views about the correct approach to the construction of the practice directions which arise for consideration. I mean no disrespect in not

setting out the details of their submissions separately, but the discussion and conclusions which follow reflect the arguments which were presented to the court.

5. The transfer of applications for judicial review from the High Court to the Upper Tribunal is governed by section 31A of the Senior Courts Act 1981, which as it currently stands provides as follows:

“31A Transfer of judicial review applications to Upper Tribunal

(1) This section applies where an application is made to the High Court-

(a) for judicial review, or

(b) for permission to apply for judicial review.

(2) If Conditions 1, 2 and 3 are met, the High Court must by order transfer the application to the Upper Tribunal.

(3) If Conditions 1 and 2 are met, but Condition 3 is not, the High Court may by order transfer the application to the Upper Tribunal if it appears to the High Court to be just and convenient to do so.

(4) Condition 1 is that the application does not seek anything other than-

(a) relief under section 31(1)(a) and (b);

(b) permission to apply for relief under section 31(1)(a) and (b);

(c) an award under section 31(4);

(d) interest;

(e) costs.

(5) Condition 2 is that the application does not call into question anything done by the Crown Court.

(6) Condition 3 is that the application falls within a class specified under section 18(6) of the Tribunals Courts and Enforcement Act 2007.”

6. The need for these provisions for transfer arises from the powers given to the Upper Tribunal to determine applications for judicial review which are contained in the Tribunals Courts and Enforcement Act 2007. The judicial review jurisdiction of the Upper Tribunal is created by section 15(1) of the 2007 Act, and as a consequence of section 15(2) the exercise of the jurisdiction is subject to the need for the conditions specified in section 18 to be met, or the provisions of section 19(3) and (4) relating to proceedings being transferred to the Upper Tribunal under section 31A of the Supreme

Court Act 1981 being in play. The relevant provisions of section 18 of the 2007 Act are as follows.

“18 Limits of jurisdiction under section 15(1)

(1) This section applies where an application made to the Upper Tribunal seeks (whether or not alone)-

(a) relief under section 15(1), or

(b) permission (or, in the case arising under the law of Northern Ireland, leave) to apply for relief under section 15(1).

(2) if Conditions 1 to 4 are met, the tribunal has the function of deciding the application.

(3) if the tribunal does not have the function of deciding the application, it must by order transfer the application to the High Court.

(4) Condition 1 is that the application does not seek anything other than-

(a) relief under section 15(1);

(b) permission (or, in a case arising under the law of Northern Island, leave) to apply for relief under section 15(1);

(c) an award under section 16 (6);

(d) interest;

(e) costs.

(5) Condition 2 is that the application does not call into question anything done by the Crown Court.

(6) Condition 3 is that the application falls within a class specified for the purposes of this subsection in a direction given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005.

(7) the power to give directions under subsection (6) includes-

(a) power to vary or revoke directions made in exercise of the power, and

(b) power to make different provision for different purposes.

(8) Condition 4 is that the judge presiding at the hearing of the application is either-

(a) a judge of the High Court or the Court of Appeal in England and Wales or Northern Ireland, or a judge of the Court of Session, or

(b) such other persons as may be agreed from time to time between the Lord Chief Justice, the Lord President, or the Lord Chief Justice of Northern Ireland, as the case may be, and the Senior President of Tribunals.”

7. The reference to Part 1 of Schedule 2 to the Constitutional Reform Act 2005 is a reference to provisions designed to govern the giving of “designated directions”. It provides a process where, by and large, any designated directions made by the Lady Chief Justice must be subject to the agreement of the Lord Chancellor. The relevant designated direction in the present case is that which was made on 21 August 2013 and amended on 17 October 2014, and which is entitled “Jurisdiction of the Upper Tribunal under section 18 of the Tribunals, Courts and Enforcement Act 2007 and Mandatory Transfer of Judicial Review applications to UTIAC under section 31A (2) of the Senior Courts Act 1981” (“the Direction”). It has been publicised on the basis that it is designed relate to the transfer of immigration and asylum judicial reviews from the jurisdiction of the Administrative Court to UTIAC.

8. The relevant provision of the Direction provides as follows.

“1. Subject to paragraphs 2 and 3 below, the Lord Chief Justice hereby specifies the following classes of case for the purposes of section 18(6) of the Tribunals, Courts and Enforcement Act 2007:

any application for permission to apply for judicial review and any application for judicial review (including any application for ancillary relief and costs in such applications) that calls into question:

(i) a decision made under the Immigration Acts (as defined in Schedule 1 to the Interpretation Act 1978) or any instrument having effect (whether wholly or partly) under an enactment within the Immigration Acts, or otherwise relating to leave to enter or remain in the United Kingdom outside the immigration rules; or

(ii) a decision of the Immigration and Asylum Chamber of the First-tier Tribunal, from which no appeal lies to the Upper Tribunal.”

9. Further provisions are made within paragraph 3 of the Direction which exclude certain types of case from its operation. Those exclusions are not relevant for present purposes. In Schedule 1 of the Interpretation Act 1978 the term “The Immigration Acts” is said to have the meaning given by section 61 of the UK Borders Act 2007. Section 61 of the 2007 Act identifies that a reference to “the Immigration Acts” is to be taken to be a reference to the following list of statutes.

- “(a) the Immigration Act 1971,
- (b) the Immigration Act 1988,
- (c) the Asylum and Immigration Appeals Act 1993,
- (d) the Asylum and Immigration Act 1996,
- (e) the Immigration and Asylum Act 1999,
- (f) the Nationality, Immigration and Asylum Act 2002,
- (g) the Asylum and Immigration (Treatment of Claimants) Act 2004,
- (h) the Immigration, Asylum and Nationality Act 2006,
- (j) the Immigration Act 2014,
- (k) the Immigration Act 2016,
- (l) Part one of the Immigration and Social Security Co-ordination (EU Withdrawal) at 2020 (Part three so far as relating to that Part),
- (m) the Nationality and Borders Act 2022,
- (n) the Illegal Migration Act 2023, and
- (o) the Safety of Rwanda (Asylum and Immigration) Act 2024.”

10. Having set out these provisions, the preliminary position in respect of this litigation is as follows. In relation to whether there is a need for it to be mandatorily transferred from the High Court to the Upper Tribunal there is no issue that conditions 1 and 2 from section 31A of the 1981 Act are satisfied in this case. The question which arises is as to whether or not this case falls within a class specified under the Direction, and therefore Condition 3 from section 31A of the 1981 Act is also satisfied, leading to the requirement that the case must be transferred to the Upper Tribunal. In that respect, paragraph 1(i) is the key provision of the Direction, and it is of course to be noted that the decision under challenge is one which was made under one of the identified Immigration Acts. Thus, it might be thought that on the basis of a superficial literal reading of the Direction it is a case subject to the requirement of mandatory transfer to the Upper Tribunal.
11. In my view, this superficial reading does not properly reflect the intention and purpose behind the creation of the Direction. Furthermore, it does not reflect the extensive evolution of the statutory framework and the broad range of content now encompassed by the lengthy list of Immigration Acts which are the subject of the Direction. For instance, as was pointed out during the course of argument, the relatively recent provisions of the 2022 Act inserted into the Immigration Act 1971 a range of powers and offences related to a wide range of subject matter such as, for instance, the forfeiture

and retention of ships, vehicles and aircraft, which it is difficult to envisage are intended to be solely subject to the specialist jurisdiction of the Upper Tribunal.

12. Other amendments to the 1971 Act undertaken subsequent to the making of the Direction include provisions in relation to searching individuals who have been arrested for documentation which may be in electronic form on a device or medium found on the person under arrest. Again, disputes as to these provisions and the powers that they provide are not plausibly within the sole jurisdiction of the Upper Tribunal. Although it is not dispositive of the point, it is useful context to observe that, for instance, disputes in relation to the proper construction of the powers (including those just identified in relation to searching persons who are under arrest by immigration officers) have been taken to be within the jurisdiction of the High Court in the case of *R(HM) v Secretary of State for the Home Department* [2022] 1 WLR 5030; [2022] EWHC 695.
13. Given the breadth of the statutory landscape created by an examination of the contents of the Immigration Acts as defined in the 1978 Act it is necessary for a more nuanced approach to be adopted rather than simply adopting a literal approach. It is essentially uncontroversial that the starting point is that an objective assessment of the meaning of the words used is required (see *R v Secretary of State for Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] AC 349 and the speech of Lord Nicholls at 396 E to 397A). It is agreed that a purposive approach to the Direction should be taken, that is to say that it should be read as a whole bearing in mind its obvious function and purpose that those matters which require consideration by the highly specialised and expert judges of the Upper Tribunal in its Immigration and Asylum Chamber should be required to be transferred to that jurisdiction. Such an approach requires that paragraph 1(i) of the Direction is read as a whole, with the phrase “or otherwise relating to leave to enter or remain in the United Kingdom outside the immigration rules” providing a contextual guide to the identification of the decisions made under the Immigration Acts or related instruments which are captured by the Direction and thereby earmarked for mandatory transfer. This approach obviously requires a careful examination of the nature and subject matter of the decision under consideration so as to enable the correct application of the Direction, and ensure that the matters identified for mandatory transfer are those which properly demand the specialist skills of the Upper Tribunal.
14. Whilst there is no case law in relation to the approach to interpreting a direction made pursuant to Part 1 of Schedule 2 of the 2005 Act, Mr Payne has drawn attention to the case of *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45; [2022] AC 995 in which the Supreme Court had to consider the approach to the construction of a Practice Direction under the CPR. In paragraph 51 of his judgment Lord Lloyd-Jones gave his view that the word “damage” in CPR PD 6B paragraph 3.1(9) should be read “in its ordinary and natural meaning and when considered in the light of the purpose of the provision”. He repeated this formulation when reiterating his conclusions in paragraph 81. In dealing with the same point of construction (albeit arriving at a contrary conclusion to Lord Lloyd-Jones and the majority) Lord Leggatt observed as follows.

“191. Where, as often happens and is the case here, a court is required to interpret legislative words which are capable as a matter of language of being understood in more than one way, the modern approach is to consider the purpose of the legislation and decide which meaning best fits that purpose. This purposive

method of interpretation is just as applicable where the rule is contained in delegated legislation such as the Civil Procedure Rules or a Practice Direction which accompanies them (made pursuant to the Civil Procedure Act 1977 and Part 1 of Schedule 2 to the Constitutional Reform Act 2005) as it is in relation to primary legislation.”

15. As Ms Luh points out, it is also important to have regard to the introductory language to paragraph 1 of the Direction which notes that the Lord Chief Justice was specifying “the following classes of case” for the purposes of section 18(6) of the 2007 Act. Thus, the two paragraphs which follow, paragraphs 1(i) and 1(ii), create two categories of case to which the provisions of the Direction apply. The clear implication of this analysis is that the three elements of paragraph 1(i) are not to be read disjunctively but as a whole. Reading paragraph 1(i) as a whole, and not as a collection of separate criteria, enables an understanding of the cases which it is regarded as necessary and appropriate to transfer to UTIAC.
16. The next stage is, therefore, to consider the type of decision involved in the present case to examine whether it falls within those covered by Paragraph 1(i) of the Direction. The decision is one which, as set out above, was reached using section 63 of the 2022 Act. This section, so far as relevant to the present issues, provides as follows.

“63 (1) A competent authority may determine that subsection (2) is to apply to a person in relation to whom a positive reasonable grounds decision has been made if the authority is satisfied that the person-

(a) is a threat to public order, or

(b) has claimed to be a victim of slavery or human trafficking in bad faith.

(2) where this subsection applies to a person the following cease to apply-

(a) any prohibition on removing the person from, or requiring them to leave, the United Kingdom arising under section 61 or 62, and

(b) any requirement under section 65 to grant the person limited leave to remain in the United Kingdom.

(3) for the purposes of this section, the circumstances in which a person is a threat to public order include, in particular, where-

(a) a person has been convicted of a terrorist offence;

(b) the person has been convicted of any other offence listed in Schedule 4 of the Modern Slavery Act 2015 anywhere in the United Kingdom, or of a corresponding offence;

(c) the person is subject to a TPIM notice (within the meaning given by section 2 of the Terrorism Prevention and Investigation Measures Act 2011);

(d) there are reasonable grounds to suspect that the person is or has been involved in terrorism-related activity within the meaning given by section 4 of that act (whether or not the terrorism -related activity is attributable to the person being or having been, a victim of slavery or human trafficking);

(da) the person is subject to a notice under part two of the National Security Act 2023;

(db) there are reasonable grounds to suspect that the person is or has been involved in foreign power threat activity within the meaning given by section 33 of that Act (whether or not the foreign power threat activity is attributable to the person being, or having been, a victim of slavery or human trafficking);

(e) the person is subject to a temporary exclusion order imposed under section 2 of the Counter-Terrorism and Security Act 2015;

(f) the person is a foreign criminal within the meaning given by section 32 (1) of the UK Borders Act 2007 (automatic deportation for foreign criminals);

(g) the Secretary of State has made an order in relation to the person under section 40(2) of the British Nationality Act 1981 (order depriving a person of citizenship status where to do so is conducive to the public good);

(h) the Refugee Convention does not apply to the person by virtue of Article 1 (F) of that Convention (serious criminals et cetera);

(i) the person otherwise poses a risk to the national security of the United Kingdom.”

17. In addition to the consequence of removal of the possibility of obtaining a favourable decision in respect of leave to remain, by virtue of section 64 of the 2022 Act section 50A was inserted into the Modern Slavery Act 2015 dealing with the provision of support during the recovery period for a person in respect of whom there has been a positive reasonable grounds decision. This section provides at section 50A(5) that any duty in relation to the provision of assistance and support during the recovery period ceases to apply in relation to a person in respect of whom a POD has been made pursuant to section 63 (2) of the 2022 Act.
18. There are a number of points which emerge from an examination of the nature and effect of making a POD in respect of a person who has the benefit of a reasonable grounds decision. The first point to observe is that these legislative provisions apply equally to United Kingdom citizens as much as foreign citizens. Both the citizens of the

United Kingdom as well as foreign citizens can be the victims of trafficking. Both UK citizens and foreign citizens can be subject to the operation of the Modern Slavery Act and its safeguarding provisions, including for instance the provision of support and assistance during the recovery period. Secondly, insofar as these provisions apply to foreign citizens, being the subject of a POD decision following a favourable reasonable grounds decision, has the effect of removing any entitlement to assistance and support during the recovery period. The prohibition on removing an individual from the United Kingdom who has been the subject of a positive grounds decision will no longer apply and nor will the requirement to grant a person who has the benefit of a reasonable grounds decision limited leave to remain in the United Kingdom be operative.

19. As set out above, the decision which is under challenge in this case was undoubtedly reached deploying a power contained within an Immigration Act. However, that is not determinative of whether or not the Direction captures this case and whether Condition 3 of section 31A of the 1981 Act requires that it is transferred to the Upper Tribunal. There are many kinds of decision which can be reached under the Immigration Acts in a wide variety of contexts. The question is whether a decision to make a POD in the circumstances of this case is one which falls within the definition provided by paragraph 1(i) of the Directive.
20. In the light of the principles of construction which have been set out above, paragraph 1(i) of the Direction has to be read as a whole, and bearing in mind the purpose of ensuring that those cases which require the specialist immigration jurisdiction provided by the Upper Tribunal are sent there for determination. Given the breadth of the coverage of the Immigration Acts not all decisions reached using powers contained within that legislation will be within the scope of paragraph 1(i). The inclusion of decisions “otherwise relating to leave to enter or remain in the United Kingdom outside the immigration rules” illustrates, consistently with the purpose of the Direction, that it is immigration decisions, or decisions arising in the context of provisions related to questions of immigration status that must be subject to the exclusive jurisdiction of the Upper Tribunal. The use of the language “relating to” is sufficiently open textured to incorporate decisions that do not directly lead to a decision granting leave to enter or remain, but includes those in relation to preparatory stages in the process of obtaining status. For instance, questions in respect of the accessibility of opportunities to provide biometric data to enable completion of the procedures leading to a decision to grant leave to enter are properly caught by the provisions of paragraph 1(i).
21. The relevant characteristics of a POD decision and its practical consequences have already been identified. It is true that the making of a POD decision has implications for a foreign national with the benefit of a reasonable grounds decision in relation to whether they are protected from removal, or can be considered for the grant of leave to remain. However, there are other more direct consequences which arise when a POD decision is made, namely, the removal of support and assistance during the recovery period to which a person is entitled as the recipient of a reasonable grounds decision. In my view the immigration dimension to these provisions cannot be regarded as determinative nor can they give rise to the conclusion that it is essential in all cases that they be considered and determined by the specialist judges of the Upper Tribunal.
22. One of the points which carries significant weight in making this determination is the fact that these provisions do not apply only to those who are the subject of immigration control. These provisions also apply to United Kingdom citizens who have been the

subject of referral and who have received a reasonable grounds decision. This factor points firmly and clearly in the direction that questions in relation to POD decisions do not fall within the scope of paragraph 1(i). Thus, having taken account of the nature and effect of a decision under section 63 of the 2022 Act to make a POD, I am satisfied that it is not a decision which, pursuant to the Direction, is required to be mandatorily transferred to the Upper Tribunal.

23. The further question which then arises is as to whether or not the case should be transferred to the Upper Tribunal as an exercise of case management discretion. In my judgement this is a more finely balanced decision. Whilst I have concluded that the requirements of the Direction are not fulfilled in respect of a decision under section 63 of the 2022 Act, it is beyond argument that decisions of that kind are well within the institutional competence of the Upper Tribunal. Indeed, section 31A(3) specifically contemplates the transfer of cases where Condition 3 is not met if it is “just and convenient” to do so. This is therefore a case management discretion of some considerable breadth which needs to be exercised in the light of the particular circumstances of the case in question.
24. In her submissions Ms Luh draws attention to a number of specific features of the present case which support retention of the claim in the High Court. Firstly, this case has been on foot for a considerable period of time, and the preparations in relation to it are well advanced. Whilst there will need to be some limited readjustments to the parties’ cases, the case is very close to being ready for hearing. Secondly, the claimant is indisputably vulnerable and there are sound reasons for expediting this case given his particular circumstances. Thirdly, the grounds upon which this judicial review is advanced include a challenge to the defendant’s Modern Slavery Act Statutory Guidance which governs the exercise of her power under section 63 of the 2022 Act. The breadth of this policy and its importance to the operation of the regime for victims of trafficking suggest that it is appropriate for this case to be retained in the High Court.
25. In my view there is substance in each of the matters which are relied upon by the claimant in relation to the exercise of the case management discretion as to whether or not to transfer this case to the Upper Tribunal. There may be other cases, related to a foreign national at a different stage in proceedings and with a different focus, which it may be more appropriate to transfer to the Upper Tribunal for determination. The specific circumstances of the present case in my view justify its continued progress in the High Court. In the light of this decision it will now be necessary for the parties to agree upon directions to enable this case to be made ready for a hearing as soon as possible. I am, therefore, expecting the parties to prepare a draft order reflecting the conclusions which I have set out in this judgement and providing the directions necessary to enable an efficient and effective hearing, including a timetable for the parties’ oral submissions alongside a time estimate to enable the matter to be listed.