4KBW

September 2023 Newsletter

Immigration Team

Edward Raw
Isaac Makka
Phil Bonavero
Kate Jones
Ben Haseldine
Nilay Shastry
Jyoti Wood
Jenny Lanigan
Adele Pullarp
Karen Staunton
Alex Maunders
Ciara Moran
Josh Stamp-Simon
Tabitha Everett

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

T: 0207 822 7000
E: clerks@4kbw.co.uk
W: www.4kbw.co.uk

SUDAN: RECENT POLICY UPDATES FROM THE UNHCR AND THE HOME OFFICE

Ciara Moran (2021)

On 15 April 2023, armed conflict began between the paramilitary Rapid Support Forces ("RSF") and the Sudanese Armed Forces ("SAF"). Fighting is predominantly in urban areas and has resulted in indiscriminate death and injury. By May 2023, the UNHCR published a Position on Returns to Sudan ("the UNHCR Position") which estimated that hundreds of civilians had been killed and thousands injured. The most recent Country Policy and Information Note, published in June 2023, cites 740 dead and over 5,000 injured. It also observes that these figures are likely an underestimate until more accurate reporting can be obtained. In many cases, civilians have been deliberately targeted by both sides. The conflict is still ongoing at the time of writing.

The UNHCR Position sets out the following recommendations to contracting States dealing with applications for refugee status or international protection:

1. As a minimum standard, the UNHCR calls for all States to suspend all forcible returns to Sudan until the situation improves;
2. The UNHCR further calls for a suspension of all negative decisions on applications for international protection from Sudanese nationals or habitual residents until the situation has stabilised and reliable information is available to be used in the assessment of risk on return;
3. The UNHCR considers that all Sudanese nationals and habitual residents of Sudan who flee the conflict will likely be in need of international refugee protection or humanitarian protection;
4. The UNHCR does not consider it appropriate to refuse claims on the basis of an internal relocation option;
5. The UNHCR calls for Sudanese nationals who are currently in safe countries to have their lawful residence in those countries extended where possi-

Immigration Team

Edward Raw
Isaac Makka
Phil Bonavero
Kate Jones
Ben Haseldine
Nilay Shastry
Jyoti Wood
Jenny Lanigan
Adele Pullarp
Karen Staunton
Alex Maunders
Ciara Moran
Josh Stamp-Simon
Tabitha Everett

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

T: 0207 822 7000
E: clerks@4kbw.co.uk
W: www.4kbw.co.uk

ble, and for sur place claims for asylum to be permitted.

Unfortunately, the most recent CPIN does not go quite so far as the UNHCR Position in the recommendations it makes to decision makers. It is open to those working in the field to challenge the CPIN on this basis (particularly since the "policy" section is only a statement of the Respondent's policy which is binding on representatives of the Respondent, and not binding on judicial decisionmakers). For example, the CPIN suggests that decision makers can distinguish between Khartoum, Darfur and North Kordofan and other areas of Sudan, where the CPIN considers that there are substantial grounds for believing there is a real risk of serious harm to a civilian's life or person solely by being present in those specific locations. It suggests that in all other areas of Sudan *"the level of violence is not at such a high level as to mean there is a real risk of serious harm to a civilian's life or person solely by being present there"*. Even more strongly, at Paragraph 4.1.1 the CPIN explicitly suggests that internal relocation may be available.

This directly contradicts the UNHCR Position that all forcible returns and negative decisions ought to be suspended until the situation has stabilised and reliable information about the extent of the conflict made available. It also contradicts the assessment by the UNHCR that all applicants fleeing the conflict are 'likely' to need international protection.

The CPIN was published one month after the UNHCR Position, and the vast majority of the sources cited in its bibliography are dated from April and May of the same year. Arguably, the information considered in producing the CPIN will have been much the same as that used to produce the Guidance, despite the differing conclusions reached.

In addition, despite the conflict persisting until the time of writing, no updated CPIN has been produced. In UNHCR Observations submitted to the International Protection Appeals Tribunal (Malta) published on 8 August 2023, the UNHCR emphasised the need for precise, up-to-date country of origin information when assessing risk. It further reminded the State that in a case

Immigration Team

Edward Raw
Isaac Makka
Phil Bonavero
Kate Jones
Ben Haseldine
Nilay Shastry
Jyoti Wood
Jenny Lanigan
Adele Pullarp
Karen Staunton
Alex Maunders
Ciara Moran
Josh Stamp-Simon
Tabitha Everett

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

T: 0207 822 7000
E: clerks@4kbw.co.uk
W: www.4kbw.co.uk

where the level of violence in a country is fluctuating, States must be extremely careful in considering whether the risk in particular areas might suddenly change. States are obligated to assess the durability of any change in a situation, including where violence has previously been widespread across a country and then becomes concentrated in a few areas, as the CPIN claims has happened in Sudan. Practitioners should be aware that any refusal decision which fails to make this assessment, for example by suggesting relocation to an area which was subject to indiscriminate violence but is now somewhat stabilised, may be open for challenge on this basis.

Furthermore, no sources are cited in the CPIN to support the idea that internal relocation might be available, aside from a 2022 report that suggests internal movement was generally unhindered for civilians. The application of the 2022 report to the situation post-April 2023 is one that can, and should, be questioned by practitioners facing refusals in light of the UNHCR Position / guidance set out in the UNHCR position.

The High Court finds the Secretary of State's Second Attempt to produce an Immigration Exemption to the UK GDPR to be Unlawful: the3million & Anor, R (On the Application Of) v Secretary of State for the Home Department & Anor [2023] EWHC 713 (Admin)

Karen Staunton (2020)

The United Kingdom General Data Protection Regulation ("**UK GDPR**") coupled with the Data Protection Act 2018 protects individual's rights to access data held on them by data controllers. In practice, this is often effected by way of subject access requests. Immigration practitioners will be well aware of the importance of subject access requests in immigration cases, and will no doubt have had cases where the Secretary of State for the Home Department refuses to comply with such requests because this is purported to be likely to prejudice the maintenance of effective immigration control. In the3million & Anor [2023] EWHC 713 (Admin), the High Court has now

Immigration Team

Edward Raw
Isaac Makka
Phil Bonavero
Kate Jones
Ben Haseldine
Nilay Shastry
Jyoti Wood
Jenny Lanigan
Adele Pullarp
Karen Staunton
Alex Maunders
Ciara Moran
Josh Stamp-Simon
Tabitha Everett

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

T: 0207 822 7000
E: clerks@4kbw.co.uk
W: www.4kbw.co.uk

reinforced the importance of protecting individual's data rights in the immigration context (*paragraph references in the body of this article are to paragraphs within the High Court judgment*).

Background

The Secretary of State has been attempting to create a lawful immigration exemption to the UK GDPR for some time. Her position is that such an exemption is necessary because administering border and immigration policy has become increasingly complex and is heavily reliant on data processing. She therefore considers that there are situations in which it will be necessary and proportionate to decline to respond fully to the assertion of data protection rights, when the unrestricted application of data subject rights will cause unwarranted prejudice to effective immigration control (**§25-8**). Such exemption must be in compliance with Article 23(2) of the UK GDPR, which lists various requirements for such an exemption to be lawful.

First attempt: 2021

The Secretary of State's first attempt at such an exemption was found to be unlawful by the Court of Appeal in R (Open Rights Group and the3million) v SSHD and SSDCMS [2021] EWCA Civ 800 because there existed no "*legislative*" measure that contained specific provisions in accordance with the mandatory requirements of Article 23(2) of the UK GDPR. The Court of Appeal further held that in the absence of such a measure, the exemption was an unauthorised derogation from the fundamental rights conferred by the UK GDPR and was therefore incompatible with that Regulation. The Secretary of State was thus directed to amend the exemption.

Second Attempt: 2023

The Secretary of State's second attempt was the subject of the3million & Anor. This second attempt, contained in Schedule 2, paragraphs 4, 4A and 4B of the Data Protection Act 2018 as amended, limited the exemption to the Secretary of State for the Home Department and required the existence of and

Immigration Team

Edward Raw
Isaac Makka
Phil Bonavero
Kate Jones
Ben Haseldine
Nilay Shastry
Jyoti Wood
Jenny Lanigan
Adele Pullarp
Karen Staunton
Alex Maunders
Ciara Moran
Josh Stamp-Simon
Tabitha Everett

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

T: 0207 822 7000
E: clerks@4kbw.co.uk
W: www.4kbw.co.uk

compliance with an Immigration Exemption Policy Document (IEPD). The IEPD had to explain the extent to which the application of any GDPR provisions affected by the Immigration Exemption "*would be likely to prejudice*" the immigration purposes. The application of the exemption had to be considered on a case by case basis of the extent to which the relevant UK GDPR provisions liable to be exempted "*would be likely to prejudice*" the Immigration Purposes, and, where it was considered that the application of any relevant provision of the UK GDPR "*would be likely to prejudice*" the immigration purposes, a record must be kept of her determination and reasoning, and the data subject informed of the outcome (**§22**).

Conclusions of the High Court

The Judge made a number of general points relating to immigration data:

- personal data to which the Immigration Exemption is applied is by its nature likely to be of a special category, revealing racial or ethnic origin. As such, it requires a higher measure of protection (**§31**);
- the data subject is inherently likely to be in a vulnerable position, with a significant imbalance of power between them and the Secretary of State (**§32**);
- this vulnerability means that the data subject is likely to be unaware of their rights under the UK GDPR, or to be able to fund litigation to enforce them (**§33**);
- the Judge stressed that the right of subject access is of great importance, contrary to the Secretary of State's characterisation of this as a second order right (**§34**);
- the Secretary of State's use of the Immigration Exemption had been "*extensive*". The first attempt had been applied to 59% of subject access requests and the second to 66% (**§35**).

The second attempt was found to be unlawful for a number of reasons:

- The Judge found that the IEPD was not a legislative measure (**§45**). Ar-

Immigration Team

Edward Raw
Isaac Makka
Phil Bonavero
Kate Jones
Ben Haseldine
Nilay Shastry
Jyoti Wood
Jenny Lanigan
Adele Pullarp
Karen Staunton
Alex Maunders
Ciara Moran
Josh Stamp-Simon
Tabitha Everett

ticle 23(2) required an express legislative basis for a balancing test between the data subject's rights and the immigration purposes. It was not sufficient that this was contained in the IEPD (**§56-7**);

- There were not sufficient safeguards to prevent abuse as required by Article 23(2)(d). This was because there was no substantive content of the IEPD prescribed by the legislation and the IEPD itself was not subject to Parliamentary scrutiny or approval. Article 23 was not analogous to Article 9(2)(g) concerning the processing of data, as Article 23 was a derogation and so must be construed narrowly. It was also drafted differently. Additionally, the Secretary of State need only "*have regard*" to the IEPD. The wording of the legislation encouraged a generalised, non-prescriptive document with policies and procedures in separate documents to the IEPD. The legislation did not require that the IEPD be published in a readily accessible manner (**§63-5**);
- The legislation failed to make provision as to the risks to the rights and freedoms of the data subject, as required by Article 23(2)(g).

The Judge made a declaratory order that the Immigration Exemption was unlawful, but suspended the order for a short period to allow the Secretary of State to put in place compliant legislation.

Comment

It is heartening that in this judgment the High Court has recognised the importance of protecting individual's data rights in the immigration context, particularly given their vulnerability and the increasing amounts of data that can be collected on individuals as technology develops. At the time of writing, the Secretary of State's third attempt is still awaited. There does not appear to be any proposed draft amendments to Schedule 2, paragraphs 4, 4A and 4B Data Protection Act 2018 following the judgment.

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

T: 0207 822 7000
E: clerks@4kbw.co.uk
W: www.4kbw.co.uk

Immigration Team

Edward Raw
Isaac Makka
Phil Bonavero
Kate Jones
Ben Haseldine
Nilay Shastry
Jyoti Wood
Jenny Lanigan
Adele Pullarp
Karen Staunton
Alex Maunders
Ciara Moran
Josh Stamp-Simon
Tabitha Everett

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

T: 0207 822 7000
E: clerks@4kbw.co.uk
W: www.4kbw.co.uk

Case Summary - AFU v R [2023] EWCA Crim 23

Tabitha Everett (2021)

This case involved an application for leave to appeal against the conviction of a 28-year-old Vietnamese national who was convicted of conspiracy to produce a Controlled Class B drug (cannabis) following a guilty plea. The Applicant was a victim of human trafficking who had been kidnapped in Vietnam before being trafficked to the UK and forced to work as a gardener in a cannabis house. It was found that there had been an abuse of process rendering the conviction unsafe. The conviction was subsequently quashed. This case will be of relevance and interest to practitioners who handle cases in fields of both crime and immigration.

The application for leave to appeal was brought on two grounds. Firstly, the Applicant stated that he was not advised adequately as to the availability of a defence under s45 of the Modern Slavery Act 2015 ("the Act"), thereby rendering his conviction unsafe. Secondly, the Applicant averred that the CPS might not have maintained the prosecution if the authorities had identified the Applicant as a victim of trafficking ("VOT") sooner (as per R v LM and others [2010] EWCA 2327). It was said that this failure constituted an abuse of process which had resulted in an unfair conviction. The Applicant was granted permission to rely on a range of fresh evidence including the Competent Authority's Reasonable Grounds and Conclusive Grounds decisions, two psychiatrists reports and an FTT judgment which made various findings about the Applicant's experience of trafficking.

The Court confirmed that the principle of finality, despite being important, does not apply where trafficking considerations have been overlooked [§74], before considering the grounds in turn.

Immigration Team

Edward Raw
Isaac Makka
Phil Bonavero
Kate Jones
Ben Haseldine
Nilay Shastry
Jyoti Wood
Jenny Lanigan
Adele Pullarp
Karen Staunton
Alex Maunders
Ciara Moran
Josh Stamp-Simon
Tabitha Everett

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

T: 0207 822 7000
E: clerks@4kbw.co.uk
W: www.4kbw.co.uk

Inadequate Advice Findings

The Court found that the Applicant's guilty plea had not been vitiated by inadequate legal advice, having heard evidence from both the Applicant and his trial Counsel and having accepted the FTT's finding that the Applicant was indeed a victim of trafficking and exploitation. It was accepted that the Applicant's trial Counsel was cognisant of the relevant s45 defence and had advised accordingly before the Applicant pleaded guilty of his own volition.

Abuse of Process Findings

The decision primarily focused on whether there had been an abuse of process. The Court reflected on a series of appellate decisions underlining the power to quash a conviction as an abuse of process if identification of a person as a VOT did not occur until after conviction [§105]. The Court adopted the test set out at [§76] of R v GS [2018] EWCA Crim 1824 and contemplated whether this was a case where either:

(1) The dominant force of compulsion was serious enough to reduce the applicant's criminality or culpability to or below a point where it was not in the public interest for him to be prosecuted. Or

(2) The Applicant would or might well not have been prosecuted in the public interest.

The Respondent had submitted that the guidance in *GS* did not apply because this case was a "post-Act" case unlike *GS*, and instead suggested that the guidance found at [§142] of R v AAD and others [2022] EWCA Crim 106 was more fitting. The Court did not accept that *AAD* endorsed a fundamentally different approach to that adopted previously by the courts. It was instead found that *AAD* did not disapprove of the guidance in *GS* and that the considerations identified in *GS* were still relevant to the question of whether the conviction was unsafe on abuse of process grounds [§118].

Immigration Team

Edward Raw
Isaac Makka
Phil Bonavero
Kate Jones
Ben Haseldine
Nilay Shastry
Jyoti Wood
Jenny Lanigan
Adele Pullarp
Karen Staunton
Alex Maunders
Ciara Moran
Josh Stamp-Simon
Tabitha Everett

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

T: 0207 822 7000
E: clerks@4kbw.co.uk
W: www.4kbw.co.uk

The Court of Appeal ruled that the Prosecution had failed, unjustifiably, to take into account the relevant CPS Guidance on prosecuting suspects who might be victims of human trafficking [§137].The Court found that the prosecution would likely have been discontinued at the second stage had the guidance been adhered to. This finding was considered in conjunction with the Respondent's notable concession that a s45 defence would "quite probably" have succeeded. It was accepted that the fresh evidence showed that the Applicant's compulsion was sufficient to reduce his criminality below a point where it would have been in the public interest to prosecute him. As such, the appeal was allowed on the basis that there had been an abuse of process, and the conviction was quashed.

This case serves as a reminder that the CPS should continually review cases involving modern slavery and both Prosecution and Defence practitioners should be alive to any evidence that might buttress a s45 defence.

Procedural Update: New Directions for hearings in the Upper Tribunal

Jennifer Lanigan (2018)

In recent weeks, new directions have been issued by the Upper Tribunal's Immigration and Asylum Chamber for all hearings including judicial review in the Upper Tribunal. Practitioners will need to be familiar with these standard directions moving forward.

Bundles: CE-File

The first update concerns filing of bundles: see Practice Direction for the Immigration and Asylum Chamber of the Upper Tribunal: Electronic filing of documents online – CE-File. This Practice Directions sets out that on or after 1 September 2023, any document provided to the Tribunal by a party who:

Immigration Team

Edward Raw
Isaac Makka
Phil Bonavero
Kate Jones
Ben Haseldine
Nilay Shastry
Jyoti Wood
Jenny Lanigan
Adele Pullarp
Karen Staunton
Alex Maunders
Ciara Moran
Josh Stamp-Simon
Tabitha Everett

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

T: 0207 822 7000
E: clerks@4kbw.co.uk
W: www.4kbw.co.uk

a) is represented in the proceedings by a person who is a representative for the purposes of rule 11 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ; or

b) is a body amenable to judicial review;

must be provided using CE-File, unless the document is an application for urgent consideration as defined in the relevant Practice Direction on Immigration Judicial Review in the Immigration and Asylum Chamber.

The new Practice Direction requires all users to register to use CE-File. Documents provided to the UT using CE-File must:

a) consist of one copy only unless a rule or practice direction requires otherwise;

b) be in PDF format unless the document is a draft order, in which case it shall be in "Word" format;

c) not exceed 50 megabytes or such other limit that may be specified by His Majesty's Courts and Tribunals Service; and

d) be categorised or labelled as to the type of document that it is (e.g. "Application", "Claim Form", "Witness Statement") and numbered sequentially.

It is important to note that CE-File cannot be used to provide documents to another party. Documents which are required to be provided to another party must be provided in accordance with the 2008 Rules of Procedure.

Standard Directions – Represented Parties

The second update concerns standard directions for all represented parties in the UTIAC. These directions must be complied with (unless varied, substituted, or supplemented by further directions). As set out in the explanatory notes, sanctions for non-compliance can include costs orders, returning of non-compliant bundles / skeletons, and a refusal of permission to rely upon

Immigration Team

Edward Raw
Isaac Makka
Phil Bonavero
Kate Jones
Ben Haseldine
Nilay Shastry
Jyoti Wood
Jenny Lanigan
Adele Pullarp
Karen Staunton
Alex Maunders
Ciara Moran
Josh Stamp-Simon
Tabitha Everett

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

T: 0207 822 7000
E: clerks@4kbw.co.uk
W: www.4kbw.co.uk

non-compliant bundles / skeletons.

From 25 September 2023, in all appeal cases where the parties are represented, the following directions will apply (set out in full for ease of use):

1. *NO LATER THAN 10 WORKING DAYS before the hearing, the Appellant* [i.e. the person who has been granted permission to appeal] *is to provide to the Upper Tribunal and the Respondent a composite electronic bundle which complies with the Guidance on the Format of Electronic Bundles in the Upper Tribunal (IAC).*

1.1 The composite bundle must contain the following documents and must be structured in the following way:

Part A: The decision of the FtT which is under appeal The grounds of appeal upon which permission to appeal was granted The decision of the FtT or Upper Tribunal granting permission to appeal Any other decision or direction made by the FtT which is relevant to the grounds of appeal Any response to the notice of appeal (r24) or appellant's reply (r25) Any decision or order of the Upper Tribunal in the appeal

Part B: Any r15(2A) application to rely on evidence not before the FtT Any evidence to which the application under r15(2A) relates

Part C: All documentary evidence relied upon by the Appellant before the FtT

Part D: All documentary evidence relied upon by the Respondent before the FtT

2. NO LATER THAN 10 WORKING DAYS before the hearing, any request for the services of an interpreter is to be made in writing, stating clearly the

Immigration Team

Edward Raw
Isaac Makka
Phil Bonavero
Kate Jones
Ben Haseldine
Nilay Shastry
Jyoti Wood
Jenny Lanigan
Adele Pullarp
Karen Staunton
Alex Maunders
Ciara Moran
Josh Stamp-Simon
Tabitha Everett

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

T: 0207 822 7000
E: clerks@4kbw.co.uk
W: www.4kbw.co.uk

language and any specific dialect required.

3. NO LATER THAN 5 WORKING DAYS before the hearing, the Appellant is to provide to the Upper Tribunal and the Respondent any skeleton argument upon which he intends to rely.

3.1 Any skeleton argument must:

a. Contain sequentially numbered paragraphs

b. Be in not less than 12 point font

c. Be as concise as possible, and not exceed 20 pages of A4

d. Not include extensive quotations from documents or authorities

e. Be cross referenced to the composite bundle thus: [CB/x]

4. NO LATER THAN 2 WORKING DAYS before the hearing of the appeal, the Respondent is to provide to the Upper Tribunal and the Appellant any skeleton argument upon which he intends to rely.

4.1 Any skeleton argument provided by the Respondent is to comply with the requirements in paragraph 3.1 above.