

**WELCOME TO ONE PUMP COURT'S
INTERNATIONAL WOMENS DAY IMMIGRATION CONFERENCE
- OUR DOMESTIC VIOLENCE UPDATE WILL BE STARTING
SHORTLY**

16.00 – 17.00

Domestic Violence Update

Speakers: Catherine Philps, Angelina Nicolaou, Priya Solanki

Chair: Justine Fisher

D/E



DESTITUTE DOMESTIC VIOLENCE CONCESSION

ANGELINA NICOLAOU



What is the Destitute Domestic Violence Concession? (DDV)

- Grant of temporary leave outside of the immigration rules
- From April 2012: those who meet the criteria are granted **3 months** leave outside of the immigration rules **with a condition code that does not restrict access to public funds**
- Why necessary?



Who is eligible for DDV Concession? (1)

- Applicants who have previously been granted LTR as a:
 - ☐ Spouse
 - ☐ Civil partner
 - ☐ Unmarried or same sex partner
- To a:
 - ☐ British citizen; or
 - ☐ Settled person; or
 - ☐ A member of HM forces who is exempt from immigration control and has served for at least 4 years



Who is eligible for DDV Concession? (2)

Applicant:

- Claims that their relationship has broken down as a result of domestic violence
- Claims to need access to funds in order to leave the relationship
- Intends to apply for ILR as a victim of DV (and therefore must be able to show that would be eligible to do so)



A v SSHD [2016] CSIH 38 (1)

Application for ILR on basis of being a victim of DV refused as applicant was granted leave as a spouse of a **refugee**.

- ❖ SSHD submitted that this was not discriminatory because a refugee sponsor was in a similar position to a student or visitor in the UK (i.e. no expectation of settlement)
- ❖ Not accepted: refugee is more similar to a British citizen/settled person because 95% of refugees go on to acquire settled status.

A v SSHD [2016] CSIH 38 (2)

- Court found this difference in treatment was discriminatory:

“there is no considered reason placed before the court for the exclusion of such individuals from the operation of the concession” [79]

“we consider that this is a case in which the line has been drawn effectively by oversight, and where the justification advanced is weak to the extent of being unjustifiable” [82]



R(otao T) v SSHD [2016] EWCA Civ 801 (1)

- Application for DDVC by a spouse of a refugee who had been **granted entry clearance** (limited leave) to the UK as the post flight **spouse of a refugee**
- T was **not** admitted to the UK as a spouse, civil partner, unmarried or same sex partner of a British citizen or someone present and settled in the UK under part 8 (at this time the Immigration rules did not include leave granted as a partner of a refugee)
- Once T was granted limited leave, her husband applied for ILR and became settled – but this was **after** she had obtained limited leave to remain.
- It was accepted that it was not unlawful for SSHD to refuse temporary relief to someone who could not satisfy the requirements for a grant of ILR



R(otao T) v SSHD [2016] EWCA Civ 801 (2)

- The applicant must be eligible to make an application for ILR:

*“In my view when considering an application under the DDV Concession for temporary relief the Secretary of State must ask herself whether, **as things stand at the date of the application**, the applicant would on the face of it **be able to meet the requirements of DVILR**. If it is clear that she would not, the Secretary of State is entitled to refuse relief... **it simply involves asking oneself whether, if the applicant were to make an application for indefinite leave to remain, she could satisfy the terms of the section**” [11]*

- Court found that T would not be able to satisfy the requirements for a grant of ILR, despite expressing sympathy for T’s position.



Impact: expansion of eligibility

As acknowledged by the Court of Appeal in FA(Sudan) at 55 – the Concession has been amended to take account of the judgment of a A

But **NOTE**: The Home Office's v.1 policy (still in force) has not been updated to reflect the position.



FA (Sudan) [2018] EWHC 3475

- Application for DDVC refused by SSHD on the basis that FA had not entered the UK under one of the routes for which the concession was established (whilst she was in fact married to a British Citizen she was not given leave to remain as a spouse of a British citizen).
- *“It is clear from the terms of the DDV Concession that it is not intended to address the position of **all** victims of domestic violence regardless of their immigration status. It is intended to provide a temporary respite of three months for a victim of domestic violence who has some form of leave to remain and is **therefore on a potential route to settlement**” [46]*
- *FA’s case is based on a misconception of the nature and purpose of the DDV Concession. It was never designed or intended to provide a general protection for victims of domestic violence” [56]*



FA (Sudan) [2021] EWCA Civ 59:

- Reiterated that “*the Concession is limited in its scope*” – need to explore the rationale for the policy in the Concession.
- Found an ‘objective justification’ for the distinction drawn based on immigration status.
- Case distinguished from A which led to an amendment of the Concession. ‘A’ had limited leave to be in the UK. ‘FA’ did not have limited leave.



Challenge to a DDVC decision

1. No right of appeal or administrative review
2. Request for reconsideration confined as per the Home Office Guidance dated 5 February 2018:
“There is no automatic right for a rejection of a request for DDV to be reconsidered. Requests should only be reconsidered where it is suggested that the policy had been incorrectly applied. Any reconsideration must be agreed by a chief caseworker” (page 8)
3. Judicial review



Resources

- HO Guidance “*Destitute domestic violence (DDV) concession*” Version 1.0 dated 5 February 2018
- A v SSHD [2016] CSIH 38
- R(otao T) v SSHD [2016] EWCA Civ 801
- FA (Sudan) [2021] EWCA Civ 59

ILR AS A VICTIM OF DOMESTIC ABUSE; EVIDENCE

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What are the requirements to be met?

- **Section DVILR: Indefinite leave to remain (settlement) as a victim of domestic abuse**
- DVILR.1.1. The requirements to be met for indefinite leave to remain in the UK as a victim of domestic abuse are that-
 - (a) the applicant must be in the UK;
 - (b) the applicant must have made a valid application for indefinite leave to remain as a victim of domestic abuse;
 - (c) the applicant must not fall for refusal under any of the grounds in Section S-ILR: Suitability-indefinite leave to remain; and
 - (d) the applicant must meet all of the requirements of Section E-DVILR: Eligibility for indefinite leave to remain as a victim of domestic abuse.



Eligibility: previous grants of leave

Eligibility for indefinite leave to remain as a victim of domestic abuse

- The applicant's first grant of limited leave under this Appendix must have been **as a partner** (other than a fiancé(e) or proposed civil partner)
- Any subsequent grant must have been granted as a partner or in accordance with the DDV concession, or to someone previously granted limited leave as a victim of DV

Eligibility; break down of the relationship

- E-DVILR.1.3. The applicant **must provide evidence** that **during the last period of limited leave as a partner...** the applicant's relationship with their partner broke down permanently **as a result of** domestic abuse.



“during the last period of limited leave as a partner”

IN (Domestic violence - IDI - policy) Pakistan [\[2007\]](#)
[UKAIT 00024](#)

There is, however, nothing in the IDI to suggest that caseworkers are to grant indefinite leave by reference to it in circumstances where a person has overstayed and the relationship with his or her spouse or partner has broken down only whilst the person has been an overstayer. §18

*“relationship with their partner broke down permanently **as a result** of domestic abuse”*

- **LA (para 289A: causes of breakdown) Pakistan [\[2009\] UKAIT 00019](#)**
- *..the Tribunal must be careful to assess the evidence in the round, looking at the totality of the evidence and remembering that a broken marriage may have ended before the parties separate and the marriage may have broken down as a result of domestic violence even if other grounds are given in matrimonial proceedings or raised before the Tribunal.*
- See also §68 and §69 of *Balakoochi*

*“the applicant must **provide evidence**”*

Ishtiaq v Secretary of State for the Home Department [\[2007\] EWCA Civ 386](#)

Old rule 289A(iv): “s able to produce such evidence **as may be required by the Secretary of State** to establish that the relationship was caused to permanently break down before the end of that period as a result of domestic violence.

- *I would hold that para 289A(iv) gives the caseworker a discretion to decide what evidence to require the applicant to produce in the individual case.*
- *In exercising that discretion, I would expect the caseworker usually to start by applying the guidance given in section 4 of chapter 8 of the IDIs.*

Ishtiaq contd

- *But if the applicant is unable to produce evidence in accordance with that guidance, it would seem to me that the caseworker should **seek an explanation for his or her inability to do so.***
- *If the applicant provides a reasonable explanation for her inability to produce such evidence, then the caseworker should give the applicant the opportunity to produce **such other relevant evidence as she wishes to produce**" §38*
- *...it is difficult to see how the caseworker can always, or even usually, decide whether a report by the applicant is unfounded **without interviewing the applicant and asking questions about the alleged domestic violence**" §40*

R (on the application of) Balakoochi v SSHD [2012] EWHC 1439

The Court summarises the IDI guidance (as it then was) read in light of the judgement in *Ishtiaq* at §35.
Useful points:

- **Applicant's own evidence** – Where the applicant has a good reason for not being able to provide supporting evidence, it is more likely that weight will be given to unsupported evidence or even unsupported non-independent evidence.
- **Witness statements from friends or family members and letters from official sources** that relay unfounded reports by the applicant should be verified where possible and treated as additional evidence when building up the case background.

R (on the application of) Balakaoohi v SSHD [2012] EWHC 1439

- **GP records** - *A GP is... highly qualified to form a professional judgment as to whether injuries presented by patients and more general complaints of behaviour experienced and suffered by them relate to domestic violence. Thus, when the purpose of the visit and the complaint is described in the notes as "domestic violence", that is not merely a paraphrase of how the patient had introduced her complaint but is the considered judgment of the GP reached at the conclusion of the consultation and examination.. §94*
- See also acknowledged difficulties with evidence - §60

R (Suliman) v Secretary of State for the Home Department [\[2020\] EWHC 326 \(Admin\)](#)

*...the Secretary of State did not address or deal with the reasons explained by the Claimant why he was reluctant to tell the police or the medical authorities. These were, variously, **his own sense of shame; 'cowardness'; his residual love for his wife despite her behaviour; and his fear of losing her or getting her into trouble.** If the Secretary of State was going to deal with matters fairly then this evidence needed to be confronted and a conclusion reached. **I am bound to say that these explanations all strike me as being inherently plausible and the fairly typical response of an abused partner in a relationship..***

§25

Home Office policy guidance: Victims of domestic violence and abuse

The Home Office has categorised evidence:

1. **Conclusive** e.g. conviction, police caution, finding of fact in the Family Court;
2. **Strong** e.g. charging decision, an injunction without a finding of fact by the Family Court, MARAC referral, DVPO, witness statement of an independent third party;
3. **Moderate** e.g. evidence of arrest, police report, *ex parte* orders, undertaking, hospital report;
4. **Weak** e.g. statement from applicant, letter from agency confirming applicant's account

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/680977/victims-of-domestic-violence-v14.pdf

Practical tips

- A should set out the account of abuse in a detailed witness statement;
- If there is a lack of evidence SSHD considers to be "conclusive" or "strong", provide a detailed explanation of the reasons this evidence is not available and provide as much other evidence as possible;
- If it would assist, suggest in a cover letter that A is invited to interview;
- If further evidence is awaited e.g. from an expert or the Family Court, ask for the decision not to be taken until it can be provided.

RAISING HUMAN RIGHTS ISSUES IN DOMESTIC VIOLENCE APPLICATIONS AND SEEKING A RIGHT OF APPEAL AGAINST AN ADVERSE DECISION

PRIYA SOLANKI



Administrative Review

- AR3.2 An eligible decision is:
 - (c) A decision made on or after 6th April 2015 on an application for leave to remain made under these Rules unless it is an application as a visitor, or where an application or human rights claim is made under:
 - (viii) Appendix FM (family members), but not where an application is made under section BPILR (bereavement) or section DVILR (domestic violence)...

Raising Human Rights in DV Applications

- Nationality, Immigration and Asylum Act 2002
 - s.82(1)A person (“P”) may appeal to the Tribunal where—
(b)the Secretary of State has decided to refuse a human rights claim made by P...
 - Under s.113, a human rights claim: *that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998.*
- s50 Immigration, Asylum and Nationality Act 2006
- Paragraph 34 of the Immigration Rules



Raising Human Rights in DV Applications

- *R (Alighanbari) v SSHD* [\[2013\] EWHC 1818 \(Admin\)](#)
defined a human rights claim as,
 - (a) A claim not to be removed from the UK; (b) an assertion of facts that could constitute an existing or prospective private and/or family life, the interference with which Article 8 ECHR protects; (c) an assertion that removal will interfere with that private and/or family life (i.e. that the, or a, basis upon which the claimant wishes to remain in the UK is the desire to maintain or build a private and/or family life)...
- *R (Shrestha) v Secretary of State for the Home Department* [\[2018\] EWCA Civ 2810](#)



Policy Guidance on Raising Human Rights

- UKVI [Rights of Appeal Policy Guidance](#) says caseworkers must carefully consider whether the matter is a human rights claim
 - Must be 'particularised', must carefully consider reasons for wanting to remain
 - Seeking leave on medical grounds is Article 3 or 8 ECHR claim
 - Being engaged in court proceedings is an Article 6 ECHR claim
 - States that a visitor application can request leave on human rights grounds
 - Prospects of success are relevant in determining this question



Rights of Appeal where a human rights claim is advanced?

- *AT, R (On the Application Of) v SSHD* [\[2017\] EWHC 2589 \(Admin\)](#)

Kerr J concluded that a domestic violence case can be a human rights claim and, if it is, a refusal will attract a right of appeal instead of an administrative review.

- See [HU197152018 \[2019\] UKAITUR](#)
- Consider *Z (Pakistan) and PG (India) SSHD* [\[2018\] EWCA Civ 1109](#) at §34
- But also see [HU161152016 \[2019\] UKAITUR](#)
- And worth noting [HU173362016 \[2017\] UKAITUR](#)



Rights of Appeal where a human rights claim is advanced?

- *Baihinga* (r. 22; human rights appeal: requirements)
[\[2018\] UKUT 00090 \(IAC\)](#)
2. ...the application will constitute a human rights claim if, on the totality of the information supplied, the applicant is advancing a case which requires the caseworker to consider whether a discretionary decision under the rules needs to be taken by reference to ECHR issues (eg Article 8) or requires the caseworker to look beyond the rules and decide, if they are not satisfied, whether an Article 8 case is nevertheless being advanced.
 3. The issue of whether a human rights claim has been refused must be judged by reference to the decision said to constitute the refusal.



Rights of Appeal where a human rights claim is advanced?

- *MY (refusal of human rights claim : Pakistan)* [\[2020\] UKUT 89 \(IAC\)](#)

(3) There is, accordingly, no justification for construing section 82(1)(b) otherwise than according to its ordinary meaning, which is that the Secretary of State decides to refuse a human rights claim if she: (i) engages with the claim; and (ii) reaches a decision that neither C nor anyone else who may be affected has a human right which is of such a kind as to entitle C to remain in the United Kingdom (or to be given entry to it) by reason of that right.



Rights of Appeal where limited leave is granted?

- *R (on the application of Mujahid) v First-tier Tribunal (Immigration and Asylum Chamber) and the SSHD (refusal of human rights claim)* [\[2020\] UKUT 00085 \(IAC\)](#)

The Secretary of State does not decide to refuse a human rights claim when, in response to it, she grants C limited leave by reference to C's family life with a particular family member, even though C had sought indefinite leave by reference to long residence in the United Kingdom.

- *Yerokun (Refusal of claim; Mujahid)* [\[2020\] UKUT 00377 \(IAC\)](#)

Under s 104(4A) a human rights appeal is deemed to be abandoned if a period of leave, however short, is granted after the appeal is brought. It is inconceivable that it was intended that a refusal of an application accompanied by a grant of leave was intended to generate a right of appeal.



THANK YOU FOR
ATTENDING!

