Immigration Team

Edward Raw
Isaac Makka
Phil Bonavero
Jyoti Wood
Jenny Lanigan
Karen Staunton
Ciara Moran
Josh Stamp-Simon
Tabitha Everett
Daniella Adeluwoye

Immigration Newsletter: November 2024 Update

New Practice Direction focuses on identifying issues early and procedural rigour

The new Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal came into force on 1 November 2024. It makes a number of changes to the way in which appeals should be prepared.

Issues based approach and procedural rigour

Great emphasis is put on identifying the issues at an early stage, with paragraph 1.1 noting '*the requirement that the parties identify, articulate, agree and then focus upon the principal controversial issues, or the disputed issues, thereby adopting an issues-based approach to the appeal*' and that this is to further the overriding objective. At paragraph 1.3, the Practice Direction goes even further, stating, '*judges should not be expected to infer issues which have not been clearly identified and articulated by the parties. The Tribunal will not tolerate a rolling consideration of issues and will not permit the issues to evolve at will for procedural advantage*'.

The second focus of the new Practice Direction is on procedural rigour with paragraph 1.2 making clear that '*[t]he Tribunal will not overlook breaches of the requirements of the Procedure Rules, Practice Directions, Practice Statements and failures to comply with directions issued by the Tribunal*' (see also paragraph 5.1). Sanctions for failing to comply with case management directions may include the exclusion of evidence in '*appropriate cases*' and are subject to the Tribunal considering such action '*just*'. The assessment of what is just will take into account all relevant principles, including the seriousness or significance of the failure to comply with rules or directions, any explanation offered for the failure or good reason for it and, as a third stage, an evaluation of all the circumstances of the case, to enable the Tribunal to deal justly with the application (paragraph 5.3). This echoes the wording of the civil relief from sanctions test[1], rather than what has tended to be the more relaxed approach taken by the Immigration Tribunals previously.

Clearly therefore the consequences for Appellants of not complying with the Practice Direction can be severe, but how does that change how cases should be prepared in practice?

Additional focus on interim hearings

Interim hearings replace what were previously known as case management review hearings. Section 6 of the Practice Direction sets out the importance of interim hearings in identifying the issues and ensuring procedural rigour. Witnesses can be directed to attend interim hearings and, strikingly, the Tribunal can fully dispose of the appeal at an interim hearing (paragraph 6.2).

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

T: 0207 822 7000
E: clerks@4kbw.co.uk
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Paragraph 6.3 makes clear that at the end of an interim hearing the Tribunal will also give to the parties an order containing written confirmation of all relevant decision-making and directions and also: (a) any issues that have been agreed at an interim hearing as being relevant to the appeal; and (b) any concessions made by a party. It is hoped that interim hearings will therefore be effectively used to require the Respondent to actually clarify the reasons why she opposes appeals, as this can often be unclear from reasons for refusal letters and reviews.

Interestingly, issues concerning jurisdiction and whether appeals have been brought in time are supposed to be dealt with by the Tribunal prior to the issuing of directions (paragraph 3.6). Where such issues are not immediately obvious, it is unclear how they will be able to be fairly dealt with without directions for both parties to set out their positions on jurisdiction and/or whether appeals were brought in time, and following an interim hearing. Should the Tribunal decide such issues without giving the parties an opportunity to make submissions, this might well be a ground for further challenge.

Changes to the preparation of evidence, bundles and ASAs

The Practice Direction contains a number of changes to the way in which evidence, bundles and appeal skeleton arguments ("ASA") should be prepared.

Firstly, text should be in no less than size 12 font with 1.5 line spacing (paragraph 1.6).

Bundles should:

- be prepared with the disputed issues in mind and in accordance with the requirements of the Procedure Rules (paragraph 7.1);
- be in a digital, indexed, bookmarked and paginated format where every page is A4 (unless a larger page size is required for good reasons). Any documents with typed text must be formatted so that characters can be recognised by the software (this function is known as Optical Character Recognition), unless doing so garbles the text (paragraph 7.2);
- include any previous decisions of the Tribunal or the Upper Tribunal (Immigration and Asylum Chamber) relating to the Appellant and any evidence or material considered to be relevant to the disputed issues as then understood (unless these have already been included in the Respondent's bundle) (paragraphs 7.3, 7.4 and 7.9).

ASAs must:

- be no more than 12 pages, unless an application is made for permission to rely on a longer ASA (paragraphs 7.6 and 7.7);
- include the name of the author and the date on which it was prepared (paragraph 7.8);
- contain three sections: (a) a brief summary of the Appellant's factual case; (b) a schedule of the disputed issues; (c) the Appellant's brief submissions on each of

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Temple
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those issues, which should state why the Appellant disagrees with the Respondent's decision with sufficient detail to enable the reasons for the challenge to be understood (paragraph 7.6);

- be concise, engage with the decision letter under challenge, not include extensive quotations from documents or authorities, identify but not quote any more than necessary from any evidence or principle of law that will enable the basis of challenge to be understood, and cross-refer to any country information evidence schedule (paragraph 7.6).

Helpfully, the Practice Direction also makes a number of requirements of the Respondent's review, which appear to be aimed at preventing pro-forma reviews and instead encouraging the Respondent to engage with and reconsider the points in issue in the light of the Appellant's evidence and ASA. It further requires the Respondent to specify which witnesses are required for cross-examination and whether there are objections to a witness statement being read by the Judge in the absence of oral evidence (paragraph 7.11).

If further evidence is submitted after the bundle, it must:

- be accompanied by an explanation of why it was not provided earlier in the appeal process (paragraph 7.13);
- include as the file name and on the first page a number and date so that the total number of bundles relevant to the case can be identified, for example "Appellant's Second Bundle provided on 14 February 2024" (paragraph 7.13);
- if it is submitted less than 5 working days prior to the hearing, include an application to admit the evidence. The Judge will decide as a preliminary matter whether to admit the evidence and if this results in the hearing being adjourned, the Tribunal will consider the issue of unreasonably incurred or wasted costs for the adjourned hearing (paragraph 7.14).

Witness statements must:

- continue to be able to stand as the entirety of the witness' evidence in chief. Where circumstances change between the drafting of the witness statement and the hearing, a supplemental statement should be provided, rather than eliciting this evidence in chief. However, evidence in chief will be allowed where there is 'good reason' for this (paragraphs 8.3 and 8.4);
- need not be in a language that the witness understands. If drafted in English and this is a language not understood by the witness, it must include a signed and dated attestation by both the witness and the person who interpreted it that the statement has been read back to the witness in a language they understand and that it accurately reflects their evidence (paragraph 8.5);
- include a statement by the intended witness in their own language that they believe the facts in it are true (paragraph 8.10):

> The statement of truth is as follows: "I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth" (paragraph 8.11).

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If the witness statement is in English, and the witness does not understand English, the witness and interpreter must endorse the following attestations: "This statement has been read to me in [LANGUAGE], a language I understand, by [NAME OF INTERPRETER]." "I, [NAME OF INTERPRETER], read this statement to [NAME OF WITNESS] faithfully interpreting it into [LANGUAGE]" (paragraph 8.12).

Expert reports must:

- be as concise as possible and focused on the issues in dispute which are within the author's field of expertise (paragraph 9.1);
- not exceed 20 pages, unless an application is made including the reasons for the report to exceed 20 pages (paragraph 9.2);
- comply with the following requirements: '*(a) be addressed to the Tribunal and not to the party from whom the expert has received instructions; (b) give details of the expert's qualifications; (c) give details of any literature or other material which the expert has relied on in making the report; (d) attach the letter of instruction, which must include the disputed issues as then understood; (e) contain a statement confirming the material and evidence provided to them (this can be achieved by clear reference to the letter of instruction); (f) make clear which of the facts stated in the report are within the expert's own knowledge; (g) say who carried out any examination, measurement or other procedure which the expert has used for the report, give the qualifications of that person, and say whether or not the procedure has been carried out under the expert's supervision; (h) where there is a range of opinion on the matters dealt with in the report: (i) summarise the range of opinion, so far as reasonably practicable; and (ii) give reasons for the expert's own opinion; (i) contain a summary of the conclusions reached; (j) if the expert is not able to give an opinion without qualification, state the qualification; (k) contain a statement that the expert understands their duty to the Tribunal and has complied, and will continue to comply, with that duty; and (l) contain the date on which it was signed*' (paragraph 9.3);
- be verified by a statement of truth as follows: "I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer" (paragraph 9.4).

Concerning country evidence:

- country guidance cases will continue to be determinative of an issue, unless a party can show why it should be departed from or should not apply (paragraph 10.1);
- only if there is no applicable and/or relevant country guidance, or a party argues that the Tribunal should depart from the country guidance, is it necessary for a party to provide background country material or information relating to the country background or conditions (paragraph 10.4). It should be made clear that this is a disputed issue (paragraph 10.5);
- Parties relying on material within country guidance decisions or additional country background information must include a country information evidence schedule ("the country schedule") within the bundle. The country schedule must: (a) contain the country guidance paragraph references and/or extracts of additional country

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background information relied upon by reference to each disputed issue; (b) not exceed 12 pages, absent an application for permission; and (c) include the relevant hyper-link to the additional country background information source document (paragraphs 10.6 and 10.8);

- if a party wants to challenge the accuracy/context of the extract in the country schedule, they must make clear that the full source document is to be made available at the hearing (paragraph 10.7).

Adjournments

Applications to adjourn must be made in writing, supported by full reasons and reasonable available supporting material no later that 4:30pm one clear working day before the hearing (e.g. by 4:30pm on Monday for a hearing on the Wednesday). It should be accompanied by proposed draft directions (paragraph 12.1). Any application made later than this must be made at the hearing and will, save in exceptional circumstances, require the attendance of the party or the representative of the party seeking the adjournment (paragraph 12.3).

Reasons

The Practice Direction also limits the extent to which written reasons will be given to '*where they are expressly required by the Procedure Rules or where the interests of justice otherwise compel written reasons being given, and, in every case where they are required, only to the extent and in the terms necessary to dispose justly of the matter in hand*' (paragraph 15.2). In particular, it is noted that in some non-deportation Article 8 human rights and EUSS cases, the Tribunal may be able to give its decision shortly after the conclusion of a hearing by providing a short Notice of Decision or by stating its reasons orally (paragraph 15.3). In such cases, the parties will be expected to make a note of the reasons (paragraph 14.3).

It is stressed that stating reasons at greater length than is necessary is not in the interests of justice. Reasons '*need refer only to the issues and evidence in dispute, and explain how those issues essential to the Tribunal's conclusion have been resolved. It follows that the Tribunal need not identify all of the evidence relied upon in reaching its findings of fact, or elaborate at length its conclusions on any issue of law*' (paragraphs 15.5 and 15.6). 'Appropriate restraint' is to be used when considering grounds of appeal based on the adequacy of reasons (paragraph 15.7).

Commentary

The new Practice Direction thus makes a number of changes to how appeals should be prepared, while also stressing the need for an issues-based approach and procedural rigour. In practice, this will require evidence to be provided well in advance of hearings, compliance with the Rules, Practice Directions and court directions, and well-reasoned applications to be made where these cannot be complied with. It will therefore be important for practitioners to identify the issues in appeals and the evidence required at an early stage. The consequences for the failure to so comply might be very serious, both for Appellants, if they are not able to rely on certain evidence in support of their appeal, and practitioners, if wasted costs orders are made against them.

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Temple
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It is unclear at this stage how the new Practice Direction will in practice work with the procedural rules, such as to deal with matters without unnecessary formality and with sufficient flexibility[2]. Practice Directions must of course be interpreted in the light of these requirements. The success of the Practice Direction therefore seems likely to turn on how it is implemented by individual judges.

It is hoped that the new Practice Direction will encourage the Respondent to properly engage with and review cases in the light of evidence and submissions. However, it remains to be seen whether the new Practice Direction will result in further substantive engagement by the Respondent at the review stage.

Finally, the paragraphs concerning the giving of oral reasons or more concise written reasons are concerning. While, of course, appeal determinations should be read fairly and in full, in an asylum or human rights context, the obligation to give the most '*anxious scrutiny*' to a case requires reasoning that shows that every factor which might tell in favour of an Appellant has been properly taken into account (ML (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 844 per Moses LJ). Adequate reasons must also be given, such that it is clear why Judges have come to the conclusions that they have (Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC)). Time will tell if the Practice Direction's approach to reasons leads to an increase in the number of inadequately reasoned determinations. The new Practice Direction, while aimed at improving efficient use of judicial time may ultimately therefore lead to further onward appeals.

Footnotes

1 See Civil Procedure Rule 3.9 and associated commentary in the White Book

2 The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, Rule 2(2)

Karen Staunton

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If you would like to instruct a member of the 4KBW Immigration team, please contact clerks@4kbw.co.uk or on 0207 822 7000.

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Temple
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