

Immigration cases 2017—a review of the year so far

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Immigration analysis: Adam Pipe, barrister at No 8 Chambers, picks out the key cases from January to June 2017 for immigration lawyers, and why they are of interest. The review covers decisions on Article 8 ECHR-related matters (including on the Minimum Income Requirement, best interests of the child, insurmountable obstacles, Part 5A public interest considerations and Section 94B certificates), British nationality and stateless children, EU law matters, judicial review developments and protection claims.

Article 8: Minimum Income Requirement, best interests and insurmountable obstacles

On 22 February 2017, the Supreme Court handed down two long awaited judgments in *R (MM (Lebanon)) v Secretary of State for the Home Department (SSHD)* and *R (Agyarko) v SSHD*, concerning the Minimum Income Requirement (MIR), [Art 8 ECHR](#), best interests of the child and insurmountable obstacles. Both judgments drew from the judgment of the European Court of Human Rights in *Jeunesse v the Netherlands* [\[2014\] ECHR 12738/10](#) and emphasised that the ultimate question in Article 8 cases is whether a fair balance has been struck between the competing public and individual interests involved, applying a proportionality test.

R (MM (Lebanon)) v SSHD [\[2017\] UKSC 10](#), [2017] All ER (D) 172 (Feb) (22 February 2017)

The Supreme Court found that the MIR contained within Appendix FM of the Immigration Rules was acceptable in principle but that the Rules and the relevant Immigration Directorate Instructions unlawfully failed to take a proper account of the duty under [section 55](#) of the Borders, Citizenship and Immigration Act 2009 ([BCIA 2009](#)) in respect of the best interests of children. The court also found that the SSHD's guidance required an amendment to allow consideration of alternative sources of funding (third party support, job offers etc) when evaluating a claim under Article 8.

R (Agyarko) v SSHD [\[2017\] UKSC 11](#), [2017] All ER (D) 168 (Feb) (22 February 2017)

Lord Reed gave the judgment of the court dismissing the appeals. The court found that the requirement in the Immigration Rules, Appendix FM, para EX.1 of 'insurmountable obstacles' to continuing a relationship is a stringent test to be met but was to be interpreted in a sensible and practical way rather than as referring solely to obstacles which make it literally impossible for the family to live together in the applicant's country of origin [43]. The 'exceptional circumstances' question is also one that the SSHD may legitimately ask. The SSHD's instructions state that exceptional does not mean unusual or unique, but means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. This is an application of a test of proportionality, consistent with the references to exceptional circumstances in European case law and cannot be regarded as incompatible with Article 8 [54-60]. Lord Reed helpfully reaffirmed the *Chikwamba* principle [51] (see *R (Chikwamba) v SSHD* [\[2008\] UKHL 40](#), [\[2008\] All ER \(D\) 330 \(Jun\)](#)) and the significance of delay in respect of the proportionality balance [52].

Article 8: Article 8 assessment and Part 5A of NIAA 2002 (public interest considerations)

R (Kaur) v SSHD [\[2017\] UKUT 14 \(IAC\)](#), [\[2017\] All ER \(D\) 121 \(Mar\)](#) (10 January 2017)

In this reported decision, the President of the Upper Tribunal (Immigration and Asylum Chamber) (UT) gave a detailed consideration to the best interest principles as set out in *Zoumbas v SSHD* [\[2013\] UKSC 74](#), [\[2014\] 1 All ER 638](#): the best interests of children must be assessed first, in isolation from public interest factors. The President goes on to consider the 'little weight' provisions set out in [section 117B\(4\)–\(5\)](#) of the Nationality, Immigration and Asylum Act 2002 ([NIAA 2002](#)). Relying on the judgment of Sales LJ in *Rhuppiah v SSHD* [\[2016\] EWCA Civ 803](#), [\[2016\] All ER \(D\) 33 \(Aug\)](#), the President found that 'little weight' involves a spectrum within which there is flexibility depending upon the fact sensitive context of the case. This is a welcome decision which avoids the 'blunt instrument' approach which these provisions may engender.

NE-A (Nigeria) v SSHD [\[2017\] EWCA Civ 239](#), [\[2017\] All ER \(D\) 68 \(Apr\)](#) (11 April 2017)

In this important decision from the Court of Appeal, consideration was given to the construction and application of [NIAA 2002, s 117C\(6\)](#) which provides that in the case of a foreign criminal who has sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are ‘very compelling circumstances’, over and above those described in the exceptions contained in [NIAA 2002, s 117C](#) (4)-(5). It was argued before the court, relying on *Ali v SSHD* [\[2016\] UKSC 60](#), [\[2017\] 3 All ER 20](#), that [NIAA 2002, s 117C\(6\)](#) is a relevant consideration for the purposes of determining whether there is a breach of Article 8, but it is not a complete code fixing how that question should be resolved. The court rejected this submission and found, relying on *Rhuppiah v SSHD* [\[2016\] EWCA Civ 803](#), [\[2016\] All ER \(D\) 33 \(Aug\)](#), that sections 117A–117D, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible with Article 8.

Article 8: section 94B certification and out-of-country rights of appeal

R (Kiarie) v SSHD [\[2017\] UKSC 42](#), [\[2017\] All ER \(D\) 70 \(Jun\)](#) (14 June 2017)

In a decision which struck a blow to the government’s ‘deport first and appeal later’ policy, the Supreme Court unanimously found the certificates issued against the appellants by the SSHD under [NIAA 2002, s 94B](#) to be unlawful. The SSHD had certified Article 8 claims of foreign criminals under s 94B in the absence of an ECHR-compliant system for the conduct of an appeal from abroad. The court found that in many deportation appeals live evidence from an appellant would be necessary in order to render the appeal effective. At present the barriers to evidence being given over video link are almost insurmountable. The implications of this decision are wide-ranging both for those in the UK and those who have already been deported in advance of their appeals. One also wonders if there will be wider implications beyond deportation (see by way of example *R (Mohibullah) v Secretary of SSHD* [\[2016\] UKUT 561 \(IAC\)](#), [\[2017\] All ER \(D\) 118 \(Jan\)](#)).

SSHD’s policy on British children (and their parents)

SF and others (Guidance, post–2014 Act) Albania [\[2017\] UKUT 120 \(IAC\)](#) (16 February 2017)

In this brief but significant decision, the Vice President of the UT found that the SSHD’s guidance, that it was not reasonable for British children to leave the UK, was relevant to the Tribunal’s assessment of the case, even in the absence of a ‘not in accordance with the law’ ground of appeal. The appeal was allowed on that basis. The relevant guidance can be found at section 11.2.3 of the Immigration Directorate Instruction [Family Migration: Appendix FM, Section 1.0b, Family Life as a Partner or Parent and Private Life: 10 year Routes](#).

Judicial review: duty of candour

R (Saha) v SSHD (Secretary of State’s duty of candour) [\[2017\] UKUT 17 \(IAC\)](#), [\[2017\] All ER \(D\) 111 \(Jan\)](#) (13 January 2017)

In this case, the President emphasised the importance of the duty of candour in judicial review proceedings and in particular the duty upon the executive. The President stated at [47], in his unmistakable prose:

In our judgement it is impossible to overstate the importance of the duty of candour in judicial review proceedings. The value and force of judicial review in a society governed constitutionally by the separation of powers and built on the rock of the rule of law is founded on, inter alia, a relationship between the executive and the courts akin to a partnership. The executive, for its part, guarantees that the court will be fully armed and equipped to adjudicate in every case. The court, for its part, guarantees, in accordance with the judicial oath of office, independent and impartial adjudication.

Judicial review: consent orders

A significant proportion of immigration judicial review applications are settled by way of a consent order which is approved by the tribunal. A common form of consent is that the SSHD agrees to reconsider an application within a specified time period. In *R (MMK) v SSHD (consent orders—legal effect—enforcement)* [\[2017\] UKUT 198 \(IAC\)](#) (5 May 2017), McCloskey J gave guidance as to the legal effect and enforcement of consent orders. The President confirmed that the normal remedy for non-compliance with a consent order is a fresh application for judicial review. The President stated at [42]:

'The consent order is a mechanism of fundamental importance and utility in public law litigation. I endorse it unreservedly. The dichotomy of recitals (on the one hand) and operative provisions (on the other) promotes many of the ingredients of the overriding objective and should, therefore, continue. All such orders must, however, be couched in terms which respect and promote the essential values of transparency, clarity and certainty.'

The President emphasised that the tribunal will not tolerate breaches of its orders [43] and that the tribunal does not want to get embroiled in enforcement measures [44].

British nationality and stateless children

R (MK (a child by her litigation friend CAE)) v SSHD [2017] EWHC 1365 (Admin), [2017] All ER (D) 84 (Jun) (14 June 2017)

In a decision which has significant implications, Mr Ockelton quashed the SSHD's decision refusing to register a child as a British citizen on the basis of the child being stateless. He found at [36] that a person is stateless if he has no nationality. Ability to acquire a nationality is irrelevant for these purposes. A child born on or after 3 December 2004, outside India, of parents at least one of whom is an Indian national, and who has not been to India, is not an Indian national unless registration of the birth has taken place in accordance with the provisions of the Citizenship Act 1955 (India) as amended. If the child had no other nationality, the child is stateless for the purposes of the [British Nationality Act 1981 \(BNA 1981\)](#), Sch 2, para 3 and, if the other requirements of that paragraph are met, is entitled to be registered as a British citizen.

Proxy marriages & EU Law

Awuku v SSHD [2017] EWCA Civ 178, [2017] All ER (D) 09 (Jan) (23 March 2017)

The Court of Appeal held that the UT had been wrong in *Kareem (Proxy marriages—EU law)* [2014] UKUT 00024 (IAC) and *TA and others (Kareem explained)* [2014] UKUT 316 (IAC), and the validity of a marriage involving an EU national should be determined by the *lex loci celebrationis* (the law of the country in which it took place). There was simply no need to create a new rule of private international law requiring reference to the law of the home state of the EU national.

Rights of appeal for extended family members

Banger (Unmarried Partner of British National) [2017] UKUT 125 (IAC) (30 March 2017)

The President has now referred a question (along with questions addressing whether the *Surinder Singh* principle is applicable to unmarried partners of returning British citizens) to the CJEU on the *Sala (EFMs: Right of Appeal)* [2016] UKUT 411 point, thus accepting that the matter is not *acte clair*.

Is a rule of national law which precludes an appeal to a court or tribunal against a decision of the executive refusing to issue a residence card to a person claiming to be an extended family member compatible with the Directive?

Zambrano developments

Chavez-Vilchez v Raad van bestuur van de Sociale verzekeringsbank Case C-133/15, [2017] All ER (D) 104 (May) (10 May 2017)

This case concerned the rejection of applications for social assistance and child benefit in the Netherlands by the third country national mothers of Dutch children. The applications had been rejected on the basis that the mothers did not have a right to reside in the Netherlands. Questions were referred to the EU Court of Justice in respect of [Article 20](#) TFEU and whether it precluded the Member State from refusing a right to reside where there was the possibility that the EU national parent may be able to take over day-to-day care of the child. The Court found that:

'the fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a

refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.'

The Court also held that Member States could require third country nationals to provide evidence in order to prove that a refusal of a right of residence would deprive the child of the genuine enjoyment of the substance of their rights as a Union citizen. However, it was for the Member State to undertake the necessary enquiries as to whether refusal would have such consequences.

Ankara Agreement cases

In *R (Akturk) v SSHD* [2017] EWHC 297 (Admin), [2017] All ER (D) 196 (Feb) (08 February 2017) Holman J found the SSHD's ECAA refusal decision defective and that the abolition of a right of appeal for Turkish citizens seeking to exercise their freedom of establishment under the ECAA was incompatible with the ECAA (and that that incompatibility has not been avoided or removed by the introduction of administrative review in such cases). In *R (Aydogdu) v SSHD (Ankara Agreement—family members—settlement)* [2017] UKUT 167 (IAC) (20 March 2017), McCloskey J held that the settlement in the UK of a migrant Turkish national who has exercised the right of establishment under the ECAA and their family members does not fall within the scope of the 'stand-still clause' in Article 41(1) of the ECAA Additional Protocol as it is not necessary for the exercise of freedom of establishment under Article 13 of the ECAA.

Protection claims

KV (Sri Lanka) v SSHD [2017] EWCA Civ 119, [2017] All ER (D) 49 (Mar) (07 March 2017)

In this protection case, the Court of Appeal considered the judgment of the UT which had dismissed the appeal of a Sri Lankan asylum seeker who had scarring on his back. The tribunal had given guidance in this case on the controversial issue of self-inflection by proxy (SIBP). The Court of Appeal found that the proper approach to the instruction of experts, their role and what their reports should include is set out in para 10 of the [Practice Direction for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal](#) issued by the Senior President of Tribunals. The court went on to find that contrary to the tribunal's guidance it is not incumbent on medical experts in scarring cases to refer to the possibility of SIBP, where the SSHD has not raised it as an issue, unless there is some feature of the case which engages the duty of the medical expert to bring it to the attention of the tribunal, pursuant to the guidance in the Practice Direction. Subject to that duty, an expert witness does not have to raise and comment on issues which have not been raised by the parties to the proceedings. The court found that the guidelines issued by the tribunal in respect of SIBP should be treated as of no effect. The best guidance available for expert witnesses is set out in para 10 of the [Practice Direction](#), and medical witnesses should have their attention explicitly drawn to this when they are instructed to prepare expert evidence.

The majority of the court substantively dismissed the appeal. Elias LJ, however, gave a powerful dissenting judgment which is worthy of close attention. Elias LJ states at [99] 'it must be a very rare case indeed where a person would subject himself to painful and severe scarring of the kind suffered by this appellant in order, presumably, to manufacture or possibly strengthen a claim for asylum'.

ZMM (Article 15(c) (CG)) [2017] UKUT 263 (28 June 2017)

In a welcome Country Guidance decision, the UT found that violence in Libya has reached such a high level that substantial grounds are shown for believing that a returning civilian would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to a threat to his life or person.

Adam Pipe is experienced in all aspects of immigration and asylum law. He is particularly interested in refugee law. Adam undertakes cases in the First-tier Tribunal, Upper Tribunal, Administrative Court and Court of Appeal. Adam is ranked for immigration in the Midlands by Chambers and Partners 2017. He is a contributing editor to Butterworths Immigration Law Service and regularly provides case law analysis for LexisNexis Legal News and LexisPSL Immigration.

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