Immigration cases 2020—July to December review

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Immigration analysis: Adam Pipe, barrister at No 8 Chambers, reviews the key cases from July 2020 to December 2020 for immigration advisers, and explains why they are of interest. The review covers the government unlawfully passing regulations preventing individuals with pre-settled status to access certain benefits, guidance on establishing whether someone is a victim of human trafficking, sponsor licence revocations and the principle of 'fairness', gaps in lawful residence for indefinite leave to remain applications on the basis of long residence and the unlawful Presidential Guidance Note issued during the coronavirus (COVID-19) pandemic. It also covers deportation and asylum updates and successful challenges to the Home Office's policies in relation to Schedule 10 accommodation, the removal window and trafficking.

Hot off the press: latest key decisions

In *Fratila v Secretary of State for Works and Pensions* [2020] EWCA Civ 1741 (18 December 2020) a majority of the Court of Appeal found that the amendment to the social security rules introduced by the Social Security (Income Related Benefits) (Updating and Amendment) (EU exit) Regulations 2019, SI 2019/872 preventing reliance upon 'pre-settled status' in order for to meet the qualifying residence tests which are a condition of entitlement to certain social assistance benefits, were unlawful on the basis that they constitute direct discrimination. The decision of the court has been temporarily stayed whilst the government considers applying to the Supreme Court for permission to appeal.

In *MN v SSHD* [2020] EWCA Civ 1746 (21 December 2020) the Court of Appeal gave comprehensive guidance in two appeals on the correct approach to deciding whether someone is a victim of human trafficking for the purpose of the process established under the so-called National Referral Mechanism (the NRM). The Court of Appeal considered the question of the standard of proof, the role of expert evidence and the question of credibility. Both of the appeals were allowed and the decisions of the competent authority were quashed.

Sponsor licence revocation and 'fairness'

In *R (Pathan) v SSHD* [2020] UKSC 41, [2020] All ER (D) 98 (Oct) (23 October 2020), the appellant made an application for leave to remain as a Tier 2 (General) migrant. Whilst the application was outstanding the Home Office revoked his employer's sponsor licence. The Home Office did not inform the appellant and, three months after revoking the licence, rejected his application on the basis that he no longer had a valid Certificate of Sponsorship (CoS) from a licensed sponsor. The appellant sought an administrative review of the decision to reject his application and not providing a 60 day period to enable him to provide a fresh CoS, but the decision was maintained. The appellant then applied for judicial review and his application was dismissed by the Upper Tribunal and the Court of Appeal. The appellant appealed to the Supreme Court who allowed his appeal. The court unanimously held that the SSHD breached her procedural duty to act fairly by failing promptly to notify the appellant of the revocation of his sponsor's licence, para [107]. However, the majority of the Justices (Lord Kerr, Lady Black, and Lord Briggs) held that the SSHD was not under a further duty to provide a period of time following notification to enable the appellant to react to the revocation of his sponsor's licence, paras [108]–[109]. Lord Wilson and Lady Arden concluded that the law did impose this further duty on the SSHD.

Long residence, 276ADE & gaps in lawful residence

In *Hoque v SSHD* [2020] EWCA Civ 1357, [2020] All ER (D) 103 (Oct) (22 October 2020) the Court of Appeal provided the long awaited guidance in respect of whether short periods of overstaying can be disregarded, for applications for indefinite leave to remain on the basis of long residence pursuant to the Immigration Rules, Part 7, para 276B. This was further to the decisions in *R (Juned Ahmed) v SSHD* [2019] UKUT 10 (IAC) and *R (Masum Ahmed) v* SSHD [2019] EWCA Civ 1070.

Para 276B(v) states (with the letter [A]–[C] inserted before each element):

> '(v) [A] the applicant must not be in the UK in breach of immigration laws, [B] except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. [C] Any previous period of overstaying between periods of leave will also be disregarded where –
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> (a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or
>
> (b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied'

Lord Justice Underhill gives the leading judgment of the majority and finds that the that the requirements identified at subparagraphs (i)–(v) are intended to be free-standing and self-contained. He therefore states, para [29]:

> 'Normally it would follow that any disregard provided for in a particular sub-paragraph would only relate to that requirement, and thus that the Appellants cannot invoke the disregards in sub-paragraph (v) to remedy their inability to satisfy the requirements of sub-paragraph (i) (a).'

Underhill LJ finds that, para [31]:

> 'Element [A] states the actual requirement which sub-paragraph (v) imposes, namely that the applicant must not "be in the United Kingdom in breach of immigration laws".'

Element [B] is therefore a disregard in respect of element [A] which provides for where an applicant has had ten years' continuous lawful residence which has expired but rule 39E applies (described as 'open-ended' overstaying). However element [B] does not qualify the requirement for ten years' continuous lawful residence in sub-paragraph (i)(a).

In respect of element [C] (dealing with what is described as 'book-ended' periods of overstaying) Underhill LJ found, and the SSHD accepted, that it must be treated as qualifying the requirement of ten years' continuous lawful residence in sub-paragraph (i)(a) if it is to have any effect. Underhill LJ therefore held, para [45]:

> 'that I would regard†Juned Ahmed†as correctly decided, although Sweeney J's reasoning is too broadly expressed to the extent that it is treated as applying to†both†disregards. Where, if I may respectfully say so, the Court went wrong in†Masum Ahmed†was that it treated the situations covered by the two cases—that is, open-ended and book-ended overstaying – as if they were the same.'

The appellants however were unsuccessful as they were relying on periods of open-ended overstaying to establish ten years' lawful residence and the majority found that element [B] could not be invoked to remedy their inability to satisfy sub-paragraph (i)(a) (Lord Justice McCombe dissenting favoured the appellant's construction). All three members of the court were critical of the drafting of the Immigration Rules and this provision in particular, paras [59], [96] and [105]. As McCombe LJ put it, para [96]:

> 'The problem, as he says, goes further than structure and presentation. After many years of trying to understand and construe infelicitous drafting in various parts of these Rules and in simply trying to see how they are supposed to work in practice, I think that there may be no solution other than to discard the present Rules and to start again. It may take a considerable time to achieve, but the result should enable officials, migrants (and their advisers) and the Tribunals and courts to understand what is going on and should reduce the volume of litigation. That result, it seems to me, would be well worth it.'

UT IAC Presidential Guidance Note unlawful

On 23 March 2020 the President of the Upper Tribunal (IAC) issued a Presidential Guidance Note (the guidance note) as to how substantive appeals were to be dealt with during the coronavirus (COVID-19) pandemic. The guidance note was challenged by JCWI on the basis that it unlawfully communicated to UTIAC Judges an 'overall paper norm' for determining substantive appeals during the pandemic in *R (Joint Council for the Welfare of Immigrants) v President of the Upper Tribunal (Immigration and Asylum Chamber)* *[2020] EWHC 3103 (Admin)*, *[2020] All ER (D) 123 (Nov)* *(20 November 2020)*. Mr Justice Fordham found that the guidance note was unlawful because it communicated that appeals should normally be decided on the papers rather than at remote hearings during the pandemic. That position was inconsistent with basic common law requirements which informs the overriding objective of just and fair disposal, with which Judges are duty-bound to comply. The guidance note had misdescribed the effect of the Senior President of Tribunals' 'Covid†Pilot Practice Direction'. The†guidance note†was also unlawful because it said:†

> 'The fact that the outcome of the appeal is of importance to a party (or another person) will not, without more, constitute a reason to convene a hearing to decide the relevant questions.'

That advice is erroneous in law and would, if followed, lead to, permit or encourage unlawful acts. It also omitted important factors recognised at common law which support holding a hearing. The order made by Fordham J. contained recitals setting out that the defendant had agreed to withdraw paragraphs 9-17 of the guidance note and had undertaken that:

> 'In all cases of a UTIAC substantive appeal (as described in paragraph 2.10 of the Judgment) where, between 23 March 2020 and the date of this Order either (a) the appeal has been determined without a hearing and in favour of

> the Secretary of State for the Home Department ("SSHD") or (b) a UTIAC Judge has decided that the appeal will be determined without a hearing, the Defendant shall use all reasonable endeavours to bring to the attention of the person who is party to the appeal (and who is not the SSHD), in writing: (i) the Judgment (ii) this Order (iii) the statement: "If you have not taken legal advice on your position, you are strongly advised to do so now.'

The effect of this important judgment is that a number of appeals dealt with on the papers will now need to be re-heard with oral argument.

Deportation

Deportation of Zambrano carers

In *Robinson (Jamaica) v SSHD* [2020] UKSC 53, [2020] All ER (D) 82 (Dec) (16 December 2020) the Supreme Court considered the extent to which a Zambrano carer is protected against deportation following the judgment of the CJEU in *SSHD v CS* (Case C-304/14) [2017] QB 558, [2016] All ER (D) 46 (Sep) and *RendÛn MarÌn v AdministraciÛn del Estado* (Case C-165/14) [2017] QB 495, [2016] All ER (D) 86 (Oct). In CS the CJEU stated that, para [50]:

> 'in exceptional circumstances a member state may adopt an expulsion measure provided that it is founded on the personal conduct of that third-country national, which must constitute a genuine, present and sufficiently serious threat adversely affecting one of the fundamental interests of the society of that member state, and that it is based on consideration of the various interests involved, matters which are for the national court to determine'.

Ms Robinson, who is the primary carer of a British son, was made the subject of a deportation order, following a conviction of supplying a class A drug (cocaine). The Upper Tribunal held that Ms Robinson had absolute protection from deportation. The SSHD appealed to the Court of Appeal which held that the phrase 'exceptional circumstances' in *CS* was not an additional requirement which the state must satisfy, but merely summarised an exception to the general rule that D, an EU citizen, cannot be compelled to leave the territory of the EU. Ms Robinson appealed to the Supreme Court who unanimously dismissed her appeal and held that the phrase 'exceptional circumstances' does not import an additional hurdle before a *Zambrano* carer can be deported from the territory of the EU. It remitted the appeal to the Upper Tribunal for redetermination. Lord Stephens said, para [57]:

> 'On the contrary, and as the Court of Appeal correctly decided, it was simply explaining that, in the prescribed circumstances, an exception could be made to the general rule that a Zambrano carer could not be compelled to leave the territory of the Union. It was not stating that certain undefined "exceptional circumstances" had first to be demonstrated.'

The European Court of Human Rights on Article 8 and deportation

In *Unuane v United Kingdon* (App.†No.†80343/17), [2020] All ER (D) 136 (Nov) (24 November 2020), the appellant, a Nigerian national appealed to the ECtHR following the dismissal of his deportation appeal by the First-tier Tribunal and Upper Tribunal. The appellant has three British children, one of whom suffers from a rare congenital heart defect. The appellant had been sentenced to five and a half years imprisonment for offences relating to the falsification of some thirty applications for leave to remain in the United Kingdom. The appellant challenged the decision of the Upper Tribunal on the basis that when considering whether there were very compelling circumstances it had not conducted a proper proportionality assessment considering all of the relevant 'Strasbourg factors'. The ECtHR agreed (para [84]) with the appellant and stressed the need for domestic courts to have regard to the factors identified in the Strasbourg and domestic case law, paras [78]–[83]. The court therefore made an assessment of Article 8 and found that in the circumstances of the present case the seriousness of the particular offence(s) committed by the applicant was not of a nature or degree capable of outweighing the best interests of the children so as to justify his expulsion, para [89].

Landmark Court of Appeal judgment on 'unduly harsh', 'very compelling circumstances', 'rehabilitation' and 'best interests'

In *HA (Iraq) and RA (Iraq) v SSHD* [2020] EWCA Civ 1176, [2020] All ER (D) 35 (Sep) (4 September 2020), the Court of Appeal gave comprehensive guidance in respect of Article 8 and deportation, post *KO (Nigeria) v SSHD* [2018] UKSC 53, [2018] All ER (D) 95 (Oct).

There were two appeals before the Court, *HA* and *RA*, both of which were decisions of panels chaired the Upper Tribunal President who had heard a number of cases at the same time in order to give authoritative guidance on section 117C NIAA 2002 in light of *KO (Nigeria)*. The Court of Appeal allowed both appeals and remitted them for

redetermination. Underhill LJ found that 'unduly harsh' is an elevated test, which carries a much stronger emphasis than mere undesirability or what is merely uncomfortable, inconvenient, or difficult; but the threshold is not as high as the very compelling circumstances test in section 117C(6), paras [51]–[52]. The formulation in *KO (Nigeria)* (para [23]) does not posit some objectively measurable standard of harshness which is acceptable, and it is potentially misleading and dangerous to seek to identify some 'ordinary' level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances; it is not possible to identify a base level of 'ordinariness', paras [44], [50]–[53] and [56]. Beyond this guidance, further exposition of the phrase will rarely be helpful; and tribunals will not err in law if they carefully evaluate the effect of the parent's deportation on the particular child and then decide whether the effect is not merely harsh but unduly harsh applying the above guidance, paras [53] and [57].

Underhill LJ also addressed the relevance of rehabilitation in the proportionality assessment under section 117C(6) NIAA 2002 finding (para [141]) that the fact that a potential deportee has shown positive evidence of rehabilitation, and thus of a reduced risk of re-offending, cannot be excluded from the overall proportionality exercise and is a factor which can carry some weight in the balance when considering very compelling circumstances.

Lord Justice Peter Jackson gave an important short judgment setting out how the decisions did not adequately address the best interests of the children of these foreign criminals in the way that is required under Exception 2 or under the proportionality assessment. He summarised as follows, para [156]:

> 'There are two broad ways in which it seems to me that a decision-maker may inadvertently be deflected from giving primary consideration to the best interests of the child of a foreign criminal. One is by focusing on the position of children generally rather than on the best interests of the individual child. The other is by treating physical harm as intrinsically more significant that emotional harm.'

The third judge in *HA (Iraq)* was Lord Justice Popplewell who reinforced the decision in *HA (Iraq)* in two subsequent deportation appeals—*AA (Nigeria) v SSHD* [2020] EWCA Civ 1296 and *KB (Jamaica) v SSHD* [2020] EWCA Civ 1385. In both of these cases the Court of Appeal allowed the appeals against the decisions of the Upper Tribunal, and restored the earlier decisions of the First-tier Tribunal which were in favour of the appellant. Also, Popplewell LJ repeated the observations of Floyd LJ in UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095 that in an appeal on a point of law it is not the case that the Upper Tribunal is entitled to remake the decision of the First-tier Tribunal simply because it does not agree with it, or because it thinks it can produce a better one.

Asylum and gender identity

The case of *Mx M (gender identity—HJ (Iran)-terminology) El Salvador* [2020] UKUT 313 (IAC) is a progressive and welcome reported decision in the Upper Tribunal where the asylum appeal of a national of El Salvador who now identifies as non-binary, having previously considered themselves a homosexual man whilst living in El Salvador was allowed. Mr Justice Bruce found, applying *HJ (Iran) v SSHD* [2010] UKSC 31 (07 July 2010), that the First-tier Tribunal judge had erred in failing to properly consider the evidence of the appellant's changed identity and had further erred in its consideration of risk. Bruce J gave guidance on the use of gender terminology saying, para [16]:

> *'There will no doubt be cases where there might be justification for not following this guidance: a case where, for instance a claim to be transgender has been expressly rejected as false. Decision makers should however where possible apply the guidance in the Equal Treatment Bench Book and use gender terminology which respects the chosen identity of claimants before them. There was no reason not to do so here, where the self-identification of the Appellant was neither challenged nor doubted.'*

Applying *HJ (Iran)*, Bruce J found that the appellant was a member of a particular social group and would be at risk upon return.

Challenges to Home Office Policy

Trafficking

In *EOG v SSHD* [2020] EWHC 3310 (Admin), [2020] All ER (D) 37 (Dec) (3 December 2020) Mostyn J found that there was an unlawful lacuna in the SSHD's policy 'Discretionary Leave Considerations for Victims of Modern Slavery' as it failed to implement the obligation in Article 10.2 of The Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) formally to protect persons in receipt of a positive reasonable grounds decision from removal from this country's national territory pending the conclusion of the process. Mr Justice Mostyn found, para [48]:

> 'Suffering such persons to remain as overstayers, or as illegal immigrants, does not fulfil the obligation. The defendant must formulate a policy that grants such persons interim discretionary leave on such terms and conditions as are appropriate both to their existing leave positions and to the likely delay that they will face.'

In *R (IJ (Kosovo)) v SSHD* [2020] EWHC 3487 (Admin) the claimant, a recognised victim of trafficking and a refugee, challenged the decision to refuse her permission to work as a cleaner whilst she was awaiting a decision on her asylum claim as the role fell outside the shortage occupation list. The claim also challenged the lawfulness of the Home Office's policy on permission to work for asylum seekers, and the Immigration Rules, Part 11B, para 360A itself. The claim was successful in respect of the challenge to the permission to work policy as it fails to make reference to the SSHD's discretion to depart from the bright line rule in individual cases, para [75], and in applying the discretion the decision maker must have regard to the primary objectives of the ECAT, para [76]. The claimant's challenge to the policy guidance was also successful on the basis that it discriminated against her, contrary to ECHR Article 14 in conjunction with Article 4 and/or Article 8. Mr Justice Bourne said, para [106]:

> 'I have concluded that the lack of reference to a discretion in the guidance does create a real risk that caseworkers will fail to have sufficient regard to the particular circumstances, and the ECAT rights, of those who claim to be victims of trafficking, and of their decisions thereby being discriminatory in the Thlimmenos [a failure to treat differently persons whose situations are significantly different] sense.'

Schedule 10 accommodation

The three claims for judicial review in *R (Humnyntskyi) v SSHD* [2020] EWHC 1912 (Admin) (21 July 2020) concerned the legality of the SSHD's policy approach to the exercise of her power under paragraph 9 of Schedule 10 of the Immigration Act 2016 to provide accommodation to those who are granted immigration bail. In each of the three cases the SSHD did not provide bail accommodation. Johnson J found the SSHD's policy and practice was unlawful as they are systemically unfair and they fetter the SSHD's discretion to consider whether the situation of an individual applicant amounts to exceptional circumstances. He also said, para [286]:

> 'It follows that the Secretary of State's policy for the provision of Schedule 10 accommodation does not come close to satisfying the irreducible minimum criteria which are necessary (and may not even be sufficient) to secure fairness. Procedural unfairness is inherent in the policy. The policy creates a real risk of unfairness in more than a minimal number of cases. The exacting test for demonstrating systemic unfairness is therefore satisfied. Further, I consider that it is satisfied by some margin. I have considerable doubts that the irreducible minimum criteria I have specified would be sufficient to secure fairness. There is force in Ms Dubinsky's submissions that much more is required in this particular context. The Secretary of State's policy is deficient in respect of each and every component of that irreducible minimum. The result is that not only is there a real risk of unfairness, that is the likely result in significant categories of case, A's case being a paradigm example.'

As a result of the SSHD's failures he found that two of the claimants had been unlawfully detained and the other's rights under Article 3 had been breached as he was made homeless. The claimants were therefore entitled to damages and the SSHD will need to amend her policy and practice in this area.

Home Office removal window

In *R (FB (Afghanistan)) v SSHD* [2020] EWCA Civ 1338, [2020] All ER (D) 95 (Oct) (21 October 2020) the Court of Appeal, in a panel presided over by the Lord Chief Justice, found that whilst removal windows are not inherently unlawful (para [87]) the SSHD's policy 'incorporated an unacceptable risk of interference with the right of access to court by exposing a category of irregular migrants, including those who have claims on article 2 and/or article 3 human rights and protection grounds, to the risk of removal without any proper opportunity to challenge a relevant decision in a court or tribunal', para [147]. The appeal was therefore allowed on the access to justice ground. In the judgment of the Lord Chief Justice, he addressed the issue of technology and pursuing appeals from abroad reflecting on the judgment of the Supreme Court in *R (Kiarie and Byndloss) v SSHD* [2017] UKSC 42 and said, para [198]:

> *'The consideration of the practicalities that followed were rooted in the technology available to and used both by the First-tier Tribunal and appellants. In the intervening years both have been transformed and their use has become ubiquitous in courts and tribunals the world over, a process accelerated by the effects of the Covid 19 pandemic which has swept around the globe since the beginning of this year. Lord Wilson discussed the cost of hiring video conference rooms and equipment, for example, which have long ago become an irrelevance in holding online video meetings. From the point of view of a litigant, whether discussing a case with legal representatives, attending a hearing or giving evidence all that is required is video enabled device attached to the internet, with widely available commercial software installed in it. The position in courts and tribunals is entirely different from how it was even three or four years ago.'*