Immigration cases 2017: July—December review

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Immigration analysis: Adam Pipe, barrister at No 8 Chambers, picks out the key cases from July to December 2017 for immigration lawyers, and why they are of interest. Issues covered include Article 3 ECHR medical cases; EU law developments; visit visas, appeals and Article 8 ECHR; Tier 1 Entrepreneurs; deprivation of citizenship; consequences of sponsor licence revocation and whether a domestic violence application constitutes a human rights application and thereby attracts a right of appeal.

Article 3 medical cases

EA & Ors (Article 3 medical cases—Paposhvili not applicable) [2017] UKUT 445 (07 August 2017)

In *EA* the Tribunal considered the seminal judgment of the European Court of Human Rights (ECtHR) in *Paposhvili v Belgium* (Application No 41738/10). At para [183] of *Paposhvili* the ECtHR said:

> 'The Court considers that the "other very exceptional cases" within the meaning of the judgment in N. v. the United Kingdom (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.'

The Tribunal found that this statement was not consistent with UK domestic law most clearly expressed in *GS (India) v Secretary of State for the Home Department* [2015] EWCA Civ 40, [2015] All ER (D) 84 (Feb), where the Court of Appeal confined Article 3 ECHR health claims to deathbed cases. The Tribunal therefore held (head note):

> 'The test in Paposhvili v Belgium, 13 December 2016, ECtHR (Application No 41738/10) is not a test that it is open to the Tribunal to apply by reason of its being contrary to judicial precedent.'

Permission to appeal has been granted to challenge this unwelcome reported decision.

EU law: family members of dual nationals

Lounes v Secretary of State for the Home Department Case C-165/16, [2017] All ER (D) 126 (Nov) (14 November 2017)

In this case, a Spanish national came to the UK to study and then work. In 2009 she naturalised as a British citizen (whilst retaining her Spanish nationality). In 2013 she entered into a relationship with Mr Lounes, an Algerian national, whom she subsequently married in 2014. Mr Lounes was refused a residence card on the basis that reg 2 of the Immigration (European Economic Area) Regulations 2006, 2006/1003, (EEA Regs 2006) deemed that dual nationals of another EEA state and the UK are not to be regarded as EEA nationals for the purpose for the Regulations. The relevant definition in reg 2 is replicated in the Immigration (European Economic Area) Regulations 2016, SI 2016/1052 (EEA Regs 2016), which have subsequently replaced the EEA Regs 2006. Following a challenge by way of judicial review a reference was made to the EU Court of Justice. Consideration was given to *McCarthy v Secretary of State for the Home Department* Case C-434/09, [2011] All ER (EC) 729; however in this case the Spanish national had exercised her right of freedom of movement and had established a right to reside in the UK before becoming British. The Court of Justice held that Mr Lounes did not have a right to reside under Directive 2004/38/EC (the Citizens' Directive), however he was eligible for a derived right of residence under Article 21(1) TFEU, on conditions which must not be stricter than those provided for by the Citizens' Directive for the grant of such a right to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national.

EU law: rights of appeal of extended family members: Sala overturned

Khan v Secretary of State for the Home Department [2017] EWCA Civ 1755, [2017] All ER (D) 67 (Nov)

In *Khan*, the Court of Appeal wrestled with the jurisprudential bombshell dropped by the Upper Tribunal (Immigration and Asylum Chamber) (UT) in *Sala (EFMs: Right of Appeal)* [2016] UKUT 0411 (IAC) where it was found that extended family members (EFMs) did not have a right of appeal under the EEA Regs 2006 as a decision of the Secretary of State

for the Home Department (SSHD) did not concern a person's entitlement to be admitted to the UK or be issued with a residence card because the SSHD controlled whether an entitlement would come into existence (through the exercise of her discretion). *Sala* caused chaos and great difficulties for EFMs wishing to challenge decisions of the SSHD. In *Khan* the Court of Appeal held at para [45] that a decision of the SSHD that someone was not an EFM did concern an entitlement and therefore there was a right of appeal under the EEA Regs 2006. It is noteworthy that reg 2 of the EEA Regs 2016 exclude decisions concerning EFMs and that this amendment was made as a direct response to *Sala.* It is inevitable that there will be now a challenge to the EEA Regs 2016, the *obiter* comments of Irwin LJ at para [46] are worthy of note where he expresses the view that an appeal before a Tribunal is preferable to judicial review.

EU law: marriages of convenience

Sadovska v Secretary of State for the Home Department (Scotland) [2017] UKSC 54, [2017] All ER (D) 171 (Jul)(26 July 2017)

In the Scottish case of *Sadovska*, the Supreme Court considered the cases of a Lithuanian woman with a permanent right of residence and a Pakistani overstayer. The couple were interviewed and then detained before they could marry. The couple appealed against the decisions to remove them and the judge held that they had not discharged the burden of proof upon them to show that their proposed marriage was not one of convenience. Lady Hale giving the judgment of the Supreme Court allowed the appeals and remitted them to the First-tier Tribunal. It was held that the burden of proof was on the SSHD to show that the marriage was one of convenience (para [28]). Lady Hale relied upon the European Commission Handbook which interprets a marriage of convenience as one where the *predominant purpose* is to obtain a right of entry or residence; however a marriage cannot be considered a marriage of convenience just because it brings an immigration advantage. Furthermore, as the Lithuanian national had established a right of residence in the UK it also had to be shown that removal would be proportionate in her case.

In *R (Molina) v The Secretary of State for the Home Department* [2017] EWHC 1730 (Admin), [2017] All ER (D) 98 (Jul) (12 July 2017) Judge Grubb found that a marriage of convenience may exist even where a relationship is genuine if the sole aim was to gain an immigration advantage.

EU law: A8 nationals and time spent in unregistered work

Secretary of State for Work and Pensions v Gubeladze [2017] EWCA Civ 1751, [2017] All ER (D) 70 (Nov)

The Court of Appeal found that the word 'reside' in Article 17(1)(a) of the Citizens' Directive meant 'legally reside', but upheld the decision of the Upper Tribunal (Administrative Appeal Chamber) that the Accession (Immigration and Worker Registration) (Amendment) Regulations 2009, SI 892/09 (which extended the Workers Registration Scheme for its final two years of operation, from 1 May 2009 to 30 April 2011) were disproportionate. The latter aspect of the decision means that unregistered work by A8 nationals over that period can be counted towards the acquisition of permanent residence.

Tier 1 Entrepreneurs: business expansion and fairness of interviews

R (Anjum) v Entry Clearance Officer, Islamabad (entrepreneur—business expansion—fairness generally) [2017] UKUT 406 (IAC) (16 August 2017)

In this helpful Tier 1 (Entrepreneur) judicial review decision from McCloskey J, the UT found that using part of the prescribed £200,000 to purchase a second business in order to develop and expand an existing business was compatible with the Tier 1 (Entrepreneur) rules. This case is also very useful in considering Entry Clearance Officer interviews, and the analysis at paras [11]-[22] is helpful. The President held the '[a]n immigration interview may be unfair, thereby rendering the resulting decision unlawful, where inflexible structural adherence to prepared questions excludes the spontaneity necessary to repeat or clarify obscure questions and/or to probe or elucidate answers given.' See also para [4] where the President encourages the use of 'amended grounds and reply' in judicial review proceedings in response to the detailed grounds of defence.

Visit visas, appeals and Article 8

Visit visa refusals can only be appealed on Article 8 ECHR grounds and since the removal of a right of appeal, to challenge the decision under the Immigration Rules, there has been a noticeable reduction in the quality of ECO decision making. A large number of applicants are stuck in a perpetual 'Groundhog Day' with repeated applications being refused on the same grounds. The two options to challenge such decisions are an appeal on Article 8 grounds or an application for judicial review. In the second half of this year there has been a number of cases where the Court of Appeal have overturned allowed Article 8 visit appeals.

In *Secretary of State for the Home Department v Abbas* [2017] EWCA Civ 1393, [2017] All ER (D) 20 (Oct) (28 September 2017) the Court held that there was no 'positive obligation' in respect of Article 8 private life where family life was not engaged.

In *Entry Clearance Officer, Sierra Leone v Kopoi* [2017] EWCA Civ 1511, [2017] All ER (D) 58 (Oct) (10 October 2017), the Court found that family life was not engaged as there was nothing beyond normal emotional ties (para [20]). In *Kopoi* the Court further held that the shortness of the visit also indicated that there was no lack of respect for family life (para [30]). As a postscript the Court noted (para [32]) the limitations of a challenge by way of judicial review given the high hurdle of a irrationality challenge. A similar approach was taken by the Court in *Secretary of State for the Home Department v Onuorah* [2017] EWCA Civ 1757, [2017] All ER (D) 27 (Nov) (03 November 2017).

This trio of decisions restricts the situations in which a visitor appeal will be allowed on human rights grounds and emphasises the limits on judicial review; leaving applicants with little remedy against poor decision making.

Deprivation of citizenship

*Sleiman (deprivation of citizenship; conduct) [*2017] UKUT 367 (IAC) (19 July 2017)

In this helpful decision the UT finds that in an appeal against a decision to deprive a person of a citizenship status (British Nationality Act 1981, s 40), in assessing whether the appellant obtained registration or naturalisation 'by means of' fraud, false representation, or concealment of a material fact, the impugned behaviour must be directly material to the decision to grant citizenship. In this case a Lebanese asylum seeker had given a false date of birth on arrival which rendered him a minor and led to a grant of Discretionary Leave. However he was granted indefinite leave to remain under the legacy scheme on the basis of the length of time his application was outstanding and his age was irrelevant (para [62]). The Tribunal therefore held that the deception was not directly relevant to the subsequent grant of citizenship and allowed the appeal (para [69]).

Curtailment notices

Uddin (2000 Order—notice to file) [2017] UKUT 408 (IAC) (11 September 2017)

Uddin is by no means an exciting decision but it is nonetheless important and useful: where the SSHD relies on a curtailment notice as having been deemed to have been given by being placed 'on file' in accordance with Article 8ZA(4) of the Immigration (Leave to Enter and Remain) Order 2000, SI 2003/658 (as amended) she has to show that there have been attempts to give notice in accordance with paras (2) or (3) which have not been possible or have failed. In *Uddin* there was no evidence at all of any attempt by the SSHD to have sent the curtailment notice by postal service to a postal address provided for correspondence by the appellant and therefore the appellant's leave had not been validly curtailed.

Consequences of sponsor licence revocation

R (Islam and Pathan) Secretary of State for the Home Department (Tier 2 licence—revocation—consequences) [2017] UKUT 369 (IAC) (17 August 2017)

In *Islam and Pathan* the UT distinguished *Patel (revocation of sponsor licence—fairness)* [2011] UKUT 211 (IAC) and found that, unlike the situation for Tier 4 applicants, a person whose sponsor's Tier 2 licence was revoked for non-compliance with the Immigration Rules is not entitled to challenge a decision not to provide them with a period of 60 days in which to secure an alternative sponsor.

ETS/TOEIC cases: out-of-country appeal not always sufficient

Ahsan v The Secretary of State for the Home Department [2017] EWCA Civ 2009

In this significant decision, which represents the latest instalment in the ETS TOEIC saga, the Court of Appeal considered whether an out-of-county appeal is a sufficient remedy for individuals facing an allegation that they had cheated in their tests. In these cases the appellants had received Immigration and Asylum Act 1999, s 10 removal decisions on the basis of deception (under the pre-Immigration Act 2014 regime) and one had received a decision that his human rights claim was clearly unfounded. Arguments were advanced relying upon the Supreme Court decision in *R (Kiarie) v Secretary of State for the Home Department* [2017] UKSC 42, [2017] All ER (D) 70 (Jun) (14 June 2017). The Court of Appeal found that 'an out-of-country appeal would not satisfy the Appellants' rights, either at common law or under article 8 of the Convention, to a fair and effective procedure to challenge the decisions to remove them; and that in those circumstances, subject to the human rights claim issue considered below, they were entitled to proceed with such a challenge by way of judicial review' (para [97]). However that conclusion depends on the circumstances of an individual case and the issues it raises. The conclusions of the court are summarised at paras [97]-[98], [128]-[129] and [158] of the judgment of Underhill LJ.

SSHD appealing allowed deportation appeals

Secretary of State for the Home Department v FY (Somalia) 2017] EWCA Civ 1853 (17 November 2017)

In this case the First-tier Tribunal had allowed the deportation appeal of a Somali man on the basis that there was a real risk that Article 3 ECHR would be breached. The decision was upheld by the UT and the SSHD appealed to the Court of Appeal. The Court of Appeal dismissed the SSHD's appeal. Thirlwall LJ found that in essence the SSHD was merely disagreeing with the conclusion of the judge. She said 'I agree with Mr Toal's principal submission that properly analysed this appeal is a straightforward attack upon findings of fact which led to a conclusion with which the SSHD does not agree. As has been said repeatedly in this court and elsewhere, more usually when the appeal is by the individual to be deported, the courts will not interfere with findings of fact made by a specialist tribunal unless the findings are perverse. The findings here were not perverse.' (para [24]) This case is also useful in its rejection of the SSHD's attack on the application of the relevant Country Guidance case, MOJ and others (Return to Mogadishu) Somalia CG [2014] UKUT 442 (IAC) (see paras [9-22]). The Court found it unhelpful for the SSHD to seek to draw factual comparisons with some of the individual cases heard in MOJ (para [12]).

Bail

Roszkowski v Secretary of State for the Home Department [2017] EWCA Civ 1893, [2017] All ER (D) 186 (Nov) (23 November 2017)

This case concerns the application of section 4 of, and para 22 of Schedule 2 to, the Immigration Act 1971, which provides that where removal directions are in force and that removal is within 14 days the Tribunal can only release an individual on bail with the consent of the SSHD. In this case consent was withheld by the SSHD. The Court held that the SSHD's withholding of consent was rational, however the Court found that once the removal directions were subsequently cancelled the appellant should have been released and that the appellant's continued detention was unlawful until new directions were set.

Domestic violence applications, human rights claims and rights of appeal

R (AT) v Secretary of State for the Home Department [2017] EWHC 2589 (Admin), [2017] All ER (D) 94 (Nov) (18 October 2017)

In *AT*, Kerr J held that domestic violence applications could also be human rights claims and therefore attract a right of appeal. At para [68] the judge found:

'In those circumstances, I agree with the claimant that Appendix AR is wrongly drafted. I do not, however, consider that it would be appropriate to quash it. I think the right course is to give effect to its application to domestic violence claims that are not also human rights claims, while recognising that it cannot be read as overriding the provision in section 82 which confers a right of appeal in a domestic violence case that is also a human rights claim.'

The judge did however go on to find that the decision should be quashed as unlawful for failing to properly consider the claim. Para [104] is helpful where the judge refers to the SSHD's guidance 'that threats to denounce a domestic violence victim to the authorities and procure her removal can form part of a course of conduct itself amounting to domestic violence. That point should have been addressed on the administrative review.'

Adam specialises in immigration, asylum and human rights law. He undertakes cases in the First-tier Tribunal, Upper Tribunal, Administrative Court and Court of Appeal.

The 2013 edition of Chambers and Partners observed—Adam Pipe is 'the counsel in the Midlands for immigration and asylum work. He is well versed in tribunal proceedings and has unparalleled experience of the immigration judges in the Midlands.'

Adam regularly speaks at conferences and seminars around the country. He provides updates on the latest developments in immigration law and regularly provides case law analysis for Lexis Nexis Legal News. He is a contributing Editor to Butterworths Immigration Law Service.

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