Immigration cases 2022 – July to December 2022 review

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Immigration analysis: Adam Pipe, barrister at No 8 Chambers, reviews the key cases from June 2022 to December 2022 for immigration advisers, and explains why they are of interest. The review covers cases looking at the Government's Rwanda scheme, deportation and Article 8 ECHR, extended family members in EEA cases and under the Withdrawal Agreement, deprivation of citizenship, visit visas, transnational marriage abandonment, the remit of the Upper Tribunal, good character and Windrush cases in citizenship applications, and the right of abode.

Rwanda scheme lawful but individual decisions flawed

On 19 December 2022 judgment was handed down in the challenge to the Government's scheme to remove individuals to Rwanda for their claims to be processed there. In AAA v SSHD [2022] EWHC 3230 (Admin) (19 December 2022), the Divisional Court (Lewis LJ & Swift J) found that, it is lawful for the SSHD to make arrangements for relocating asylum seekers to Rwanda and for their asylum claims to be determined in Rwanda rather than in the UK. On the evidence before the court, the SSHD has made arrangements with the government of Rwanda which are intended to ensure that the asylum claims of people relocated to Rwanda are properly determined in Rwanda. In those circumstances, the relocation of asylum seekers to Rwanda is consistent with the Refugee Convention and with the statutory and other legal obligations on the government including the obligations imposed by the Human Rights Act 1998. However in respect of eight of the claimants, the court found that various decisions in their cases were flawed and would be quashed. It is likely that we will see onward appeals in respect of the Rwanda litigation in 2023.

Deportation and Article 8 tests

In *HA (Iraq) v SSHD* [2022] UKSC 22 (20 July 2022), the Supreme Court considered three conjoined appeals concerning section 117C Nationality, Immigration and Asylum Act 2002 (NIAA 2002), the unduly harsh test and the very compelling circumstances test. The Supreme Court dismissed the SSHD's appeals in all three cases. In respect of the unduly harsh test Lord Hamblen rejected the submission that the Court of Appeal had wrongly rejected the notional comparator test and also that it had wrongly lowered the applicable threshold. In *KO (Nigeria) v SSHD* [2018] UKSC 53 no notional comparator baseline was envisaged against which the level of harshness was to be evaluated. The correct approach, held to be authoritative in *KO (Nigeria)*, was the guidance of the Upper Tribunal in *MK (Sierra Leone) v SSHD* [2015] UKUT 223 (IAC), [2015] INLR 563. It is then for the Tribunal to make an evaluative judgment as to whether the elevated threshold has been met on the facts and circumstances of the case before it. In regard to the very compelling circumstances test this requires all of the relevant circumstances, including those identified by the European Court of Human Rights, to be weighed against the very strong public interest in deportation. The sentence imposed by the criminal court provides the surest guide as to the seriousness of the offence. In principle the nature of the offending can be a relevant consideration but care must be taken to avoid double counting. Rehabilitation is also a relevant factor however the weight to be given to it depends on the facts and circumstances of the case.

Article 8, deportation and ongoing family proceedings

In *CJ (family proceedings and deportation) South Africa* [2022] UKUT 00336 (IAC), the Upper Tribunal (UT) considered how the principle that it may be a breach of Article 8 ECHR to remove an individual prosecuting contact proceedings concerning children before the resolution of those proceedings is reconciled with the statutory Article 8 considerations concerning deportation (section 117C NIAA 2002). The UT held that the general approach in *MS (Ivory Coast) v SSHD* [2007] EWCA

Civ 133, *MH (pending family proceedings-discretionary leave) Morocco* [2010] UKUT 439 (IAC) and *RS (immigration and family court proceedings) India* [2012] UKUT 218 (IAC) concerning the need for an appellant to be permitted to remain in the UK in order to prosecute family proceedings remains applicable. The UT went on to hold that the Tribunal should not allow an appeal to a 'limited' extent as the only option under Part 5 NIAA 2002 is to allow or dismiss an appeal. Where a Tribunal concludes that the appellant has an Article 8 ECHR right to remain at least until the conclusion of family proceedings concerning the appellant's children, that is likely to merit a finding that there are 'very compelling circumstances over and above those described in Exceptions 1 and 2' for the purposes of section 117C(6) of the 2002 Act, and the appeal should usually be allowed on that basis. The Tribunal can observe that the requirements of Article 8 are only likely to necessitate the granting of such period of leave as is sufficient to enable the family proceedings to be determined. Once the family proceeding are resolved both parties can reassess their positions in the light of the findings of the Family Court.

Upper Tribunal: when to remit or remake decisions

In *AEB v SSHD* [2022] EWCA Civ 1512 (18 November 2022), the Court of Appeal considered the circumstances in which the UT should remit an appeal to the First-tier Tribunal (FTT) rather than retaining it itself. AEB was a deportation case where the appellant had been sentenced to four years imprisonment. The FTT dismissed the appellant's appeal, however the UT set aside the decision on the basis that the FTT had committed errors of law including depriving the appellant of a fair hearing. The UT decided to remake the decision itself rather than remit the appeal to the FTT; the UT dismissed the appeal. Para 7 of the Practice Statements of the Immigration and Asylum Chambers of the FTT and the UT states:

> *'Decisions of appeal in Upper Tribunal'*
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> 7.1 Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).
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> 7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
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> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
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> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.
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> 7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.'

Lord Justice Stuart-Smith held, after reviewing the jurisprudence, that where an error of law has deprived a party of a fair hearing, the normal procedure is and should be to remit (at para [17]). If a different course is to be adopted cogent reasons, adequately expressed, should be provided. In this appeal it could not be said that the outcome would have inevitably been the same and therefore the appeal was allowed on this ground and the appeal was remitted to the FTT de novo. There was also a ground challenging the UT's assessment of very compelling circumstances but this was rejected.

Extended family members, durable Partners, Appendix EU and the Withdrawal Agreement

In *Batool and others* [2022] UKUT 219 (IAC) (19 July 2022) a Presidential panel of the Upper Tribunal considered the position of extended family members (EFMs) who had not applied for an EEA family

permit before 11pm on 31 December 2020 but had applied prior to that time under Appendix EU (Family Permit) as family members. The UT held that an EFM whose entry and residence was not being facilitated by the United Kingdom before 11pm on 31December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the Immigration Rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, SI 2020/61 (Citizens' Rights Appeals Regs 2020). Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member. The UT also considered the applicability of Article 8 to EU Settlement Scheme appeals and the 'new matter' provisions contained in reg 9 of the Citizens' Rights Appeals Regs 2020. In respect of arguments in relation to the EU Charter of Fundamental Rights the UT held that it had no bearing upon the appeals and had ceased to be part of the UK's law on 31 December 2020 (although see the very recent decision in: *SSWP v AT (Aire Centre and IMA Intervening)* [2022] UKUT 330 (AAC)).

Celik (EU exit, marriage, human rights) [2022] UKUT 220 (IAC) (19 July 2022) concerned the position of durable partners who had not applied under the Immigration (European Economic Area) Regulations 2016, SI 2016/1052 prior to 11pm on 31 December 2020. A large number of these individuals were unable to marry prior to 31 December 2020 due to Covid-19 related issues and subsequently married after that date and made unsuccessful Appendix EU applications. The President held that a person (P) in a durable relationship in the UK with an EU citizen has no substantive rights under the UK-EU Withdrawal Agreement, unless their entry and residence were being facilitated before 11pm on 31 December 2020 or P had applied for such facilitation before that time. The President also held that P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Citizens' Rights Appeals Regs 2020. That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the specified date, but for the Covid-19 pandemic. The President reiterated that reg 9 allows for the Tribunal to consider human rights grounds subject to the proviso that a new matter cannot be considered without the SSHD.

Following the decisions in Batool and Celik the SSHD amended her 'Rights of appeal' guidance (version 13.0 22 September 2022) to include a section entitled 'New matters in Citizens' Rights

Appeals' in which she indicated that, '[i]t will not normally be appropriate for a new matter that raises protection or human rights grounds to be considered by the SSHD so that it can be heard as part of the Citizens' Rights Appeal unless it has been made through a relevant application.'

Batool and *Celik* are disappointing decisions for practitioners and applicants alike, and it remains to be seen if the Court of Appeal take a different view in 2023.

Assessing EEA dependency and education as an essential need

Prior to the 31 December 2020 there were a significant number of applications by extended family members (EFMs) which have been making their way through the courts and often turn upon the question of dependency. *Singh v SSHD* [2022] EWCA Civ 1054 (26 July 2022) was such a case and related to the appellant's fifth unsuccessful application for a residence card. The FTT found that the appellant had not established that he was dependent upon his uncle for his essential needs whilst he was in India. The UT found no error of law in the decision of the FTT. Permission to appeal was granted to appeal to the Court of Appeal on the questions of whether education was an essential need and whether dependency is to be assessed on a 'global' or 'singular' basis. The 'global' approach was described as requiring a person to establish that such assistance is required to meet all of their needs as a whole, whereas the 'singular' approach as only needing the individual to show they have received funds from the EEA national to meet one of their essential needs. Both of the parties accepted, and the Court agreed, that education was capable of being an essential need, but was not necessarily so. In terms of the assessment of dependency the appellant and respondent were in agreement that the global and singular tests are in fact the same, and the former will therefore typically subsume the latter. Briss LJ reviewed the jurisprudence on dependency and held that the correct approach was that set out by the CJEU at para [23] of *Rahman* [2012] Case-83/11 where it said that, '[i]t is incumbent upon the competent authority, when undertaking that examination of the applicant's personal circumstances, to take account of the various factors that may be relevant in the

particular case.' Lord Justice Briss also relied upon further explanation given by Lord Justice Sullivan in *SM (India) v ECO (Mumbai)* [2009] EWCA 1426 where he said at para [28]:

> 28. In reality, people's circumstances, their lives and their lifestyles are not always quite so straightforward, and any attempt to draw a bright line between determining whether an applicant has a need for material support to meet his "essential needs" and where there is recourse to support, it being unnecessary to determine the reasons for that recourse, is best considered not on the basis of hypothetical examples but on a case-by-case basis, with the benefit of clear and sufficient factual findings by the AIT.

Deprivation of citizenship post-Begum

In the second half of 2022 the UT has continued to give guidance upon the correct approach to deprivation of citizenship following the decision of the Supreme Court in *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7 (26 February 2021).

In *Berdica v SSHD (Deprivation of citizenship: consideration)* [2022] UKUT 276 (IAC) (05 April 2022) the UT held that the decision in Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 238 was binding upon the FTT and that in deprivation of citizenship appeals, consideration is to be given both to the sustainability of the original decision and also whether upon considering subsequent evidence the SSHD's maintenance of her decision up to and including the hearing of the appeal is also sustainable. The latter requires an appellant to establish that the Secretary of State could not now take the same view.

In *Muslija (deprivation: reasonably foreseeable consequences) Albania* [2022] UKUT 337 (IAC) the UT gave guidance upon the reasonably foreseeable consequences of deprivation which is relevant to the assessment of proportionality under Article 8. The UT again cautions judges against a proleptic analysis of the reasonably foreseeable consequences of deprivation. 'Proleptic' in this context means an anticipatory analysis of an individual's prospective removal or deportation. In regards to periods of limbo the UT found that limbo without more, cannot possibly tip the proportionality balance in favour of an individual retaining fraudulently obtained citizenship. The UT concluded (at [19e]), 'It is highly unlikely that the assessment of the reasonably foreseeable consequences of a deprivation order could legitimately extend to prospective decisions of the Secretary of State taken in consequence to the deprived person once again becoming a person subject to immigration control, or any subsequent appeal proceedings.' It is likely that in 2023 we will see the Court of Appeal having to grapple with the question of the correct approach to deprivation cases post *Begum*.

Challenging visit visa refusals: a helpful Scottish case

Since the removal of the right of appeal for visit visa refusals the quality of decisions by Entry Clearance Officers (ECOs) has often been very poor. Applicants are left with few options and are often stuck in 'groundhog day' repeatedly making fresh applications which get refused on the same grounds. In *Gulham Sagra* [2022] ScotCS CSOH_71 (15 September 2022) the petitioner was refused a visit visa on the usual grounds of Immigration Rules, Appendix V, paras V4.2(a) and (c), the ECO doubting that she was a genuine visitor and that she intended to return at the end of his visit. The ECO questioned the credibility of the petitioner's circumstances in Pakistan. In this case the sponsor had provided a statement providing evidence of the petitioner's circumstances in Pakistan. The ECO failed to engage with the evidence in the statement as Lord Ericht states at para [11], 'the ECO does not explain why he has rejected the evidence in the statutory declaration as to the applicant's family ties in Pakistan. That leaves us in real and substantial doubt as to the reason why the ECO has come to the decision which he did.' Consequently, the judicial review was successful and the Court ordered reduction of the decision (the equivalent of a quashing order in Scots law).

DVILR and transnational marriage abandonment

In *R (AM) v SSHD* [2022] EWHC 2591 (Admin) Mr Justice Lieven considered a challenge to the Domestic Violence Indefinite Leave to Remain (DVILR) section of the Immigration Rules from a Pakistani claimant who has been a victim of domestic violence culminating in what is described as transnational marriage abandonment (TMA), leading to her being stranded in Pakistan and separated

from her two-year old British child for eight months. The claimant challenged the absence of provision in Section DVILR for such cases. Lieven J observed at [78] that:

> 'The women in these cases are the victims of a very serious form of domestic abuse, often involving serious physical and psychological harm. In many if not most cases they will either have been separated from their children or it will be impossible for their children to return to the UK, even where they are UK citizens, without leaving their mothers. The impact on the Article 8 family rights of the victims is therefore very great. The Defendant does not argue that such women should not ultimately be admitted to the UK or are an inappropriate call on UK resources'.

Lieven J concluded at para [79] that the justification advanced was not proportionate to the interference with Article 8 rights, and the differential treatment between victims of spousal abandonment inside and outside the UK was not justified and therefore was in breach of Article 14 and of the Human Rights Act 1998. Hopefully as a result of this decision provision will be made for victims of TMA in the rules.

Long residence and defective notices of decision

In *Marepally v SSHD* [2022] EWCA Civ 855 (24 June 2022) the Court of Appeal once again ventured into the deep and muddy waters of Immigration Rules, Part 7, para 276B, section 3C of the Immigration Act 1971 (IA 1971) and the Immigration (Notices) Regulations 2003, SI 2003/658. The real issue in this case was whether a defective notice, which failed to inform the appellant of his right of appeal, meant that the appellant's application had never been determined and his leave was statutorily extended by virtue of IA 1971, s 3C. The appellant relied upon the decision in Khan v SSHD [2017] EWCA Civ 424 where Underhill LJ said at para [24], 'I should record that it was common ground before us that if the claimant had now to pursue an appeal to the First-tier Tribunal there would be no distinct point about such an appeal being out of time. That is because, if he is right, he has never received a valid decision notice (see para 22 above) and accordingly time has never started to run against him.' In dismissing the appeal Lewis LJ found that the errors of UT were immaterial and the appeal could not succeed. In terms of the appellant's argument based on *Khan* Lewis LJ said at [50], '[t]hat passage does not, however, amount to a binding ruling by the Court that any defect in a notice of decision renders it invalid and that the time for appealing against the decision does not begin to run until the appellant is sent a notice of decision which complies with the requirements of the 2003 Regulations.'

Windrush, good character and British citizenship

The original claimant in *Rose v SSHD* [2022] EWCA Civ 1068 (27 July 2022), Mr Hubert Howard, was born in Jamaica, on 17 December 1956. He came to this country, at the age of three, with his mother in November 1960. He lived here until his death on 12 November 2019. Throughout that period he was entitled to reside in the UK, latterly on the basis that he had indefinite leave to remain; and he did not require any individual grant of permission to do so. He was thus a member of the 'Windrush generation'. Like many others in the Windrush generation, Mr Howard suffered serious problems from being subject to the 'hostile environment' as a result of being unable to obtain formal documentation of his immigration status. Most seriously, in 2012 he lost his long-term job as a caretaker for the Peabody Trust following an inspection by immigration officers: the Trust was very reluctant to let him go but felt that it had no alternative. His family have now been compensated under the Windrush Compensation Scheme for the way in which he was treated. However, the issue before the Court was the distinct and more limited question of whether he was entitled to British citizenship. On 9 July 2018 Mr Howard applied for naturalisation as a British citizen. By a decision dated 5 November 2018, maintained after review in two subsequent decisions dated 3 December 2018 and 23 May 2019, the SSHD refused that application on the basis that he did not satisfy the statutory 'good character requirement'. Mr Howard brought proceedings challenging the refusal of his application. The primary basis of the challenge was that the refusal was inconsistent with promises made by the then Secretary of State, Ms Amber Rudd, in a statement to the House of Commons dated 23 April 2018 about the treatment of members of the Windrush generation ('the Windrush statement'). On 16 October 2019 the Secretary of State reviewed her decision again and decided, 'on an exceptional basis', to grant the application; and a certificate of naturalisation was issued on 21 October 2019. Very sadly, Mr Howard, who had been suffering from leukaemia for several years, died less than a

month later. The SSHD accepted that neither her eventual grant of citizenship to Mr Howard nor his death rendered the proceedings academic, and they were continued, pursuant to CPR 19.2 (4), by his daughter Maresha Howard Rose.

By a decision handed down on 23 April 2021 Swift J held that the refusal of Mr Howard's application for naturalisation had been unlawful and made a declaration accordingly. The Court of Appeal allowed the SSHD's appeal finding that Swift J relied upon circumstances which did not relate to the good character requirement (at [39-40]). Underhill LJ also rejected the contention that the only rational course open to the SSHD was to relax the good character guidance in the favour of the Windrush generation (at [42]). Underhill LJ observed at [44] that there was a more fundamental objection to the claimant's case in that para 1 (1) (b) of Schedule 1 to the BNA 1981 imposes an absolute requirement of good character and 'it follows that the judgment required by section 6 (1) should be confined to weighing evidence that is capable of going to character (in the relevant sense) and that it is not legitimate to introduce considerations which themselves have nothing to do with character—such as, here, the particular circumstances of the Windrush generation.' However Underhill LJ did not decide the case on that basis. As a postscript Underhill LJ stated that the judgment in no way undermines the shameful way in which the claimant was treated and there never should have been any question as to his entitlement to live and work in this country.

Right of abode and the correct interpretation of section 2(1) of the Immigration Act 1971

In *Murugason v SSHD* [2022] EWHC 3160 (Admin) (14 December 2022), Philip Mott KC considered the correct interpretation of section 2(1) of IA 1971 which governed whether the claimant had a right of abode in the UK. IA 1971 introduced the 'right of abode'. It divided British subjects into two groups, 'patrials' and others. Patrials enjoyed the right of abode, which allowed them 'to live in, and to come and go into and from, the United Kingdom without let or hindrance'. Others, even if Citizens of the United Kingdom and Colonies (CUKCs), did not have that right, and could only 'live, work and settle in the United Kingdom by permission'. This was a change in immigration status, not citizenship or nationality. Henceforth the two were separate.

Section 2(1) of the 1971 Act, as originally enacted, provided as follows:

'2 Statement of right of abode, and related amendments as to citizenship by registration

(1) A person is under this Act to have the right of abode in the United Kingdom if—

(a) he is a citizen of the United Kingdom and Colonies who has that citizenship by his birth, adoption, naturalisation or (except as mentioned below) registration in the United Kingdom or in any of the Islands; or

(b) he is a citizen of the United Kingdom and Colonies born to or legally adopted by a parent who had that citizenship at the time of the birth or adoption, and the parent either—

(i) then had that citizenship by his birth, adoption, naturalisation or (except as mentioned below) registration in the United Kingdom or in any of the Islands; or

(ii) had been born to or legally adopted by a parent who at the time of that birth or adoption so had it; or

(c) he is a citizen of the United Kingdom and Colonies who has at any time been settled in the United Kingdom and Islands and had at that time (and while such a citizen) been ordinarily resident there for the last five years or more ; or

(d) he is a Commonwealth citizen born to or legally adopted by a parent who at the time of the birth or adoption had citizenship of the United Kingdom and Colonies by his birth in the United Kingdom or in any of the Islands.'

The issue in *Murugason* was the words 'in the United Kingdom or in any of the Islands' in section 2(1)(b)(i) and whether they only qualify registration or all of the options, ie birth, adoption, naturalisation or registration. The Deputy Judge found that the meaning of the statute was clear and that the qualifying words applied to all of the options listed in the sub-section. The claimant's case therefore failed and he did not have the right of abode in the UK prior to the British Nationality Act 1981 coming into force, and therefore did not become a British citizen under section 11 of that Act.