Immigration Case Law Update: Highlights from the last 6 months

No8 Chambers Immigration Seminar 1.3.22

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Rwanda scheme lawful but individual decisions flawed

AAA v Secretary of State for the Home Department (Rwanda) [2022] EWHC 3230 (Admin) (19 December 2022)
http://www.bailii.org/ew/cases/EWHC/Admin/2022/3230.html

On 19th 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. 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 United Kingdom. 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 8 of the Claimants the court found that various decisions in their cases were flawed and would be quashed.

Permission to appeal to the Court of Appeal has now been granted.

UT and Remittals to the FTT: AEB v Secretary of State for the Home Department [2022] EWCA Civ 1512 (18 November 2022)

In *AEB* the Court of Appeal considered the circumstances in which the Upper Tribunal should remit an appeal to the First-tier Tribunal rather than retaining it itself. *AEB* was a deportation case where the Appellant had been sentenced to 4 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. §7 of the Practice Statements of the Immigration and Asylum Chambers of the FtT and the UT states:

> ***Disposal of appeals in Upper Tribunal***
>
> *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).*
>
> *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:-*
>
> *(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*
>
> *(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.*
>
> *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.*

Stuart-Smith LJ 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 [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.

AEB v Secretary of State for the Home Department [2022] EWCA Civ 1512 (18 November 2022)

17.I do not understand the reference to "a fairly strong general rule" to be suggesting the existence of a rule of law or procedure rather than an observation on what will be the usual outcome. For similar reasons, I would only use the word "presumption" with extreme care, and would avoid qualitative expressions such as "strong presumption" wherever possible. Subject to that minor gloss, I agree with and respectfully endorse this passage. It provides compelling and principled support for the conclusion, amply reflected in paragraph 7.2(a) of the Practice Statements that, where an error of law has deprived a party of a fair hearing below, the normal procedure is and should be to remit. Echoing the observation of Sir Ernest Ryder, if a different course is to be adopted, it needs cogent reasons and, as a separate requirement, those reasons should be adequately expressed.

AEB v Secretary of State for the Home Department [2022] EWCA Civ 1512 (18 November 2022)

48. Put slightly differently, the admitted error by the UT has deprived AEB of (a) a fair hearing before the FtT; (b) the first appeal "standard" error of law test in respect of the range of factual findings and evaluative judgments which would have been made by the FtT; and (c) the opportunity to appeal against an adverse finding on a point of law which does not have to meet the second appeal test. Since the point of the paragraph 7.2(a) exception is to avoid those consequences, all of which flow from the unfairness of the original FtT hearing, these are losses that are substantial and which render the UT's error material.

49. It is accepted by the Secretary of State that, if the UT had addressed the issues properly, it may have remitted the case to the FtT. In my judgment that is putting things at their lowest since no good reason has yet been advanced for not remitting. Be that as it may, if the UT had remitted the decision the outcome is unpredictable save that (a) if AEB were to have lost the remitted appeal before the FtT he would have had two possible tiers of appeal above him; and (b) if AEB had won before the FtT he would obviously have secured a real advantage which he has in fact lost. I say this not to encourage any suggestion that Judge-shopping is an acceptable pastime – it is not – but to build upon the Secretary of State's acceptance that it cannot be said that the result would have been the same if the case had been remitted. That acceptance was, in my judgment, sound since the detailed and thorough evaluation of the case by the UT demonstrates that the decision was nuanced and difficult and that a different outcome could have fallen within the range of reasonable conclusions to which either the UT Judge or any other Judge could have come.

https://www.bailii.org/ew/cases/EWCA/Civ/2022/1512.html

Begum (Remaking or remittal) Bangladesh [2023] UKUT 46 (IAC) (7 February 2023)

(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.

(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal.

(3) Applying AEB v Secretary of State for the Home Department [2022] EWCA Civ 1512, in considering the question of whether the appeal should be retained or remitted it will be material to take account of the loss of the two-tier decision making process if the decision is retained. Not every finding of an error of law concerning unfairness will require the appeal to be remitted: the nature of the unfairness and the extent of its impact on the findings made overall will need to be evaluated as part of the decision as to whether the general principle should be departed from.

https://www.bailii.org/uk/cases/UKUT/IAC/2023/46.html

No power to dispose of appeal without considering merits: SSGA (Disposal without considering merits; R25) Iraq [2023] UKUT 00012 (IAC)

1. Judges in the FtT (IAC) do not have power to dispose of an appeal without considering its merits. This is because of the statutory duty under s.86 of the 2002 Act to determine each matter raised as a ground of appeal.

2. Every judge seized of an appeal must reach his or her own decision on the case and must exercise for himself or herself any available discretion. Judges who give directions must be careful to ensure that the wording of their directions does not and cannot be perceived to direct how another judge should dispose of the appeal or exercise any available discretion. If a judge tasked with deciding an appeal is faced with any direction that may be so perceived, the judge must make it clear in the decision that he/she has considered the matter for himself/herself.

3. A positive act is required by a party demonstrating clearly that the party no longer pursues his or her case before a judge can be satisfied that that is the case. Nothing less will do. Judges in the FtT (IAC) do not have power to treat an appeal as unopposed on the ground that the party in question has not complied with any requirement of the FtT Rules or a practice direction or any direction(s) of the Tribunal even if the failure to comply is persistent.

SSGA (Disposal without considering merits; R25) Iraq [2023] UKUT 00012 (IAC)

4. The following guidance applies when consideration is being given to whether or not an appeal should be disposed of without a hearing:

(i) Rule 25(1) of the FtT Rules provides that the FtT (IAC) must hold a hearing which disposes of proceedings except where rule 25(1)(a) to (g) apply. Seven exceptions to the general rule are provided for in rule 25(1)(a) to (g).

(ii) Any decision whether to decide an appeal without a hearing is a judicial one to be made by the judge who decides the appeal without a hearing. The mere fact that a case has been placed in a paper list does not and cannot detract from the duty placed on the judge before whom the case is listed as a paper case to consider for himself or herself whether one or more of the exceptions to the general rule apply. If, having considered rule 25, the judge is not satisfied that at least one of the exceptions in rule 25(1)(a) to (g) is satisfied, the judge must decline to decide the appeal without a hearing and direct the administration to list the appeal for a hearing.

(iii) If a judge decides that one or more of the exceptions in rule 25(1) is satisfied and therefore decides an appeal without a hearing, the judge's written decision must explain which exception is satisfied and why by engaging with the pre-requisites specified in the relevant provision and giving reasons for how any discretion conferred by the relevant exception has been exercised and/or how any judgment required to be made is made. Furthermore:

SSGA (Disposal without considering merits; R25) Iraq [2023] UKUT 00012 (IAC)

(a) For the exception in rule 25(1)(e) to apply, mere non-compliance with a provision of the FtT Rules, a practice direction or a direction is not in itself sufficient to permit a judge to decide an appeal without a hearing. The Tribunal must, in addition, be "satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing". The judge's written decision must therefore identify the procedural failure or failures in question, explain the judge's view of their causes on such evidence as is before the judge as well as explain the persistence and gravity of the procedural failure or failures. The written decision must explain the extent to which such failures have obstructed the overriding objective and why the judge is "satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing". If credibility is in issue on any material aspect of the claimant's case, the judge's written decision must explain why it is nevertheless appropriate in all of the circumstances to decide the appeal without a hearing and the relevance of the procedural failure(s) to it being deemed appropriate by the judge to decide the appeal without a hearing.

(b) For the exception in rule 25(1)(g) to apply, rule 25(2) has to be satisfied. If a judge proceeds to decide an appeal without a hearing under rule 25(1)(g), the judge's written decision must demonstrate why rule 25(2) is satisfied and go on to explain why the judge has concluded that the appeal can justly be determined without a hearing notwithstanding any dispute there may be as to the credibility of any material fact.

(iv) A hearing should be held whenever credibility is disputed on any material issue or fact. Cases in which it would be appropriate to determine an appeal without a hearing if credibility is materially in issue would be rare indeed. In almost all cases, the appropriate course of action would be to list the case for a hearing and decide the case on such material as is before the Tribunal.

https://www.bailii.org/uk/cases/UKUT/IAC/2023/12.html

Giving evidence by video link from abroad where there was no permission from the foreign state was not unlawful and did not render the hearing a nullity

Raza v Secretary of State for the Home Department [2023] EWCA Civ 29 (18 January 2023)

http://www.bailii.org/ew/cases/EWCA/Civ/2023/29.html

76. The primary question for this Court is whether there is any provision or rule of domestic law which shows that the FtT hearing was unlawful and a nullity. There is none. The 2002 Act expressly requires some appeals to be made from, and some to be continued from, abroad. The 2002 Act does not provide that the lawfulness of such appeals depends on any condition, such as the obtaining of permission from a foreign state. The Rules assume that a hearing can be conducted partly by video link. The Rules do not provide for any further conditions in relation to the taking of evidence from abroad. Neither *Nare* nor *Agbabiaka* suggests that the taking of video evidence from abroad without the permission of the state concerned is unlawful, or that it makes the hearing a nullity. *Agbabiaka* suggests that such a hearing might be contrary to the public interest because of its potential to damage international relations, and, thus contrary to the interests of justice, but that is a different point. I accept Mr Kovats's submission that the sanctions for such conduct are diplomatic, not legal.

Durable Partners Who Marry: Elais (fairness and extended family members) [2022] UKUT 300 (IAC) (28 September 2022)

http://www.bailii.org/uk/cases/UKUT/IAC/2022/300.html

The fairness issue:

1. *In order to conduct a fair hearing, cross-examination should be facilitated by the judge without undue interruption.*

2. *Where a transcript or recording is available of a hearing at which it is alleged that the proceedings were unfair, it is less likely to be appropriate to seek an account from the judge as to what took place.*

The extended family member issue:

3. *Where:*

   a. *an application for a residence card as the durable partner of an EEA national under the Immigration (European Economic Area) Regulations 2016 was made or refused before the end of the "implementation period" on 31 December 2020 at 11.00PM, and*

   b. *the putative durable partners marry after the end of the implementation period,*

in any appeal against the refusal of the application, the post-implementation period marriage is not capable of amounting to a "new matter" for the purposes of an appeal under the 2016 Regulations and is, at its highest, simply further evidence as to existence and durability of the claimed relationship between the appellant and the EEA sponsor.

4. *Where such an appellant relies on a post-implementation period marriage to demonstrate the durability of the relationship upon which an application for a residence card as a durable partner was based, whether that marriage is genuine and subsisting may be a relevant issue for the tribunal to determine. The established EU law jurisprudence concerning marriages of convenience does not apply to that assessment.*

EU Nationals with PSS who fail to apply for SS: The Independent Monitoring Authority for the Citizens' Rights Agreements, R. (On the Application Of) v Secretary of State for the Home Department [2022] EWHC 3274 (Admin) (21 December 2022)

The judgment rules on two issues.

- Firstly, it makes clear that people with pre-settled status, who continue to live lawfully in the UK, cannot lose their residence rights except for reasons that are clearly set out in the Withdrawal Agreement (for example by being absent from the UK for too long).

  It confirms that the Withdrawal Agreement does not allow for the Home Office to require a second application to the Scheme for rights to continue. It is therefore unlawful for individuals to lose their rights just because they do not make a second application to the Scheme

- Secondly, individuals granted pre-settled status should automatically be able to access the rights of settled status **as soon as** they reach five years of qualifying residence - even if they have not yet applied for, or been granted, settled status.

https://the3million.org.uk/news/2022-12-21/high-court-judgment-pre-settled

Nationality & Children of EU Citizens

Roehrig, R (On the Application Of) v Secretary of State for the Home Department [2023] EWHC 31 (Admin) (20 January 2023)
http://www.bailii.org/ew/cases/EWHC/Admin/2023/31.html

In Roehrig Eyre J. considred the meaning of 'settled' for the purposes of the British Nationality Act 1981 and the circumstances in which a person born in the UK to an EU citizen exercising Treaty rights, during the period of the UK's membership of the EU, was born a British citizen under section 1(1) of the Act.

3. As already noted the Claimant was born on 20th October 2000. At that time M was resident in the United Kingdom by virtue of her status as a worker who was a citizen of an EU member state. M was born in France and had come to the United Kingdom, aged 18, in June 1995. M has remained living in the United Kingdom since then and on 21st August 2018 she became a British citizen by naturalisation.

4. On 14th December 2020 the Claimant applied for a British passport invoking the citizenship which he contends he acquired on birth. The Defendant refused that application on 8th April 2021 on the basis that at the time of the Claimant's birth M was subject under the immigration laws to a restriction as to the period for which she might remain in the United Kingdom.

Nationality & Children of EU Citizens

5. The approach which the Defendant took to the Claimant's application accorded with the approach she had taken since 2nd October 2000 to children born on or after that date to EU citizens resident in the United Kingdom. In the period from the coming into force of the BNA on 1st January 1983 to 2nd October 2000 the Defendant's approach had been to regard children born to EU citizens resident in the United Kingdom and exercising a European law right of free movement as having acquired British citizenship on birth by reason of section 1(1)(b) of the BNA. On 2nd October 2000 the Immigration (European Economic Area) Regulations 2000 ("the 2000 Regulations") came into force. From that date until 11th October 2022 the Defendant continued, in the circumstances I will describe more fully below, to treat such children born before 2nd October 2000 as having acquired British citizenship by birth[2].

Roehrig, R (On the Application Of) v Secretary of State for the Home Department [2023] EWHC 31 (Admin) (20 January 2023)

89.That conclusion is that the 2000 Regulations were immigration laws. I am also satisfied that the qualification to which M was subject by reason of regulation 14, namely that she was only entitled to remain so long as she was a qualified person, was a restriction under such laws. This is necessarily the position given that the qualification derives from regulation 14. The fact that the regulation was thereby reflecting the provisions of EU law does not prevent the restriction being one under the immigration laws. Putting the matter shortly it is a restriction contained in the immigration laws and its ultimate source does not alter its nature as being a restriction under those laws.

90.It follows that the issue of whether M was settled in the United Kingdom on 20th October 2000 depends on whether the restriction was one "on the period for which she may remain".

Roehrig, R (On the Application Of) v Secretary of State for the Home Department [2023] EWHC 31 (Admin) (20 January 2023)

110.Accordingly, the restriction to which M was subject was one which was a restriction as to the period for which she might remain in the United Kingdom.

…

Conclusion.

113.The effect of the preceding analysis is that M was not settled in the United Kingdom for the purpose of the BNA at the time of the Claimant's birth and so the Claimant did not at that time acquire British citizenship through section 1(1)(b) of that Act. The claim, therefore, fails.

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 ECOs has been very poor. Applicants are often 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* the Petitioner was refused a visit visa on the usual grounds of V4.2(a) & (c) of the Immigration Rules, 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 [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 (Scots Law for a quashing order).

GULHAM SAGRA FOR JUDICIAL REVIEW [2022] ScotCS CSOH_71 (15 September 2022)

http://www.bailii.org/scot/cases/ScotCS/2022/2022_CSOH_71.html

[9] The difficulty with that passage is that there was a document submitted by the petitioner which contained evidence of these matters, namely the statutory declaration by the sponsor. The sponsor is someone who could be expected to have knowledge of these matters as she was a family member of the petitioner, being the mother-in-law of the petitioner's son.

[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.

[17] We simply do know what the reason for rejecting the sponsor's evidence was, and it is inappropriate for the court to speculate as to whether it was one of the reasons suggested above, or indeed some other reason.
[18] The petitioner is entitled to a clear statement of the reasons for rejection of the evidence. The evidence goes to the central issue which had to be decided by the ECO, which was whether the petitioner's life and family ties in Pakistan were such that the petitioner would leave the UK at the end of the visit. Without a clear statement of the reasons, the petitioner is unable to properly assess whether she has any potential remedies against the substance of the decision.

The relevance of *Chikwamba* to appeals today: *Alam & Anor v Secretary of State for the Home Department [2023] EWCA Civ 30 (19 January 2023)*

http://www.bailii.org/ew/cases/EWCA/Civ/2023/30.html

5. The main issue on these appeals is whether the decision of the House of Lords in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40; [2008] 1 WLR 1420 now has any, and if so, what, bearing on the issues which tribunals have to consider when appellants who have been in the United Kingdom unlawfully for many years resist their removal on article 8 grounds, when the fact-finder has decided that they can continue their family life abroad. A1 also has leave to argue that the F-tT erred in law in holding that there were no insurmountable obstacles to the continuation of his family life in Bangladesh.

6. For the reasons given in this judgment, I have reached five conclusions. Three are matters of general principle. The others concern the present appeals.
    i. The decision in *Chikwamba* is only potentially relevant on an appeal when an application for leave to remain is refused on the narrow procedural ground that the applicant must leave the United Kingdom in order to make an application for entry clearance.
    ii. Even in such a case, a full analysis of the article 8 claim is necessary. If there are other factors which tell against the article 8 claim, they must be given weight, and they may make it proportionate to require an applicant to leave the United Kingdom and to apply for entry clearance.
    iii. A fortiori, if the application is not refused on that procedural ground, a full analysis of all the features of the article 8 claim is always necessary.
    iv. Neither tribunal erred in law in its approach to *Chikwamba*.
    v. The F-tT did not err in law in the case of A1 by applying the test of 'undue harshness' rather than the test of 'insurmountable obstacles'.

Alam & Anor v Secretary of State for the Home Department [2023] EWCA Civ 30 (19 January 2023)

106. In *Chikwamba*, the Secretary of State met a very strong article 8 case by relying on an inappropriately inflexible policy. The decision does not in my view decide any wider point than that that defence failed. There are three other matters that should be borne in mind when it is cited nowadays.

    i. The case law on article 8 in immigration cases has developed significantly since *Chikwamba* was decided.

    ii. It was decided before the enactment of Part 5A of the 2002 Act. Section 117B(4)(b) now requires courts and tribunals to have 'regard in particular' to the 'consideration' that 'little weight' should be given to a relationship which is formed with a qualifying partner when the applicant is in the United Kingdom unlawfully.

    iii. When *Chikwamba* was decided there was no provision in the Rules which dealt with article 8 claims within, or outside, the Rules. By contrast, by the time of the decisions which are the subject of these appeals, Appendix FM dealt with such claims. Paragraph EX.1 of Appendix FM provided an exception to the requirements of Appendix FM in article 8 cases if the applicant had a relationship with a qualifying partner and there were 'insurmountable obstacles' to family life abroad.

107. Those three points mean that *Chikwamba* does not state any general rule of law which would bind a court or tribunal now in its approach to all cases in which an applicant who has no right to be in the United Kingdom applies to stay here on the basis of his article 8 rights. In my judgment, *Chikwamba* decides that, on the facts of that appellant's case, it was disproportionate for the Secretary of State to insist on her policy that an applicant should leave the United Kingdom and apply for entry clearance from Zimbabwe.

Alam & Anor v Secretary of State for the Home Department [2023] EWCA Civ 30 (19 January 2023)

108.Four aspects of Lord Brown's reasoning are also significant.

i. He rejected the submission that an appeal could never be dismissed on the ground that the appellant should be required to leave the United Kingdom and apply for entry clearance from abroad. Instead, he recognised that it could be proportionate in some cases for the Secretary of State to insist on removal for that purpose.

ii. His view was that the appellant's family would 'have to be allowed to live together here' eventually.

iii. It was not feasible for family life to be established in Zimbabwe because the appellant's husband was a refugee from Zimbabwe.

iv. He was sceptical about the value to be put on the public interest in immigration control in that case.

109.Only two of the decisions of this Court on which the appellants rely (*VW (Uganda)* and *Hayat*) were decided by reference to *Chikwamba*. The other decisions are cases in which comments were made about *Chikwamba*, but those comments were not part of this Court's decision. The observations about *Chikwamba* which have been made by the Supreme Court are also comments which were not part of the Court's decision. Neither comment goes further than to say that, if an application for entry clearance is certain to succeed, that might make removal disproportionate.

110.The core of the reasoning in *Hayat* is that *Chikwamba* is only relevant when an application for leave is refused on the narrow procedural ground that the applicant must leave and apply for entry clearance, and that, even then, a full analysis of the article 8 claim is necessary. If there are other factors which tell against the article 8 claim, they must be given weight, and may make it proportionate to require an applicant to leave the United Kingdom and to apply for entry clearance. I consider that, in the light of the later approach of the Supreme Court to these issues, the approach in *Hayat* is correct. A fortiori, if the application for leave to remain is not refused on that narrow procedural ground, a full analysis of all the features of the article 8 claim is always necessary.

Alam & Anor v Secretary of State for the Home Department [2023] EWCA Civ 30 (19 January 2023)

111.I do not consider that the reasoning in *VW (Uganda)*, to the extent that I can understand it, binds this Court. First, the Rules and the statutory background were different then. Second, the Supreme Court has now recognised that the insurmountable obstacles test is the right test, so the premise of Sedley LJ's analysis is wrong. Third, having applied the wrong test, Sedley LJ left hanging in the air the question whether (applying his test) it was reasonable for the family to continue its family life in Uganda. It must be supposed that he thought that it was not necessary to ask that question if it was disproportionate to require the first appellant to leave the United Kingdom and to apply for entry clearance; and that that was decisive of the article 8 claim, but he does not spell out that step in his reasoning, and it is clearly a wrong step, for the reasons which I have just given.

112.The two present appeals, subject to A1's ground 2, are both cases in which neither appellant's application could succeed under the Rules, to which courts must give great weight. The finding that there are no insurmountable obstacles to family life abroad is a further powerful factor militating against the article 8 claims, as is the finding that the relationships were formed when each appellant was in the United Kingdom unlawfully. The relevant tribunal in each case was obliged to take both those factors into account, entitled to decide that the public interest in immigration removal outweighed the appellants' weak article 8 claims, and to hold that removal would therefore be proportionate. Neither the F-tT in A1's case nor the UT in A2's case erred in law in its approach to *Chikwamba*.

113.Moreover, the Secretary of State did not refuse leave in either case on the ground that the appellant should leave the United Kingdom and apply for entry clearance. I accept Mr Hansen's submission, based on *Hayat*, that *Chikwamba* is only relevant if the Secretary of State refuses an application on the narrow procedural ground that the appellant should be required to apply for entry clearance from abroad. It does not apply here, because the Secretary of State did not so decide. *Chikwamba* is irrelevant to these appeals. I also reject the appellants' submission that the UT determination in *Younas* was wrong; in *Younas* and in *Thakral*, the UT's approach was correct.

114.Rhuppiah does not help the appellants. Even if there is some flexibility in section 117B and section 117B(4)(b), there is, on the findings which the tribunals were entitled to make, no exceptional positive feature of the claim of either appellant which could enable it to succeed. There is, moreover, in each case (and subject to ground 2 in A1's case), a further negative factor, that is, that family life could continue abroad.

Appendix FM-SE Income and Savings: Fatima (paragraph 1 (d) Appendix FM-SE: interpretation) [2022] UKUT 155 (IAC) (20 April 2022)

Interpretation of the phrase "lawfully derived" in paragraph 1 (d) of Appendix FM-SE is to be on a case-to-case basis. The drafter of the Rule did not see fit to provide a definition, and it would not be appropriate for the Tribunal to do so.

13. It is clear from the judge's findings that Mr Hussain's income was derived from employment that he carried out in his work for Chicago Pizza. There is no suggestion that can be maintained that he did not do that work and nor is there any suggestion that can any longer be maintained that he was in any sense complicit in the non-payment by his employer of tax and national insurance deductions to the Revenue. It seems to us clear that the income in this case was, on a common sense interpretation of the phrase, lawfully derived by Mr Hussain. The fact that in the background the tax and national insurance deducted from his wages which should have been paid to the Revenue were, unknown to him, not so paid, cannot in our view detract from the fact that his income arose perfectly lawfully from lawful employment. It seems to us that it would be significantly too broad an interpretation of the Rule to regard Mr Hussain's income as not having been lawfully derived on the basis that his employer failed to pass on the deducted tax and national insurance to HMRC. We do not think that the interpretive approach urged on us by Mr Avery can be sustained. Each case must be decided on its own facts, and that, we think, is a proposition that finds support from the absence of any attempt to provide any further clarification of the phrase "lawfully derived" either in the Immigration Rules or in any policy document. In a case as here where an employee has behaved perfectly lawfully it would in our view be quite wrong to interpret paragraph 1(d) in such a way as to taint him with what may well have been fraud on others on the part of his employer.

14. We do not propose to make any attempt to define what is meant by "lawfully derived" in paragraph 1(d). As we say, this is a matter that must be considered on the facts of each case as and when they arise. In this case we are confident that the income of Mr Hussain was lawfully derived. In line with the guidance in TZ (Pakistan) [2018] EWCA Civ 1109; [2018] Imm AR 1301, at paragraph 34, " where a person satisfies the Rules ... this will be positively determinative of that person's article 8 appeal, provided their case engages Article 8(1), for the very reason that it would then be disproportionate for that person to be removed" [refused entry clearance] the appeal is allowed.

https://www.bailii.org/uk/cases/UKUT/IAC/2022/155.html

Nationality, Children & Fees: *R (on the application of O (a minor, by her litigation friend AO)) (Appellant) v Secretary of State for the Home Department (Respondent) & R (on the application of The Project for the Registration of Children as British Citizens) (Appellant) v Secretary of State for the Home Department (Respondent) [2022] UKSC 3*

The Supreme Court dismissed an ultra vires challenge to subordinate legislation which set the fee at which a child or young person could apply to be registered as a British citizen at a level which many young applicants have found to be unaffordable (£973 at that time and £1,012 since 6th April 2018).

Lord Hodge held that statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered [**31**]. Applying those principles, Lord Hodge concluded that, in the 2014 Act, Parliament authorised the subordinate legislation by which the SSHD has fixed the relevant application fee [**51**]. The appropriateness of imposing the fee on children is a question of policy which is for political determination, and not a matter for the court. The appeal was therefore dismissed [**52**].

However the SSHD had lost in the Administrative Court and Court of Appeal on section 55 BCIAA 2009 grounds which was not before the Supreme Court and led to the SSHD introducing a new *'Affordability fee waiver: Citizenship registration for individuals under the age of 18'* *https://www.gov.uk/government/publications/citizenship-fee-waiver-for-individuals-under-18-caseworker-guidance*.

The Importance of British Citizenship: A Quote from O which you may be able to use in other contexts

26.There is no dispute as to the importance to an individual of the possession of British citizenship. It gives a right of abode in the UK which is not subject to the qualifications that apply to a non-citizen, including even someone who has indefinite leave to remain. It gives a right to acquire a British passport and thereby a right to come and go without let or hindrance. It can contribute to one's sense of identity and belonging, assisting people, and not least young people in their sensitive teenage years, to feel part of the wider community. It allows a person to participate in the political life of the local community and the country at large. As the Secretary of State has stated in a guidance document, "Becoming a British citizen is a significant life event. Apart from allowing you to apply for a British Citizen passport, British citizenship gives you the opportunity to participate more fully in the life of your local community." - Guide T, *Registration as a British citizen - a guide for those born in the UK on or after 1 January 1983 who have lived in the UK up to the age of ten* (March 2019), Introduction, p 3.

Deportation Update: The Supreme Court on Unduly Harsh, Very Compelling Circumstances & Rehabilitation

In *HA (Iraq)* the Supreme Court considered three conjoined appeals concerning section 117C NIAA, 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 Secretary of State for the Home Department [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 Secretary of State for the Home Department [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 & Ongoing Family Proceedings: CJ (family proceedings and deportation) South Africa [2022] UKUT 00336 (IAC)

In *CJ* the Upper Tribunal considered how the principle that it may be a breach of Article 8 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 Secretary of State for the Home Department [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 00218 (IAC) concerning the need for an appellant to be permitted to remain in the United Kingdom 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.

CJ (family proceedings and deportation) South Africa [2022] UKUT 00336 (IAC)

1) Where an appellant in an appeal challenging the refusal of a human rights claim is engaged in proceedings before the Family Court, the general approach in MS (Ivory Coast) v Secretary of State for the Home Department [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 United Kingdom in order to prosecute family proceedings remains applicable. In particular, a tribunal considering this issue should address the questions at paragraphs 43 to 45 of RS (other than the questions in paragraph 44(ii)).

2) A tribunal should not purport to allow the appeal to a "limited extent" nor give a direction that a period of discretionary leave should be granted to the appellant in accordance with paragraph 44(ii) of RS. The only option now open to the tribunal on an appeal under Part 5 of the 2002 Act is to allow or dismiss the appeal. The power to give a direction for the purpose of giving effect to its decision previously contained in section 87 of the 2002 Act was repealed by the Immigration Act 2014 on 20 October 2014.

3) In an appeal against the refusal of a human rights claim, 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 in express reliance on that subsection.

4) It is likely to be helpful for the tribunal to observe that, although implementing allowed appeals is a matter for the Secretary of State, 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.

5) When the family proceedings are resolved, the appellant and the Secretary of State may each reassess their respective positions in light of the final contact arrangements, as determined by the Family Court.

https://www.bailii.org/uk/cases/UKUT/IAC/2022/336.html

Questions?

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