Immigration cases 2020—January to June review

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Immigration analysis: Adam Pipe, barrister at No 8 Chambers, reviews the key cases from January to June 2020 for immigration advisers, and explains why they are of interest. The review covers successful challenges to the No Recourse to Public Funds and Fee Waiver policies, Article 3 and Article 8 updates, para 322(5) refusals and deportation and asylum cases.

No Recourse to Public Funds and Fee Waiver policies found to be unlawful

The first half of 2020 saw successful challenges to the Secretary of State for the Home Department's (SSHD) No Recurse to Public Funds (NRPF) and Fee Waiver policies. These decisions will benefit the most vulnerable migrants especially during the pandemic and with ever increasing application fees being a key part of the government's 'hostile environment'.

In *R (W, a child (by his litigation friend)) v SSHD (Project 17 intervening)* [2020] EWHC 1299 (Admin), [2020] All ER (D) 137 (May) a Divisional Court found, in respect of those granted leave under the Immigration Rules, Appendix FM, para D-LRPT.1.2 (the ten-year parent route) that the NRPF regime, comprising para GEN 1.11A and the policy instruction read together, do not adequately recognise, reflect or give effect to the SSHD's obligation not to impose, or to lift, the condition of NRPF in cases where the applicant is not yet, but will imminently suffer inhuman or degrading treatment without recourse to public funds. The Divisional Court found that:

> 'in its current form the NRPF regime is apt to mislead caseworkers in this critical respect and gives rise to a real risk of unlawful decisions in a significant number of cases.'

In reaching its decision the court relied upon *Limbuela v SSHD* [2006] 1 AC 396. The court ordered the SSHD to amend her policy instruction which has since been done.

In *R (Dzineku-Liggison) v SSHD* [2020] UKUT 222 (IAC), [2020] All ER (D) 144 (May) the Upper Tribunal (UT) found that the SSHD's Fee Waiver guidance, version 3, was unlawful because it failed properly to reflect the settled test, of whether the applicant is able to afford the fee. The SSHD's policy applied a test of destitution or exceptional circumstances which was incorrect following *R (Omar) v SSHD* [2012] EWHC 3448 (Admin), [2012] All ER (D) 82 (Dec) and *R (Carter) v SSHD* [2014] EWHC 2603 (Admin), [2014] All ER (D) 280 (Jul) which had established that the correct test was one of affordability. Judge Blundell concluded at [89]:

> 'I come to the clear conclusion that the overall effect of the guidance is to circumscribe unduly the circumstances in which an individual might qualify for a fee waiver. The underlying affordability test is not mentioned expressly. The structure of pages 13 and 14 is confused and confusing. The guidance is dominated by references to destitution, which further obscures the relevant test. The analysis required by the third stage impermissibly erects an 'exceptional circumstances' hurdle. A reasonable and literate person applying the guidance would understand the three stages to be focused upon destitution, the threat of destitution and the existence of exceptional circumstances.'

Blundell J also found that the actual decision in respect of the applicants failed to apply the affordability test and even if it was applied it was irrational to the facts stating at [94] that:

> 'The evidence which had been presented was sufficient, on any rational view, to establish that the applicants were unable to pay a combined application fee of nearly £8000 from their own resources.'

The Home Office were granted permission to appeal to the Court of Appeal however the fee waiver guidance was amended on 18th June 2020 adding 'they are not able to pay the fee' to the reasons for which a fee waiver may be granted (the policy still also includes the references to destitution and exceptional circumstances).

Article 3 ill-health cases: Paposhvili reigns supreme

In the landmark decision in *AM (Zimbabwe) v SSHD* [2020] UKSC 17, [2020] All ER (D) 181 (Apr) (29 April 2020)†the Supreme Court finally laid to rest the decision in *N v SSHD* [2005] UKHL 31 in Article 3 health cases concerning a lack of medical treatment in the receiving state. The court found that *Paposhvili v Belgium* [2017] ECHR 41738/10 should be

followed. AM is a Zimbabwean national and is HIV positive and on his second different antiretroviral medication. AM has been convicted of serious criminal offences and the SSHD seeks to deport him. In *Paposhvili*, the ECtHR considered the 'other very exceptional cases' beyond deathbed cases which were referred to in *N v United Kingdom* [2008] ECHR 26565/05, [2008] All ER (D) 05 (Jun). It held [183] that 'other very exceptional cases' should now be taken to include cases in which there were substantial grounds for believing that the applicant, while not at imminent risk of dying, would face a real risk in the receiving country of being exposed either to a serious, rapid and irreversible decline in health resulting in intense suffering, or to 'a significant reduction in life expectancy'. The Supreme Court found that the Court of Appeal was mistaken in taking the ECtHR's phrase, 'a significant reduction in life expectancy' to mean 'the imminence of death'. 'Significant' here means 'substantial'. In *Paposhvili*, the ECtHR also set out requirements [186 to 191] for the procedure to be followed in Article 3 ill-health cases. One requirement is for the applicant to adduce evidence 'capable of demonstrating that there are substantial grounds for believing' that, if removed, they would be exposed to a real risk of being subjected to treatment contrary to Article 3. That is a demanding threshold for the applicant. Their evidence must be capable of demonstrating 'substantial' grounds for believing that it is a 'very exceptional case' because of a 'real' risk of subjection to 'inhuman' treatment. They must put forward a case which, if not challenged or countered, would establish a violation of the article. If the applicant presents evidence to that threshold, the returning state can seek to challenge or counter it. *Paposhvili* states that, in doing so, the returning state must 'dispel any doubts raised' by the evidence; but 'any doubts' here should be read to mean any serious doubts. The Supreme Court remitted the case to the UT for the Article 3 claim to be heard on up-to-date evidence.

Article 8: British children, Chikwamba & Zambrano

In *Younas (section 117B(6)(b); Chikwamba; Zambrano) Pakistan* [2020] UKUT 129 (IAC), [2020] All ER (D) 121 (Apr) (24 March 2020), the appellant, a Pakistani national who had spent her life in the UAE, entered on a visit visa in 2016 while pregnant. The appellant's partner is a British citizen and the couple's British daughter was born subsequent to her arrival. The appellant's partner has two British sons from a previous relationship. The appellant applied in 2018 for leave to remain and her application was refused. In the UT, the SSHD accepted that:

- there are insurmountable obstacles to the appellant's family life continuing outside of the UK, and
- it would not be reasonable or proportionate for the family unit to be indefinitely separated

The UT found that the appellant and her partner had exaggerated their evidence particularly in relation to the appellant's connections in Pakistan and her partner's financial situation. The UT found that the partner was more likely than not to be able to meet the financial requirement or could do within a short space of time. The UT therefore found that the appellant and her daughter would likely be out of the United Kingdom for four to nine months in order to make an application for entry clearance. it also found that the appellant could not meet the requirements of the Immigration Rules, Appendix FM as she had entered as a visitor. The UT rejected the appellant's argument based upon *Chikwamba v SSHD* [2008] UKHL 40 finding that, while the appellant was likely to succeed in her application for entry clearance, the public interest in her removal was strong given her history. In respect of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002) the tribunal found that while it must assume that the child would leave the United Kingdom, the length of time she would be absent from the United Kingdom is part of the real world assessment required by *KO (Nigeria)* [2018] UKSC 53, [2018] All ER (D) 95 (Oct). The UT also rejected the appellant's argument based on *Zambrano v Office national de l'emploi (Case C-34/09)*, [2011] All ER (D) 199 (Mar) finding that applying a practical test to the actual facts, the appellant's daughter would not be deprived of the genuine enjoyment of her rights. This is a very troubling decision and is problematic in its interpretation of *Chikwamba* and *Zambrano*.

Article 8: section 117B(6) and the reasonableness question

In *Runa v SSHD* [2020] EWCA Civ 514, [2020] All ER (D) 54 (Apr) (08 April 2020), the appellant entered the UK as a visitor in 2006 and overstayed. In 2014 she married a British citizen and made an application for leave to remain on the basis of being a partner. In 2015 the appellant had her first British son. Her appeal then came before the First-tier Tribunal (FTT) who allowed her appeal. The SSHD applied for permission to appeal to the UT. In 2018 her second British son was born. When her case came before the UT in 2019 the Deputy Judge found an error of law in the decision of the FTT for failing to make proper findings and erring in its approach to the Immigration Rules, Part 8, para 276ADE. The Deputy Judge went on to dismiss the underlying appeal. The appellant appealed to the Court of Appeal arguing that the Deputy Judge had erred in his construction and application of NIAA 2002, s 117B(6). The Deputy Judge had considered whether the children could remain with their father in the United Kingdom or whether the family as a whole could relocate to Bangladesh. The Deputy Judge found that there were no insurmountable obstacles to the appellant and her partner living in Bangladesh and therefore it would reasonable for the children to follow them.

The appellant's argued that where one parent had a right to remain it cannot be reasonable to expect the children to leave the United Kingdom. This was rejected by the Court of Appeal. The Court of Appeal did however accept that a full fact-finding exercise must be undertaken to answer the sole question of whether it would be reasonable for the child to leave. The case was remitted to the FTT to make proper findings of fact as the Deputy Judge had asked the wrong question.

Family life, adults, foster carers and errors of law

In *Uddin v SSHD* [2020] EWCA Civ 338, [2020] All ER (D) 78 (Mar) (12 March 2020) the senior president of Tribunals allowed the appeal of Mr Uddin, a 20-year old Bangladeshi national who was found abandoned in London in 2013. He was treated as a trafficked child and placed into foster care. His asylum claim was rejected but he was granted leave to remain as an unaccompanied asylum-seeking child. At the end of his leave he applied for an extension which was rejected by the SSHD. He appealed and his appeal was heard on Article 3 & Article 8 grounds, the focus of the FTT was on Article 3. The FTT dismissed his appeal rejecting the credibility of his historical account. However there were no proper findings in relation to the uncontested evidence of his relationship with his foster family. The Court of Appeal helpfully remind us that the fact that someone is untruthful about one matter does not mean that they are necessarily untruthful about another [11]. The Court of Appeal were critical of the Deputy Judge, who erred [15] in applying an erroneous assumption that just because the decision was carefully prepared by an experienced judge they wouldn't be expected to make a mistake. The Deputy Judge had also introduced the notion that foster carers have a financial motivation and this supported the decision that there was no emotional dependency. The SSHD therefore argued before the Court Appeal that 'foster carers' were a special case. This was rejected by the Court of Appeal. The existence of family life, after a young person has reached majority, is a question of fact. There was no requirement of exceptional dependency. Continued cohabitation will be suggestive of ongoing committed support which is the hallmark of family life. The case was therefore remitted to the FTT.

Deportation

The first half of 2020 saw the usual high number of decisions in deportation cases. A few to note include the following:

In *Patel (British citizen child-deportation)* [2020] UKUT 45 (IAC), [2020] All ER (D) 126 (Feb) (29 January 2020) the UT held that, in respect to a qualifying child, NIAA 2002, s 117C(5) imposes the same two requirements as the Immigration Rules, Part 13, para 399(a)(ii) (that it would be unduly harsh for the child to leave the United Kingdom and for the child to remain). When considering these provisions judicial decision makers are assessing a hypothetical question rather than undertaking a predictive factual analysis. British citizenship is a relevant factor when assessing whether the 'unduly harsh' requirement is met, however it is not necessarily a weighty factor. The tribunal also emphasised that undue harshness goes beyond just being harsh and there can be some substantial interference with the rights of a British child before the decision is unduly harsh.

In *SC (paras A398–339D: 'foreign criminal': procedure) Albania* [2020] UKUT 187 (IAC) (27 April 2020) and *MZ (Hospital order: whether a 'foreign criminal')* [2020] UKUT 225 (IAC) (15 June 2020)†the UT grappled with the definition of a 'foreign criminal' in NIAA 2002, s 117D(2) and the Immigration Rules, Part 13, para A398. In SC the UT held that a foreign national who has been convicted outside the United Kingdom of an offence is not, by reason of that conviction, a 'foreign criminal'. In *MZ* the UT held that an individual sentenced to a hospital order following a finding under section 5(1)(b) of the Criminal Procedure (Insanity) Act 1964 that he 'is under a disability and that he did the act or made the omission charged against him' is excluded from the statutory provisions by section 117D(3)(a) and from the Immigration Rules concerning deportation.

In *R (Mahmood) v Upper Tribunal (Immigration and Asylum Chamber)* [2020] EWCA Civ 717, [2020] All ER (D) 35 (Jun) (05 June 2020)†the Court of Appeal considered NIAA 2002, s 117D(2)(c)(ii) and whether the appellants committed 'an offence that has caused serious harm'. Simon LJ held [36]:

> *'the provision must be given its ordinary meaning informed by its context. The three categories must be read together. This is more than simply a conventional approach to statutory interpretation. It is plain, for example, from the structure of the provision that an offender who has been sentenced to a term of less than 12 months for an offence may nevertheless be treated as a 'foreign criminal' if the offence caused serious harm; and that 'serious harm' will only be relevant when the sentence for an offence is less than 12 months. This throws light on what may be encompassed by an offence which causes serious harm. While it is possible to think of offences which, despite causing the most serious harm, would not typically attract an immediate prison sentence of at least 12 months (causing death by careless driving is an example), in general paragraph (c)(ii) is not concerned with the most serious kind of harm which comes before the Crown Court.'*

The court went on to find that an evaluative judgment has to be made in the light of the facts and circumstances of the offending [42]. In terms of proving the serious harm, the views of the SSHD were the starting point, and may be compelling, but ultimately this will be a matter for the tribunal taking into account all relevant factors.

In *LE (St Vincent And the Grenadines) v SSHD* [2020] EWCA Civ 505, [2020] All ER (D) 52 (Apr) (07 April 2020) a former Royal Marine who had seen active service in Iraq and Afghanistan but later tricked an elderly vulnerable woman of £20,000 to £30,000 for his own use, was sentenced to two years imprisonment. The appellant has two sons by two different relationships with and with whom he has infrequent contact. There is a concise summary on the law in respect to Article 8 and deportation with reference to the key case law on the 'unduly harsh' and 'very compelling circumstances' tests [14–21]. The Court of Appeal held [30] that the UT were correct to set aside the FTT's finding that the decision was 'unduly harsh' on the children as it failed to apply the correct test and recognise that it requires a degree of harshness beyond the inevitable disruption to family life and upset that deportation of a parent necessarily involves for any child. The court also found that the FTT had erred in applying a conventional proportionality balance rather than applying the test set out in NIAA 2002, s 117C. It also held [34] that nothing in the Military Covenant suggests that service personnel who commit criminal offences while they are still in the Armed Forces, as this Appellant did, are somehow entitled to preferential treatment. Flaux LJ said [36]:

> *'Similarly, whatever one's own opinion as to the fairness or appropriateness of deporting a man who endured danger serving in this country's Armed Forces for fourteen years, the statutory regime is clear. Unless one or other of the Exceptions can be satisfied, the public interest in deporting foreign criminals will only be outweighed if the appellant can show "very compelling circumstances". Once it is accepted, as it rightly is by Mr Karnik, that military service without more will not always amount to such circumstances, one has to look at the circumstances of this appellant, his military service and family and personal life to determine whether they are very compelling. However regrettable it is for the appellant, in my judgment nothing in his particular life or military service amounts to such very compelling circumstances. That conclusion is not altered by the existence of the Covenant. While it recognises the stresses imposed on family life by military service, it is silent about non-UK ex-service personnel who have committed criminal offences. Parliament has not created any statutory exception for foreign criminals who have served in the Armed Forces and the clear wording of the statute cannot be overridden by any general duty to ex-service personnel and their families contained in the Covenant.'*

Tax discrepancies, para 322(5) & dishonesty

Cases involving discrepancies between the applicants' tax returns and the income they declared to the Home Office in previous applications are still a hot issue and have generated a number of important decisions in the first half of 2020.

In *Abbasi (rule 43; para 322(5): accountants' evidence) Pakistan* [2020] UKUT 27 (IAC), [2020] All ER (D) 111 (Jan) (8 January 2020)†the applicant was successful before the UT who relied inter alia on a letter from his accountants accepting blame for the errors in his tax returns. The UT were subsequently contacted by the firm of accountants indicating that the letter was not from them and was in fact a fraud. The UT reconvened the appeal before a presidential panel and considered its powers to set aside a decision which disposes of the proceedings, pursuant to Rule 43 of the Tribunal Procedure (UT) Rules 2008. The UT decided that it could apply Rule 43 of its own motion and fraud before the tribunal constitutes an abuse of process such to amount to a 'procedural irregularity' for the purposes of Rule 43(2)(d). The tribunal went on to say of accountant's evidence [64]:

> *'the First-tier Tribunal or Upper Tribunal, as the case may be, should expect the accountant in question to attend the hearing, having provided in advance a Statement of Truth, in order to explain in detail the circumstances in which the error came to be made; the basis and nature of any compensation; and whether the firm's insurers and/or any relevant regulatory body have been informed. In the absence of such evidence, the Tribunal is unlikely to be able to place any material weight on letters of this kind.'*

However the applicant had already been granted leave to remain by the SSHD so the appeal ceased to exist by virtue of NIAA 2002, s 104(4A) and therefore it was a matter for the SSHD to decide what action should be taken.

The case of *TY (Pakistan) v SSHD* [2020] EWCA Civ 157, [2020] All ER (D) 85 (Feb) (14 February 2020)†did not concern tax discrepancies but rather a late filing of tax returns. The FTT found that while the appellant had not been dishonest, so as to justify a refusal under the Immigration Rules, Part 9, para 322(5), he had lacked integrity and dismissed the appeal pursuant to the Immigration Rules, Part 7, para 276B(ii). The UT upheld the decision. Permission to appeal to the Court of Appeal was granted on the ground that the UT had not appreciated that para 276B(ii) required the decision-maker to conduct a balancing exercise by taking into account all relevant factors. Irwin LJ noted that the SSHD's refusal had referred to paras 322(5) and 276B(ii) in an undifferentiated way whereas they represent two discrete tests. He found that there is nothing in the case law which precludes the finding that deliberately failing to submit tax returns can be regarded as conduct justifying the refusal of an application for indefinite leave to remain.

However Irwin LJ [44] said:

> *'But the individual must have the opportunity to explain. There must be procedural fairness. The facts must be established and the case viewed on its merits. There should be a balancing exercise, taking into account any positive factors.'*

The appeal was therefore allowed as the balancing exercise had not been conducted, there was positive material which must be considered and this was not a case where the conduct is such that the balance must fall against the appellant.

In *Ashfaq (Balajigari: appeals)* [2020] UKUT 226 (IAC), [2020] All ER (D) 100 (Jul) (17 June 2020)†the UT picked up where it had left off in *Abbasi*. Ockelton VP summarises the legal principles in tax discrepancy cases. The tribunal pointed out that if the SSHD's decision carries a right of appeal, the availability of the appeal process corrects the defects of justice identified in *Balajigari* [2019] EWCA Civ 673, [2019] All ER (D) 134 (Apr). At [14] the vice president points out that it seems to be assumed that the original figures provided for immigration purposes are correct, however there is no reason to suppose that is the truth of the matter and the truth figures may be those given in the original tax returns or somewhere in-between. The vice president says [15] that the explanation by any accountant said to have made or contributed to an error is essential because the allegation of error goes to the accountant's professional standing. Without evidence from the accountant, the tribunal may consider that the facts laid by the SSHD establish the appellant's dishonesty.

Refusals of human rights claims and rights of appeal

In *MY (refusal of human rights claim: Pakistan)* [2020] UKUT 89 (IAC), (27 February 2020)†and *R (Mujahid) v First-tier Tribunal (Immigration and Asylum Chamber) and the Secretary of State for the Home Department (refusal of human rights claim)* [2020] UKUT 85 (IAC), [2020] All ER (D) 116 (Mar) (25 February 2020) the president considered the questions of refusals of human rights claims and rights of appeal. *MY* was an application for settlement on Domestic Violence grounds which also included a human rights claim. The FTT dismissed the appeal for want of jurisdiction on the basis that the decision was not a refusal of a human rights claim. The appellant argued that the decision was a refusal of a human rights claim, relying on *R (AT) v SSHD* [2017] EWHC 2589 (Admin), as a human rights claim had been made and the SSHD had refused it. The UT dismissed the appeal relying on the Court of Appeal decisions of *R (Shrestha) v SSHD* [2018] EWCA Civ 2810 and *Balajigari & others v SSHD* [2019] EWCA Civ 673, [2019] All ER (D) 134 (Apr). The president summarises his judgment as follows [81]:

> '(a) a human rights claim is defined by section 113 of the 2002 Act
>
> (b) the respondent's assessment of whether a claim satisfies that definition is not legally determinative
>
> (c) the respondent's Guidance is, however, broadly compatible with what the High Court has found to be the minimum elements of a human rights claim
>
> (d) the fact a human rights claim has been made does not mean that any reaction to it by the respondent, which is not an acceptance of the claim, acknowledged by the grant of leave, is to be treated as the refusal of a human rights claim, generating a right of appeal to the First-tier Tribunal
>
> (e) the respondent is legally entitled to adopt the position that she may require human rights claims to be made in a particular way, if they are to be substantively considered by her so that, if refused, there will be a right of appeal
>
> (f) in view of (d) and (c) above, there is no justification for construing section 82(1)(b) of the 2002 Act otherwise than according to its ordinary meaning, which is that the respondent decides to refuse a human rights claim if she:
>
> (i) engages with the claim; and
>
> (ii) reaches a decision that neither the claimant (C) nor anyone else who may be affected has a human right which is of such a kind as to entitle C to remain in the United Kingdom (or to be given entry to it) by reason of that right'

In *Mujahid* the applicant applied for indefinite leave to remain on long residence grounds but was refused under the Immigration Rules, Part 9, para 322(5) due to tax discrepancies. The SSHD however granted him limited leave to remain on the basis of his daughter having resided here for seven years. The applicant appealed the refusal of indefinite leave to remain to the FTT. The FTT issued a notice refusing to accept the applicant's appeal on the basis that there was not an appealable decision. The applicant judicially reviewed the decision of the FTT. The president dismissed the application

for Judicial Review relying on the same jurisprudence as in *MY*. The president found that a refusal of a human rights claim involves the SSHD taking that stance that she is not obliged to grant leave to remain in response to a claim that removing an applicant, or requiring them to leave, would be a violation of their human rights. Therefore where the SSHD grants limited leave to remain, in response to an application for indefinite leave to remain, there is no refusal of a human rights claim and no right of appeal.

'New matters' in the Upper Tribunal

In *Birch (Precariousness and mistake; new matters: Jamaica)* [2020] UKUT 86 (IAC), [2020] All ER (D) 125 (Mar) (26 February 2020),†the appellant arrived in the United Kingdom in 1999 and had leave to remain until 2001. In 2007/8 she was introduced to someone posing as an immigration officer and paid £3,000 to regularise her stay. The appellant's passport was stamped with an indefinite leave to remain stamp and she received a letter purporting to grant her the same. The stamp and the letter were subsequently found to be counterfeit but it was accepted that the appellant had been deceived and until 2015 she genuinely believed she had indefinite leave to remain. A Presidential Panel of the UT set aside the decision off the FTT dismissing her appeal on the basis that the judge had not taken into account the guidance in para 53 of *Agyarko* [2017] UKSC 11, [2017] All ER (D) 168 (Feb) where Lord Reed said:

> *'One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate.'*

The UT held that these observations apply to persons who have no leave to remain and that this was a material consideration in the assessment of the weight to be given to private and family life. At the date of the hearing before the UT the appellant had accrued 20 years residence in the United Kingdom and prima facie qualified for a grant of leave pursuant to the Immigration Rules, Part 8, para 276ADE. The SSHD argued that this was a new matter which could not be considered pursuant to NIAA 2002, s 85(4)–(6). However the phrase 'the Tribunal' is defined as the FTT by NIAA 2002, s 81 and the prohibition on new matters does not apply to proceedings in the UT. This is a welcome decision and means that there is an advantage to cases remaining in the UT rather than being remitted to the FTT where the new matter prohibitions do most certainly apply.

Protection claims: membership of a particular social group and mental health

In a most welcome and far reaching decision, *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC) (03 June 2020) refuses to follow previous reported decisions *(SB (PSG-Protection Regulations-Reg 6) Moldova CG* [2008] *UKAIT 0002* and *AZ (Trafficked women) Thailand* CG [2010] UKUT 118 (IAC)), the UT held in DH that the Refugee Convention provides greater protection than the minimum standards imposed by a literal interpretation of Article 10(1)(d) of the Qualification Directive in defining what constitutes a Particular Social Group (PSG) and that Article 10(d) should be interpreted by replacing the word 'and' between Article 10(1)(d)(i) and (ii) with the word 'or', creating an alternative rather than cumulative test. The tribunal also held that depending on the facts, a 'person living with disability or mental ill health' may qualify as a member of a PSG either as:

- sharing an innate characteristic or a common background that cannot be changed, or
- because they may be perceived as being different by the surrounding society and thus have a distinct identity in their country of origin

The tribunal say that a person who is unable to secure a firm diagnosis of the nature of their mental health issues is not denied the right to international protection just because a label cannot be given to their condition and that the assessment of whether a person living with disability or mental illness constitutes a member of a PSG is fact specific to be decided at the date of decision or hearing. The key issue is how an individual is viewed in the eyes of a potential persecutor making it possible that those suffering no, or a lesser degree of, disability or illness may also qualify as a PSG.