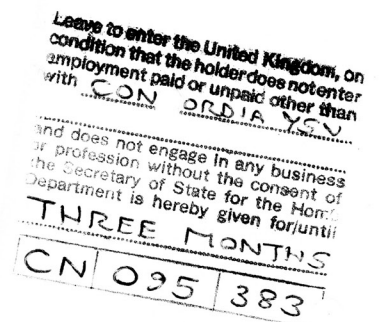
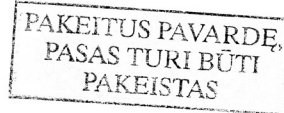
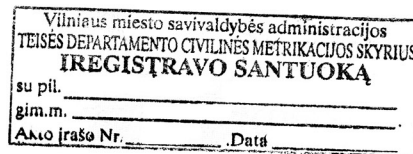
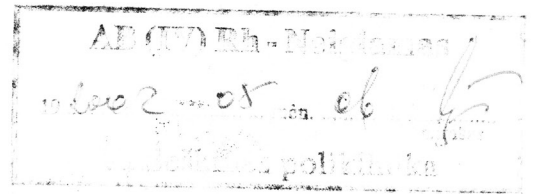
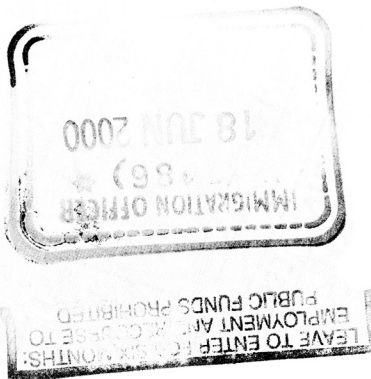
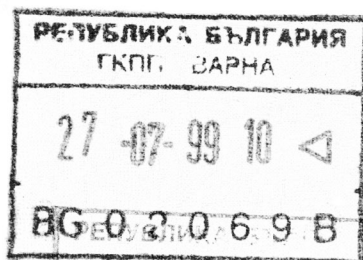
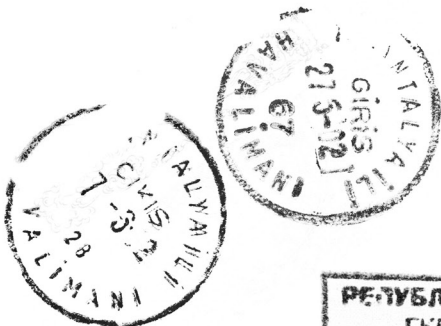


Lexis®PSL Immigration 2016 Cases: July–December review



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Immigration Cases 2016: July to December

Adam Pipe, barrister at No 8 Chambers, picks out the key cases from mid-July to early December 2016 for immigration lawyers, and why they are of interest. The review covers deportation/Article 8 cases in the Supreme Court, rights of appeal, ETS/TOEIC cases, reasonableness and section 117B(6) of the Nationality, Immigration and Asylum Act 2002 and sponsor licence and asylum cases.

Two new deportation cases from the Supreme Court: best interests plus the Immigration Rules and Article 8

Makhlouf v Secretary of State for the Home Department (Northern Ireland) [2016] UKSC 59, [2016] All ER (D) 93 (Nov) (16 November 2016)

In this deportation appeal, the Appellant had two British children with whom he had not had direct contact for a significant length of time. The Supreme Court unanimously dismissed his appeal finding that the children had no relationship with the Appellant. At paragraph 40 Lord Kerr said that where a decision is taken about the deportation of a foreign criminal who has children residing in the UK, separate consideration of their best interests is required, especially if they do not converge with those of the parent to be deported and particularly in the case of a child with dual ethnic background. At paragraph 47 Lady Hale added, *'it is quite correct to say that children must be recognised as rights-holders in their own right and not just as adjuncts to other people's rights. But that does not mean that their rights are inevitably a passport to another person's rights.'*

Ali v Secretary of State for the Home Department [2016] UKSC 60, [2016] All ER (D) 90 (Nov) (16 November 2016)

The Appellant was a failed Iraqi asylum seeker with Class A drug convictions. He was in a long-term relationship with his British fiancée and had two children with whom he had no contact. The Supreme Court dismissed the Appellant's appeal against the Court of Appeal's decision to remit the appeal to the Upper Tribunal, however Lord Kerr dissented. The judgments analyse the interaction between the deportation rules and the appellate body considering Article 8 of the European Convention on Human Rights. Appellate decision making in Article 8 cases is governed by *Huang* [2007] UKHL 11, [2007] 4 All ER 15 and the structured approach. The European Court of Human Rights has given guidance on the relevant factors to take into account (*Boultif v Switzerland* [2001] ECHR 54273/00, *Maslov v Austria* [2008] ECHR 1638/03, *Jeunesse v Netherlands* [2014] ECHR 12738/10). The appellate body's decision making process is not governed by the Immigration Rules, but should nevertheless involve their consideration. The appellate body must make its own assessment of the proportionality of deportation, on the basis of its own consideration of the factors relevant to the particular case, and application of the relevant law. But in doing so, it must not disregard the decision under appeal. Where the Secretary of State for the Home Department (SSHD) has adopted a policy in relation to the assessment of proportionality, set out in the Rules and endorsed by Parliament, the appellate

body should give considerable weight to that policy. Lord Wilson endorsed the balance sheet approach to decision making. Dissenting Lord Kerr concluded that the application of the Rules, and their prescription of the weight to be given to the public interest in the deportation of foreign criminals, were not compatible with the balancing exercise that had to be undertaken in considering the relevant factors arising under Article 8 in a particular case.

Appeals

Sheidu (Further submissions; appealable decision) [2016] UKUT 412 (IAC) (7 September 2016)

A Vice-Presidential panel of the Upper Tribunal (Immigration and Asylum Chamber) (UT) found that if the SSHD makes a decision that is one of those specified in Nationality, Immigration and Asylum Act 2002, s 82(1), it carries a right of appeal even if the intention was not to treat the submissions as a fresh claim. Whilst it is not the job of the First-tier Tribunal (FTT) to determine if further submissions amount to a fresh claim (*R (Waqar) v Secretary of State for the Home Department* IJR [2015] UKUT 169 (IAC), [2015] All ER (D) 78 (Apr) (permission to appeal to Court of Appeal refused by Beatson LJ on 17 November 2015), *R (Robinson) v Secretary of State for the Home Department* IJR [2016] UKUT 133 (IAC), *R (MG) v First-tier Tribunal (Immigration and Asylum Chamber)* [2016] IJR UKUT 283 (IAC), [2016] All ER (D) 108 (Jun) and *R (Amin Sharif Hussein) v First-tier Tribunal and Secretary of State for the Home Department* [2016] UKUT 409 (IAC)) it is the job of the FTT to determine if a decision is one which falls within NIAA 2002, s 82. The UT found that the decision in the present case was a refusal of a human rights claim and therefore carried a right of appeal.

Sala (EFMs: Right of Appeal) [2016] UKUT 411 (IAC) (19 August 2016)

Dropping a jurisprudential bomb shell, a Vice-Presidential panel of the UT found that there is no statutory right of appeal against the decision of the SSHD not to grant a Residence Card to a person claiming to be an Extended Family Member as it did not concern a person's entitlement to be issued with a Residence Card. The SSHD argued in this appeal that there was a right of appeal, however, following the appeal she has incorporated the decision in *Sala* in the new Immigration (European Economic Area) Regulations 2016 SI 2016/1052.

ETS: the latest developments

The SSHD is now relying on more evidence, both general and specific in ETS/TOEIC cases. This was demonstrated in the latest reported ETS decision *MA (ETS – TOEIC testing) [2016] UKUT 450 (IAC) (16 September 2016)* in which the President allowed the SSHD's appeal finding that the Appellant's claims were demonstrably false. The question of whether a person engaged in fraud in procuring a TOEIC English language proficiency qualification will invariably be intrinsically fact sensitive. The SSHD then decided to withdraw her appeal before the Court of Appeal in *Qadir v Secretary of State for the Home Department [2016] EWCA Civ 1167, [2016] All ER (D) 147 (Nov) (25 October 2016)*. Beatson LJ gave a judgment which sets out at paragraphs 29–35 how the different categories of cases in the appeal system will be dealt with.

Immigration, Asylum and Nationality Act 2002, s 117B(6) & reasonableness

R (on the application of MA (Pakistan)) and others v Upper Tribunal (Immigration and Asylum Chamber) and others [2016] EWCA Civ 705, [2016] All ER (D) 52 (Jul) (07 July 2016)

Elias LJ confirms that section 117B(6) is a self-contained provision which, if satisfied, would result in Article 8 being infringed. In the assessment of reasonableness, Elias LJ favoured the argument of the appellants—that the focus was solely upon the child. However following *MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450*, Elias LJ held that reasonableness included a consideration of the parents and their immigration history. This case concerned '7-year' children and not British children. The SSHD still accepts (in extant policy documents) that it would be unreasonable for British children to leave the EU.

Sponsor licence cases

R (on the application of Raj and Knoll Ltd) v Secretary of State for the Home Department [2016] EWCA Civ 770, [2016] All ER (D) 90 (Jul), (19 July 2016)

The Court of Appeal comprehensively rejects this appeal in a judicial review challenge to the revocation of a Tier 2 sponsor licence concerning nursing homes. The Court finds that it is not necessary to decide if the SSHD can operate a 'light trigger' approach to revocation and whether the Court should adopt a heightened standard of review as the SSHD did not act on suspicion alone and the Appellant was clearly in breach. The Court however do sound two notes of caution at paragraph 31, with reference to *R (Westech College) v Secretary of State for the Home Department [2011] EWHC 1484 (Admin), [2011] All ER (D) 69 (Jun)*, stressing that the SSHD must comply with her public law duties and that Tier 2 is not identical with Tier 4. Counsel for the SSHD submitted that there may be reasons in a Tier 4 case why the SSHD can act on suspicion alone.

Steps to avoid persecution

Secretary of State for the Home Department v MSM (Somalia) [2016] EWCA Civ 715, [2016] All ER (D) 74 (Jul) (12 July 2016)

The Court of Appeal dismisses the SSHD's appeal and makes obiter comments rejecting the SSHD's argument that in imputed political opinion cases the court should consider the reasonableness of taking steps to avoid persecution. See paragraph 37 for a useful summary. This case hopefully sounds the death knell for discretion arguments in protection claims.

Dublin III

Secretary of State for the Home Department v ZAT and others (United National High Commissioner for Refugees and AIRE Centre, intervening) [2016] EWCA Civ 810, [2016] All ER (D) 22 (Aug) (02 August 2016)

The Court of Appeal allowed the SSHD's appeal against the decision of the UT President in the Calais children case, finding that the UT applied the wrong test in setting too low a hurdle for permitting the Dublin III process to be displaced by Article 8 considerations. However by the time of the appeal two of the four children had been granted refugee status and the SSHD accepted that the UK is the correct place for the asylum claims to be determined.

Clearly unfounded certificates

R (on the application of FR (Albania) and another) v Secretary of State for the Home Department [2016] EWCA Civ 605, [2016] All ER (D) 101 (Jul) (23 June 2016)

In this Albanian blood feud case the Court of Appeal gave comprehensive guidance on the correct approach to certification of claims as 'clearly unfounded' under NIAA 2002, s 94. Beatson LJ states at paragraph 62, '*the intensity of review in a certification case is at the more and possibly most intensive end of the spectrum to which I have referred at [48] above, but the jurisdiction remains a supervisory and reviewing one*'. Davis LJ emphasised at paragraph 126 the importance of the two-stage reasoning process in play and avoiding the impermissible approach of, '*because I have rejected the asylum claim therefore I certify as clearly unfounded*'.

Review prepared on 11 December 2016.

Adam Pipe

Produced in partnership
with **No 8 Chambers**



Adam is experienced in all aspects of immigration and asylum law. He is particularly interested in refugee law. Adam undertakes cases in the First-tier Tribunal, Upper Tribunal, Administrative Court and Court of Appeal.

Adam is ranked for Immigration in the Midlands by Chambers and Partners 2016.

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

Adam is a contributing editor to Butterworths Immigration Law Service and regularly provides case law analysis for LexisNexis Legal News and LexisPSL Immigration.



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