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Immigration cases 2015
July - December review

Adam Pipe, barrister at No 8 Chambers, picks out the key cases from mid-July to December 2015 for immigration lawyers, and why they are of interest. The review covers Supreme Court decisions, judicial review highlights, and other cases in the areas of article 8 of the European Convention on Human Rights (ECHR), refugee/protection claims, EU/EEA law, practice and procedure, deportation and nationality (including one earlier case from June 2015).

For Adam's review of the key cases from January to 15 July 2015, see here.

Supreme Court decisions

R (on the application of Ali) v Secretary of State for the Home Department; R (on the application of Bibi) v Secretary of State for the Home Department (Liberty Intervening) [2015] UKSC 68, [2015] All ER (D) 150 (Nov) (18 November 2015)

In *Ali and Bibi* the Supreme Court considered the pre-entry English language test which is now contained within Appendix FM. The rule requires an applicant to show an ability to speak English at A1 level by passing a test with an approved provider. An exception to the rule is provided where exceptional circumstances are shown. The Home Office guidance sets out how the exception will operate. The court unanimously dismissed the appeal finding that the rule itself does not breach ECHR, art 8 (and that the art 14 argument adds nothing). However, the court was concerned that the restrictive interpretation of exceptional circumstances contained in the current guidance is likely to lead to a significant number of cases where the interference with art 8 is disproportionate. The court therefore invited further submissions from the parties on whether a declaration should be made that the operation of the guidance in its present form is incompatible with art 8 rights where compliance with the requirement is impracticable (the court was split on whether a declaration was necessary).

Mandalia v Secretary of State for the Home Department [2015] UKSC 59, [2015] All ER (D) 97 (Oct) (14 October 2015)

In *Mandalia* the question of 'evidential flexibility' within the Points-Based System reached the Supreme Court. The appellant had provided the Home Office with bank statements demonstrating that he had the requisite funds for 22 days rather than the required 28 days. The question for the court was whether the Home Office had acted unlawfully in refusing the application without first giving the appellant an opportunity to provide the missing bank statements. The court unanimously answered the question in the affirmative, the Home Office's Process Instruction obliged it to have contacted the appellant and given him an opportunity to remedy the defect in his application. The court also overruled *R (Gu) v Secretary of State for the Home Department* [2014] EWHC 1634 (Admin), [2015] 1 All ER 363 which had adopted the erroneous reasoning of the Court of Appeal.

ECHR, art 8

Visit visas and art 8

During 2015 there were a number of reported cases considering art 8 in visit visa cases where there was no right of appeal under the Immigration Rules. In my opinion these cases are illustrative of the future under the Immigration Act 2014 (IA 2014) appeals regime. The key relevant cases in the first half of the year were *Mostafa (Article 8 in entry clearance)* [2015] UKUT 112 (IAC) (6 March 2015), *Adjei (visit visas—Article 8) (Rev 1)* [2015] UKUT 261 (IAC) (6 May 2015) and *Abbasi and another (visits—bereavement—Article 8)* [2015] UKUT 463 (IAC) (29 July 2015).

Kaur (visit appeals; Article 8) [2015] UKUT 487 (IAC) (26 August 2015)

In this case the Upper Tribunal (Immigration and Asylum Chamber) (UT) reminds judges that the starting point for the art 8 assessment is the state of the evidence in respect of the application under the Immigration Rules. Dr Storey relies upon the principles set out by the Court of Appeal in *Secretary of State for the Home Department v SS (Congo)*[2015] EWCA Civ 387, [2015] All ER (D) 210 (Apr). Dr Storey also clarifies that there is no conflict between *Mostafa* and *Adjei*.

Statutory art 8 considerations

Over the year there were a number of cases from the UT looking at the statutory art 8 considerations which are contained in the new Part 5A of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002). Relevant cases in the first half of the year were *Dube (ss.117A–117D)* [2015] UKUT 90 (IAC) (24 February 2015), *AM (S.117B)* [2015] UKUT 260 (IAC) (17 April 2015) and *Forman (ss 117A–C considerations)* [2015] UKUT 412 (IAC) (19 June 2015).

*Bossade (ss.117A–D—interrelationship with Rules) [*2015] UKUT 415 (IAC) (16 July 2015)

The statutory NIAA 2002, Pt 5A considerations do not apply to the consideration of art 8 under the Immigration Rules but to the second stage consideration (albeit in deportation cases this will be under the rules). In relation to whether NIAA 2002, s 117B(6) is a complete answer to the public interest question, paras [38] and [39] are of interest.

Treebhawon and others (section 117B(6)) [2015] UKUT 674 (IAC) (19 November 2015)

The President provisionally finds that NIAA 2002, s 117B(6)

is a complete answer to the public interest question. Where the conditions in NIAA 2002, s 117B(6) are satisfied the public interest considerations in NIAA 2002, s 117B(1)–(3) will be outweighed. NIAA 2002, s 117B(6) is not qualified or diluted by NIAA 2002, s 117B(4), (5). This case will be of great use to practitioners in cases involving those with a parental relationship with a British or 'seven year' child.

See also *Clarke (Section 117C—limited to deportation)* [2015] UKUT 628 (IAC) (22 October 2015) and *Deelah and others (section 117B—ambit) (Rev 1)* [2015] UKUT 515 (IAC) (30 July 2015).

Deportation

R (on the application of Kiarie) v Secretary of State for the Home Department [2015] EWCA Civ 1020, [2015] All ER (D) 96 (Oct) (13 October 2015)

In *Kiarie* the Court of Appeal considered the interpretation and application of NIAA 2002, s 94B, as inserted by IA 2014. Where a person liable to deportation has had a human rights claim refused by the Secretary of State for the Home Department (SSHD) but has a right of appeal against that decision, NIAA 2002, s 94B empowers the SSHD to certify the claim if she considers that removal of the person pending the outcome of such an appeal would not result in a breach of their human rights, including where they would face a real risk of serious irreversible harm. The effect of certification is that any appeal must be brought from outside the UK. The court dismissed the appeal (granting permission for judicial review but dismissing the substantive claim) finding that an out-of-country appeal will meet the procedural requirements of art 8 in the generality of criminal deportation cases. Judicial review of a decision to certify under NIAA 2002, s 94B will only lie where there are special or exceptional circumstances in play. The SSHD's guidance was however found to contain an incomplete and misleading statement of the statutory test.

Greenwood (No 2) (para 398 considered) [2015] UKUT 629 (IAC) (16 November 2015)

In this wide-ranging decision the President of the UT dismissed the SSHD's challenge to the decision of the First-tier Tribunal (FTT) allowing a deportation appeal. In respect of the deportation provision in the Immigration Rules the President found that paras 399 and 339A must be considered in the application of the 'over and above' test enshrined in para 398. Furthermore, the President went on (paras [18] and [19]) to disapprove of the SSHD's practice of challenging every allowed deportation appeal. The President also considered the new appeals provisions and found that the tribunal still had the power to find a decision unlawful leaving a fresh decision to be made by the SSHD. Throughout the decision the President admonishes unmeritorious challenges to decisions of the FTT and reminds us of the high threshold for irrationality challenges.

Conflicting reported deportation decisions

The UT have reported two contradicting decisions on para 399 of the Immigration Rules. In *MAB (para 399; 'unduly harsh')* [2015] UKUT 435 (IAC) (16 July 2015) the UT finds that the consideration of the phrase 'unduly harsh' in the rules has the sole focus on the consequences for the individual concerned. Whereas in *KMO (section 117—unduly harsh)* [2015] UKUT 543 (IAC) (25 September 2015) the UT disagreed and found that a consideration of unduly harsh involves a consideration of a person's claim under art 8 and requires the public interest to be taken into account. See also para 23 of *Treebhawon*, where the President endorsed the approach in *Bossade* and confirmed that the statutory art 8 factors are not relevant when assessing art 8 under the Immigration Rules.

Other deportation cases

The UT also analysed the deportation provisions of the Immigration Rules in *Terrelonge (para 399(b))* [2015] UKUT 653 (IAC) (3 November 2015) and *AB (para 399(a))* [2015] UKUT 657 (IAC) (20 November 2015). Both decisions merit brief consideration when preparing a deportation case.

In *DM (Zimbabwe) v The Secretary of State for the Home Department* [2015] EWCA Civ 1288, [2015] All ER (D) 116 (Dec) (11 December 2015) the Court of Appeal considered the relevance of *Maslov v Austria* (App no 1638/03) [2008] ECHR 1638/03 principles to an individual who is here unlawfully. Jackson LJ states (para [35]):

'I accept that paragraphs 71 to 74 of Maslov set out factors which are relevant considerations in deportation cases, but the weight attached to those factors is diminished if the deportee is unlawfully present in the host country. I do not accept that paragraph 75 sets out principles of law which apply to criminal offenders who are unlawfully present in a country.'

EU/EEA law

R (on the application of Ahmed) v Secretary of State for the Home Department [2015] UKUT 436 (IAC), [2015] All ER (D) 47 (Aug) (24 July 2015)

This decision concerns the situation where the SSHD seeks to remove a person with a (pre-IA 2014) section 10 decision but the person has an in-country right of appeal against a decision to refuse them a residence card as the spouse of an EEA national, on the basis that the respondent believes that the marriage is one of convenience. The UT held that the EEA appeal did not preclude the SSHD from removing the person and could proceed whether or not the person is in the UK. The UT agreed with the High Court's approach in *R (on the application of Abdullah) v Secretary of State for the Home Department and Asylum and Immigration Tribunal* [2009] EWHC 1771 (Admin). The UT also held that there was not an in-country right of appeal against the section 10 decision as NIAA 2002, s 92(4)(b) concerned someone who 'is' an EEA national or family member thereof as

opposed to someone who 'may be' an EEA national or a family member thereof.

Amirteymour and others (EEA appeals; human rights) [2015] UKUT 466 (IAC) (4 August 2015)

A senior panel of the UT resolved the issue in respect of human rights in EEA appeals. Human rights cannot be raised in EEA appeals unless a notice issued under NIAA 2002, s 120 has been served or there has been a removal decision. The UT distinguishes *JM v Secretary of State for the Home Department* [2006] EWCA Civ 1402. In any event the Immigration (European Economic Area) Regulations 2006, SI 2006/1003 (the EEA Regs 2006) were amended with the effect that the sole grounds of appeal in respect of decisions made on or after 6 April 2015 is that the decision breaches the appellant's rights under the EU treaties. The Court of Appeal also reached a similar decision in *TY (Sri Lanka) v The Secretary of State for the Home Department* [2015] EWCA Civ 1233, [2015] All ER (D) 28 (Dec) (01 December 2015) albeit distinguishing *JM v Secretary of State for the Home Department* on a slightly different basis to the UT in *Amirteymour*. Jackson LJ found that, since there was no section 120 one-stop notice served by the SSHD when the appellant's EEA residence card application was refused, the appellant was confined to the subject matter of the original decision. That is a decision that the appellant does not fulfil the requirements of the EEA Regs 2006.

Agho v The Secretary of State for the Home Department [2015] EWCA Civ 1198, [2015] All ER (D) 263 (Nov) (26 November 2015)

In this case the Court of Appeal considers marriages of convenience in EEA law. The court confirms that the burden of proof is on the SSHD/entry clearance officer, relying on *Entry Clearance Officer, Nicosia v Papajorgji* [2012] UKUT 00038 (IAC), and that the burden is not discharged by showing 'reasonable suspicion'. The standard of proof required is the civil standard. The Court of Appeal goes on to review the reasoning of the FTT and UT and finds that the UT should have found an error of law in the FTT decision. The appeal would be allowed and the appellant was entitled to a residence card.

In relation to EEA deportation cases, practitioners should consider *MC (Essa principles recast)* [2015] UKUT 520 (IAC) (11 September 2015) as to the relevance of rehabilitation and *Secretary of State for the Home Department v Straszewski* [2015] EWCA Civ 1245, [2015] All ER (D) 40 (Dec) (03 December 2015) where the Court of Appeal emphasises the difference between deportation cases involving EEA nationals and those involving non-EEA nationals. Moore-Bick LJ concludes in respect of EEA deportation cases (para [31]):

'I do not think that public revulsion at the offender's conduct has any part to play in deciding whether there are sufficiently serious grounds of public policy to justify his deportation, save in exceptional cases of a kind in which failure to remove the offender might itself tend to undermine confidence in the state's ability to administer justice.'

The latest consideration of Zambrano principles *(C-34/09: Gerardo Ruiz Zambrano v Office national de l'emploi* [2011] All ER (EC) 491(08 March 2011)) is set out in *Ayinde and Thinjom (Carers—Reg.15A—Zambrano)* [2015] UKUT 560 (IAC) (13 August 2015) where the UT reminds us that the key question is whether the British citizen will be forced to leave the territory of the EU rather than a test of reasonableness.

Refugee/protection claims

AH (Algeria) v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening) [2015] EWCA Civ 1003, [2015] All ER (D) 145 (Oct) (14 October 2015)

The Court of Appeal considers the scope of the exclusion clause in article 1F(b) of the Refugee Convention ('he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee'). The court finds that post-crime expiation is not relevant to art 1F(b), that 'serious' is not qualified to mean 'particularly serious' and that the UT did find facts sufficient to show such a degree of personal involvement in serious crime on the appellant's part as to justify exclusion under art 1F(b). Laws LJ concludes at para [46]:

'If it was wrong to presume that mere membership of an organization with terrorist aims was enough for Article 1F(b) to bite, so also is it wrong to presume that any particular level of overt activity has to be shown. JS (Sri Lanka) is nothing to the contrary. As Ward LJ said, "serious" is an ordinary word. Its interpretation therefore depends upon the context of its use, here Article 1F; and its application upon all the facts of the particular case.'

Judicial review highlights

R (on the application of Mehmood) v Secretary of State for the Home Department; R (on the application of Ali) v Secretary of State for the Home Department [2015] EWCA Civ 744, [2015] All ER (D) 164 (Jul) (14 July 2015)

The Court of Appeal addressed pre-IA 2014 removal decisions under section 10 of the Immigration and Asylum Act 1999 (IAA 1999) in *Mehmood* (the appellant *Ali* concerned an ETS TOEIC case). The court held that judicial review is inappropriate where there is an out-of-country right of appeal, save where there are 'special or exceptional factors'. An out-of-country appeal must be regarded as an adequate safeguard, disputes of fact are rarely to be regarded as 'special or exceptional' circumstances and matters of procedural fairness can be considered in the out-of-country appeal. The court also found that a section 10 decision invalidates leave extended by section 3C of the Immigration Act 1971 (IA 1971). The court similarly rejected the 'sequencing question', finding that as there was legally no decision until the service of the notice in writing (applying IA 1971, s 4) it was therefore irrelevant that the refusal letter in respect of the

variation application pre-dated the removal decision.

R (on the application of Hamasour) v Secretary of State for the Home Department (IJR) [2015] UKUT 414 (IAC), [2015] All ER (D) 293 (Jul) (13 July 2015)

Throughout 2015 practitioners will have noticed that the SSHD routinely issues supplemental decision letters following the issuing of judicial review proceedings. In this case the UT gives guidance on how these should be treated in judicial review proceedings, by reference to the decision in *R (on the application of Nash) v Chelsea College Of Art & Design* [2001] EWHC Admin 538. In *Hamasour*, the UT finds that the supplementary decision is in fact a new decision with a right of appeal to the FTT. The UT therefore refused to grant relief given the alternative remedy.

See also *R (on the application of Khan) v Secretary of State for the Home Department* (IJR) [2015] UKUT 353 (IAC) (15 June 2015) which finds that where a person disputes the SSHD's assertion that there is no right of appeal the correct approach is to lodge an appeal to the FTT and request that the issue be determined. Judicial review will only be available in exceptional circumstances.

Practice and procedure

Wagner (advocates' conduct—fair hearing) [2015] UKUT 655 (IAC) (6 November 2015)

This case concerned a 73-year-old South African national who had lived with his British wife in South Africa for most of their lives. In 2012 the couple moved back to Northern Ireland and the appellant cared for his wife who had some serious health difficulties. The appellant's appeal was dismissed by the FTT and the appellant complained to the UT that he had not received a fair hearing and that he and his wife had been subject to aggressive and inappropriate questioning by the Home Office Presenting Officer (HOPO). The President reviewed what happened at the hearing and found that the proceedings were not unfair but that the appellant was probably not expecting the adversarial nature of proceedings (paras [6], [7]). The President restates the importance of the judge in ensuring that proceedings are fair (para [8])—see also *Alubankudi (Appearance of bias)* [2015] UKUT 542 (IAC) (23 September 2015). The President found that some of the questions asked by the HOPO were improper and that comments disguised as questions are inappropriate (paras [9], [10]). The President also reviewed the correct test for procedural unfairness and the importance of keeping contemporaneous notes of proceedings (paras [11]–[13]). Of interest to practitioners will be the fact that the President found an error of law in the FTT's treatment of the medical evidence (para [14]) and the re-making of the decision in favour of the appellant. The President's application of NIAA 2002, s 117B and the *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 principle is instructive (paras [17]–[21]).

Mitchell (Basnet revisited) [2015] UKUT 562 (IAC) (8 October 2015)

This important case on practice and procedure somewhat modifies the principles in *Basnet (validity of application—respondent) Nepal* [2012] UKUT 113 (IAC) concerning the validity of applications rejected due to the alleged non-payment of fees. The UT found that the burden of proof is not on the SSHD where the evidence shows that the application form was insufficiently completed. The decision also sets out the SSHD's evidence as to the procedure for processing of payments (paras [14], [15]) which was not before the UT in *Basnet*.

Nationality

R (on the application of Hysaj) v Secretary of State for the Home Department; R (on the application of Bakijasi) v Secretary of State for the Home Department; R (on the application of Kaziu) v Secretary of State for the Home Department [2015] EWCA Civ 1195, [2015] All ER (D) 239 (Nov) (26 November 2015)

The Court of Appeal dismissed an appeal by appellants who had gained naturalisation upon the basis of a fraudulent claim when they arrived in the UK. The appellants had claimed to be ethnic Albanians from Kosovo when they were in fact nationals of Albania. The SSHD found that their naturalisation was null and void based upon Court of Appeal decisions interpreting an earlier statutory provision–section 20 of the British Nationality Act 1948. The Court of Appeal found that the answer was clear with reference to binding authority. However the court found that the interpretation of the British Nationality Act 1981 given by those authorities is problematic and it would be desirable for Parliament to clarify the law by express statutory provision.

R (on the application of SA) v Secretary of State for the Home Department [2015] EWHC 1611 (Admin), [2015] All ER (D) 92 (Jun) (08 June 2015)

In this case the SSHD refused to naturalise a South African national on good character grounds. The claimant had been issued with a conditional discharge while he was a minor, following arrest for the possession of cannabis. An application for naturalisation was made four days before the claimant's eighteenth birthday. The Deputy Judge found that the SSHD had unlawfully failed to exercise her discretion and had unlawfully fettered her discretion in rigidly adhering to her policy to treat 16- and 17-year-olds as adults for character purposes (para [66]). The Deputy Judge found that the blanket policy was irrational (para [76]) and breached art 8 (paras [77], [78]). The judgment contains a helpful summary (including the relevance of section 55 of the Borders, Citizenship and Immigration Act 2009) of the relevant principles in respect of good character and children at para [64]. It is understood that the SSHD is seeking permission to appeal.

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The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

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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 Band 1 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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