Immigration cases 2019—July to December review

Immigration analysis: Adam Pipe, barrister at No 8 Chambers, reviews the key cases from July to December 2019 for immigration advisers, and explains why they are of interest. The review covers EU law, Article 8 updates, common law procedural fairness and deportation and asylum cases.

Article 8: proportionality, insurmountable obstacles and little weight

In *GM (Sri Lanka) v SSHD* [2019] EWCA Civ 1630, [2019] All ER (D) 57 (Oct) (04 October 2019) Green LJ helpfully summarises the current law on Article 8. The appeal concerned a Sri Lankan couple, the appellant had entered into a relationship with her partner when she had leave to remain as a student and her partner had discretionary leave to remain under the 'legacy scheme'. The couple had two children. The tribunal dismissed the appeal finding that little weight was to be given to their family life applying the provisions of section 117B NIAA 2002 (Article 8: public interest considerations). Subsequent to the hearings before the tribunal the appellant's partner and children had been granted indefinite leave to remain. The Court of Appeal allowed the appeal and remitted the claim to the Secretary of State for the Home Department (SSHD) as by that time the couple had a third child who was a British citizen. Green LJ's summary of the current state of play in respect of Article 8 will be very useful to advisers and is a helpful reminder to decision makers. Green LJ summarises:

- the correct test for proportionality is whether a fair balance has been struck rather than one of exceptionality [25-32]
- consideration should be given to the nature of the rights which have relinquished in the event that a couple have to relocate abroad [34-35], and
- the 'little weight' provisions in s117B only apply to private life and not family life [36-38]

Green LJ also considers the paramountcy of the interests of the children [42-45] and relevance of insurmountable obstacles [46-53]. In respect of insurmountable obstacles, whilst it is a test under the Immigration Rules it is merely a relevant factor when Article 8 proportionality is being considered outside of the Rules. The same themes were addressed by the court again in *Lal v SSHD* [2019] EWCA Civ 1925, [2019] All ER (D) 78 (Nov) (8 November 2019) especially the consideration of the insurmountable obstacles test and the consideration of Article 8 outside of the Rules.

Trafficking & Article 8

In *DC (Trafficking, Protection/Human Rights appeals: Albania)* [2019] UKUT 351 (IAC) (3 September 2019) the Upper Tribunal gave guidance on the relevance of National Referral Mechanism (NRM) trafficking decisions to protection and human rights appeals. The tribunal's review of the relevant authorities on this issue and a summary of the tribunal's conclusions is at para 53. The tribunal holds that the Competent Authority's decision is relevant evidence which would need to be assessed in a protection claim, bearing in mind that the standard of proof applied by the Competent Authority was the balance of probabilities. The tribunal also found that in a human rights appeal, the finding that a Competent Authority had not reached a rational decision could lead to the appeal being allowed for that reason alone but that this would be a rare situation. The question of whether the appellant has been a victim of trafficking is relevant to whether their removal would breach the ECHR.

Article 3: medical cases

In *SSHD v PF (Nigeria)* [2019] EWCA Civ 1139, All ER (D) 96 (Jul) (04 July 2019) Hickinbottom LJ allowed the SSHD's appeal in a deportation case where the claimant suffered from sickle cell disease. In his judgment Hickinbottom LJ summarises the current legal position in respect of human rights health claims following the judgment of the European Court of Human Rights in *Paposhvili v Belgium* Case C-41738/10, [2017] ECHR 41738/10. He finds that:

- the decision of the House of Lords in *N v SSHD*[2005] UKHL 31, [2005] 4 All ER 1017 is still binding subject to it being overruled by the Supreme Court (who are to consider this issue in *AM (Zimbabwe) v SSHD* [2018] EWCA Civ 64, [2018] 1 WLR 2933, and

- *Paposhvili* does relax the threshold in respect of Article 3 health claims but only does so to a very modest extent

Hickinbottom LJ also confirms that there is a switching burden of proof in relation to Article 3 claims to resist removal [16(iv)]. In respect of Article 8, *Paposhvili* has no relevance and absence of treatment claims cannot in and of themselves found an Article 8 claim but can be raised where there are other factors which engage Article 8.

The judgment of the ECHR in *Savran v Denmark* Case C-57467/15, [2019] ECHR 57467/15 (01 October 2019)†is very interesting with the court finding by a majority (4:3) that Article 3 would be violated in the applicant's case as†it is unclear whether the applicant has a real possibility of receiving relevant psychiatric treatment if returned to from Denmark to Turkey and that this uncertainty raises serious doubts as to the impact of removal on the applicant. The majority stated that when such serious doubts persist, the returning state must either dispel such doubts or obtain individual and sufficient assurances from the receiving state, as a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3.

EU law

In the two linked appeals of *Patel v SSHD, SSHD v Shah* [2019] UKSC 59, [2019] All ER (D) 77 (Dec) the Supreme Court gave guidance in respect of *Zambrano* cases and the nature of the 'compulsion' test. The *Patel* case concerned an Indian national who cared for his adult British parents whereas the *Shah* case concerned a Pakistani national who was the primary carer of his British infant son, Mrs Shah was also a British national but she worked full-time.

The Supreme Court relied upon the recent decision from the CJEU in *KA v Belgium*†Case C-82/16, [2018] 3 CMLR 28 which has consolidated much of the jurisprudence in this area. The Supreme Court held that what lies at the heart of the *Zambrano* jurisprudence is the requirement that the EU citizen be compelled to leave the EU territory if the third-country national, with whom the EU citizen has a relationship of dependency, is removed [22]. In *KA* the CJEU drew a distinction between an adult Union citizen and a Union citizen who is a child. The decision in *Chavez-Vilchez* (*Chavez-Vilchez v Raad van bestuur van de Sociale verbekeringsbank*†Case C-133/15,†[2018] QB 103) is about children. *Chavez-Vilchez* does not relax the level of compulsion required in the case of adults and it will only be in "exceptional circumstances"†that such a case would succeed [27]. The *Patel* appeal therefore failed. In *Shah* the Supreme Court found that the Court of Appeal was wrong to consider that Mrs Shah's decision to leave would be voluntary and that therefore there was no compulsion. The overarching question was whether the son would be compelled to leave with his father, who was his primary carer, because of his dependency on his father. In answering that question, the Supreme Court had to take into account the child's bests interests and his relationship with each parent (*Chavez-Vilchez* para 71). The compulsion test is practical. It is to be applied to the actual facts. The First-tier Tribunal found the son would be compelled to leave. That is sufficient compulsion for the purposes of *Zambrano* [30]. The *Shah* case was therefore successful.

Chen children can rely upon the unlawful income of parent

In *Bajratari v SSHD* Case C-93/18, [2019] All ER (D) 92 (Oct) (02 October 2019) Mrs†Bajratari (an Albanian national) applied to the SSHD for a derivative residence card as the primary carer of her EU citizen (Irish) self-sufficient child. The family were reliant on the unlawful income of Mr Bajratari in the UK. The question before the CJEU was whether income from employment that is unlawful under national law establishes, in whole or in part, the availability of sufficient resources under Article†7(1)(b) of Directive 2004/38/EC (the Citizens' Directive)? The CJEU held that Article†7(1)(b):

> 'must be interpreted as meaning that a Union citizen minor has sufficient resources not to become an unreasonable burden on the social assistance system of the host Member State during his period of residence, despite his resources being derived from income obtained from the unlawful employment of his father, a third-country national without a residence card and work permit.'

Surinder Singh cases and the 'centre of life'requirement

In *ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan* [2019] UKUT 281 (IAC) (31 July 2019)†the Upper Tribunal considered the test set out in Regulation 9 of the Immigration (European Economic Area) Regulations 2016, SI 2016/1052 which seeks to implement *R v Immigration Appeal Tribunal and Surinder Singh* Case C-370/90, [1992] 3 All ER 798 and subsequent judgments. The Upper Tribunal found that the:

> 'requirement to have transferred the centre of one's life to the host member state is not a requirement of EU law, nor is it endorsed by the CJEU.'

In terms of the genuine residence test the question was whether there had been a genuine exercise of Treaty Rights which is a fact-specific question. The tribunal also confirmed that:

> 'There is no requirement for the EU national or his family to have integrated into the host member state, nor for the sole place of residence to be in the host state; there is no requirement to have severed ties with the home member state; albeit that these factors may, to a limited degree, be relevant to the qualitative assessment of whether the exercise of Treaty rights was genuine.'

The tribunal also gave some helpful guidance on 'abuse of rights' reminding that the burden is on the SSHD if such abuse is alleged.

Ankara agreement and common law fairness

The claimants in *R (Karagul & others) v SSHD* [2019] EWHC 3208, [2019] All ER (D) 178 (Nov) were four Turkish nationals who had made applications for leave to remain as businesspersons under the Agreement establishing an Association between the European Economic Community and Turkey (the Ankara Agreement) (ECAA) and the additional protocol to the Ankara Agreement. Their applications were rejected by the SSHD on the basis that they did not genuinely intend to establish a business. ECAA applications do not carry a right of appeal but only a right to administrative review *(SSHD v CA (Turkey)* [2018] EWCA Civ 2875,†[2019] All ER (D) 48 (Jan)) where generally new evidence cannot be relied upon. The claimants' judicial review claim focussed on two grounds:

- the first ground, which was rejected by Saini J was whether the current remedial regime for challenging such refusals violates the EU law principle of 'effectiveness', and
- the second ground, which was successful, was whether the decisions of the SSHD were in breach of her common law duty of fairness

Saini J relied upon the principles of fairness summarised in *R (Citizens UK) v SSHD* [2018] EWCA Civ 1812, [2018] All ER (D) 03 (Aug), and upon the recent Tier 1 (General) tax amendment case *R (Balajigari) v SSHD* [2019] EWCA Civ 673, [2019] All ER (D) 134 (Apr), finding as follows [103]:

> 'I summarise that general principle as follows but with the caveat that its application will of necessity be modified depending on the terms of the statutory regime:†
>
> (1) Where a public authority exercising an administrative power to grant or refuse an application proposes to make a decision that the applicant for some right, benefit or status may have been dishonest in their application or has otherwise acted in bad faith (or disreputably) in relation to the application, common law fairness will generally require at least the following safeguards

to be observed. Either the applicant is given a chance in a form of interview to address the claimed wrongdoing, or a form of written "minded to" process, should be followed which allows representations on the specific matter to be made prior to a final decision.†

(2) Further, a process of internal administrative review of an original negative decision which bars the applicant from submitting new evidence to rebut the finding of wrongdoing is highly likely to be unfair.†

(3) The need for these common law protections is particularly acute where there has been a decision by the legislature to remove an appeal on the merits to an independent and impartial tribunal.'

Saini J therefore concluded that the decisions were procedurally unfair as the SSHD had implicitly alleged dishonesty and not provided the claimants with an opportunity to explain themselves before a decision was made. The principles in this case will be of wider application in respect of decisions which only have a limited remedy of administrative review.

Deportation

A significant proportion of immigration law cases considered by the Court of Appeal concern deportation cases. A few to note from the second half of the year include:

SSHD can deport when change in the law even though no further offending

In *MA (Pakistan) v SSHD* [2019] EWCA Civ 1252, [2019] All ER (D) 101 (Aug) (18 July 2019)†the court considered the case of a man who had been convicted of manslaughter in 2006 and sentenced to four years imprisonment. In 2011/12 his appeal against deportation was successful and on 27 October 2012 the SSHD wrote to him indicating that no deportation action would be taken against him. He was subsequently granted six months leave to remain which was extended. In March 2015 the SSHD indicated deportation was being considered. On 9 August 2016, the SSHD refused his application and maintained the decision to deport. The appellant's subsequent appeals were dismissed. The Court of Appeal found that the SSHD was entitled to take deportation action notwithstanding the lack of further offending. The 27 October 2012 letter did not create a legitimate expectation that the appellant would not be deported in the future and that a change in the law provides a proper basis for such action.

Deportation 'unduly harsh': a degree of harshness going beyond what would usually be expected

In *KO (Nigeria) & Ors v SSHD* [2018] UKSC 53, [2019] 1 All ER 675 (24 October 2018)†the Supreme Court held that the 'unduly harsh' test for deportation must not focus on the public interest arising from the criminality but rather, on whether the effects of deportation on a child or partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation. In *SSHD v PG (Jamaica)* [2019] EWCA Civ 1213, [2019] All ER (D) 54 (Jun) (11 July 2019)†the Court of Appeal allowed the SSHD's appeal and restored the deportation order in respect of the appellant finding that the matters relied upon were insufficient to conclude that the effects upon his partner or children would be unduly harsh. Holroyde LJ [39] said:

'I recognise of course the human realities of the situation, and I do not doubt that SAT and the three children will suffer great distress if PG is deported. Nor do I doubt that their lives will in a number of ways be made more difficult than they are at present. But those, sadly, are the likely consequences of the deportation of any foreign criminal who has a genuine and subsisting relationship with a partner and/or children in this country… Many parents of teenage children are confronted with difficulties and upsetting events of one sort or another, and have to face one or more of their children going through "a difficult period" for one reason or another, and the fact that a parent who is a foreign criminal will no longer be in a position to assist in such circumstances cannot of itself mean that the effects of his deportation are unduly harsh for his partner and/or children.'†

The Court of Appeal came to a similar decision in *SSHD v KF (Nigeria)* [2019] EWCA Civ 2051, [2019] All ER (D) 160 (Nov) (22 November 2019).

Public interest in deportation: fixed or moveable?

In *Akinyemi v SSHD* [2019] EWCA Civ 2098, [2019] All ER (D) 20 (Dec) (04 December 2019) the appellant was born in the UK in 1983 and had lived here lawfully for all of his life. The appellant never took steps to acquire British nationality despite being entitled for many years. The appellant had a significant criminal history and had struggled with mental health problems from a young age. Because the appellant had been sentenced to at least four years imprisonment, he had to show that there were very compelling reasons over and above those in exceptions 1 and 2 of section 117C NIAA 2002 in order to avoid deportation. The Upper Tribunal dismissed his appeal. The appellant appealed challenging the Upper Tribunal's treatment of the public interest. The Court of Appeal allowed the appeal remitting back to the Upper Tribunal (again). Sir Ernest Ryder, Senior President of Tribunals states [39]:

> 'The correct approach to be taken to the 'public interest' in the balance to be undertaken by a tribunal is to recognise that the public interest in the deportation of foreign criminals has a moveable rather than fixed quality. It is necessary to approach the public interest flexibly, recognising that there will be cases where the person's circumstances in the individual case reduce the legitimate and strong public interest in removal. The number of these cases will necessarily be very few i.e. they will be exceptional having regard to the legislation and the Rules. I agree with the appellant that the present appeal is such a case.'

The Court relied heavily on *Hesham Ali (Iraq) v SSHD* [2016] UKSC 60, [2017] 3 All ER 20 and found that Part 5A NIAA 2002†had not changed the underlying principles relevant to the assessment of the weight to be given to the public interest and Article 8.

Criminality & social and cultural integration

The second requirement of exception 1 in section 117C NIAA 2002 is that the person facing deportation is 'socially and culturally integrated in the UK'. In *CI (Nigeria) v SSHD* [2019] EWCA Civ 2027, [2019] All ER (D) 156 (Nov) (22 November 2019) the Court of Appeal considered whether social and cultural integration can be broken by offending and imprisonment. The court found that social and cultural integration can†be broken by criminal offending and imprisonment but this is a fact-sensitive question. The Upper Tribunal had erred in its approach to the question. Leggatt LJ [77] said:

> 'The judge should simply have asked whether – having regard to his upbringing, education, employment history, history of criminal offending and imprisonment, relationships with family and friends, lifestyle and any other relevant factors – CI was at the time of the hearing socially and culturally integrated in the UK. The judge should not, as he appears to have done, have treated CI's offending and imprisonment as having severed his social and cultural ties with the UK through its very nature, irrespective of its actual effects on CI's relationships and affiliations – and then required him to demonstrate that integrative links had since been "re-formed".'

The Court of Appeal went on to find that the Upper Tribunal erred in its assessment of very compelling circumstances by failing to properly apply *Maslov v Austria*†Case C-1638/03, [2009] INLR 47 given that the appellant was a settled migrant who had spent most of his life here. This case contains a helpful summary of the scope and enduring relevance of *Maslov* [103-114]. The Court found that the errors were material and remitted the case to the Upper Tribunal.

Sponsored employment: skilled chefs and the Shortage Occupation List

The Shortage Occupation List has historically excluded skilled chefs who work in an establishment which offer a take-away service. This exclusion was removed from 6 October 2019 following a recommendation by the Migration Advisory Committee in May 2019. In *R (Imam v SSHD)* [2019] EWCA Civ 1760, [2019] All ER (D) 73 (Nov) (22 October 2019)†the Court of Appeal dismissed a challenge to the exclusion, finding that in accordance with the principles in *R v Immigration Appeal Tribunal, Ex p Manshoora Begum*†[1986] Imm AR 385 the rule was not irrational and that the recommendations in the MAC report did not assist as this represented the position now rather than when the decision was made in the case.

Asylum — cessation of refugee status

The Court of Appeal found in *SSHD v MS (Somalia)* [2019] EWCA Civ 1345 (29 July 2019)†that a 'mirror image' approach applies in respect of the cessation of refugee status. Hamblen LJ summarises and states [49]:

> 'in a case in which refugee status has been granted because the person cannot reasonably be expected to relocate, a cessation decision may be made if circumstances change, so as to mean that that person could reasonably be expected to relocate, provided that the change in circumstances is, in the language of the Qualification Directive, "significant and non-temporary". Helpful guidance in relation to the assessment of the reasonableness of internal relocation is given in the recent decision of this Court in†AS (Afghanistan) v SSHD†[2019] EWCA Civ 873.'

MS (Somalia) has recently been followed by the Upper Tribunal in *SB (refugee revocation; IDP camps) Somalia* [2019] UKUT 358 (IAC) (14 October 2019) which also reminds us that the country guidance in†*MOJ & Ors†(Return to Mogadishu) Somalia* CG†[2014] UKUT 442 (IAC) did not include any finding that a person who finds themselves in an internally displaced person camp is thereby likely to face Arti-cle 3 ECHR harm.

Adam Pipe specialises in immigration, asylum and human rights law. He undertakes cases in the First-tier Tribunal, Upper Tribunal, Administrative Court and Court of Appeal.

The 2015 edition of Chambers and Partners observed—'He is a case law guru who is always very well prepared in front of the Tribunal.'

Adam regularly speaks at conferences and seminars around the country. He provides updates on the latest developments in immigration law and regularly provides case law analysis for Lexis Nexis Legal News. He is a contributing Editor to Butterworths Immigration Law Service.

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