Immigration cases 2018—a review of the year so far

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Immigration analysis: Adam Pipe, barrister at No 8 Chambers, reviews the key cases from January to June 2018 for immigration lawyers, and explains why they are of interest. The review covers EU law, Article 8, health cases, Points-Based System cases on fairness and flexibility, deportation, protection claims, costs in judicial review claims, trafficking of persons and deprivation of British citizenship.

EU law

SM (Algeria) v Entry Clearance Officer, UK Visa Section [2018] UKSC 9, [2018] 3 All ER 177 (14 February 2018)

In *SM (Algeria)* the Supreme Court considered whether a child adopted under the Algerian 'kefalah' system was a family member or an extended family member under Directive 2004/38/EC. The Supreme Court considered that the matter was not *acte clair* and were also concerned that this may create opportunities for the trafficking and exploitation of children. The Court therefore referred a number of questions to the CJEU. On the question of jurisdiction, the Court confirmed that an extended family member (EFM) did have a right of appeal under the Immigration (European Economic Area) Regulations 2006 and that *Sala v Secretary of State for the Home Department* [2016] UKUT 411 was rightly overruled in *Khan v Secretary of State for the Home Department (AIRE Centre Intervening)* [2017] EWCA Civ 1755. However the Court noted that the position was different under Immigration (European Economic Area) Regulations 2016, which had expressly excluded from the definition of an EEA decision in regulation 2(1), decisions to refuse to issue an EEA family permit, a registration certificate or a residence card to an EFM.

The CJEU has clarified what redress procedures are required, in order for an EFM to challenge a decision to refuse them residence documentation, in *Secretary of State for the Home Department v Banger (Citizenship of the European Union—Right of Union citizens to move and reside freely within the territory of the European Union—Judgment)* [2018] EUECJ C-89/17, [2018] All ER (D) 70 (Jul) (12 July 2018). The Court found that *'Article 3(2) of Directive 2004/38 must be interpreted as meaning that the third-country nationals envisaged in that provision must have available to them a redress procedure in order to challenge a decision to refuse a residence authorisation taken against them, following which the national court must be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with. Those safeguards include the obligation for the competent national authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence.'* In my opinion Judicial Review is not an adequate remedy and full appeal rights will need to be restored in the light of the judgment. On the substantive issue in *Banger* the CJEU found, relying on Article 21(1) TFEU, that *Surinder Singh* principles applied to unmarried partners and that decisions to refuse residence documentation to such an applicant must be based upon an extensive examination of the applicant's personal circumstances and jusitifed with reasons.

Baigazieva v Secretary of State for the Home Department [2018] EWCA Civ 1088, [2018] All ER (D) 135 (Apr) (20 April 2018)

A major headache for immigration lawyers has been slightly eased by the Court of Appeal in *Baigazieva*, where it was held that a third country national, relying upon a retained right of residence, has to show that their former spouse was a qualified person to the point of the initiation of divorce proceedings rather than the point of divorce. Until this decision it has been very difficult for

individuals to show that their former spouse was working at the date of the decree absolute, which is usually much later then when the relationship broke down.

Whilst the retained right does not take effect until the point of divorce, there was no warrant for the conclusion that the Appellant had to prove that her former spouse remained a qualified person up until that point.

Secretary of State for the Home Department v Robinson (Jamaica) [2018] EWCA Civ 85, [2018] All ER (D) 18 (Feb) (2 February 2018)

In *Robinson*, the Court of Appeal considered deportation of those with a derivative right of residence on *Zambrano* (*Case C-34/09 Ruiz Zambrano v Office National de l'Emploi* [2012] QB 265) grounds in the light of recent CJEU jurisprudence (*Case C-165/14 Rendón Marin v Administración del Estado* [2017] QB 495 and *Case C-304/14 Secretary of State for the Home Department v CS* [2017] QB 558). Those with a derivative right of residence on *Zambrano* grounds must not refused a residence permit on the sole ground that they have a criminal record, but deportation can be justified where the personal conduct of the third-country national constitutes a genuine, present and sufficiently serious threat adversely affecting one of the fundamental interests of the society considering all relevant circumstances, in the light of the principle of proportionality. The court also held that *Case 30/77 R v Bouchereau* [1978] ECR 732 was good law and in the most extreme cases EEA deportation can be justified on public revulsion alone.

Article 8

TZ (Pakistan); PG (India) v Secretary of State for the Home Department [2018] EWCA Civ 1109, [2018] All ER (D) 114 (May) (17 May 2018)

In this case the Court of Appeal considered applications for leave to remain made by non-settled migrants who rely on relationships they each established with a British citizen at a time when their immigration status was precarious. The court held that no gloss is needed on the principles set out by the Supreme Court in *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, [2017] 4 All ER 575. In *Agyarko* the Supreme Court made clear that the scheme established by the Rules and the SSHD's policy guidance are lawful and compatible with article 8. Accordingly, the SSHD is entitled to apply a test of insurmountable obstacles to the relocation of the family within the Rules and a test of exceptional circumstances as described outside the Rules. Helpfully at [28] the Court affirms the relevance of *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, [2009] 1 All ER 363 and *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2008] 4 All ER 28. At [34] the court holds that if an individual meets the requirements of the Immigration Rules then this will be determinative of an appeal (provided Article 8 is found to be engaged). The Court also commended the 'balance sheet' approach to judges determining Article 8 appeals (at [35]).

MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88 (IAC) (1 February 2018)

The latest judicial consideration of seven-year children is the decision of the President in *MT and ET (child's best interests; ex tempore pilot) Nigeria.* The President underscores the need for there to be powerful reasons to justify the removal of a child with in excess of seven years residence in the UK (the child ET had ten years residence in this case) following the decision in *MA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 705. Helpfully the immigration history of MT (ET's mother) is set out at [34] and is found to come nowhere close to establishing a powerful reason justifying removal.

Health cases

AM (Zimbabwe) v Secretary of State for the Home Department; Nowar v Secretary of State for the Home Department [2018] EWCA Civ 64 (30 January 2018)

It is clear from the judgment in *AM* that the issue of Article 3 medical cases and *Paposhvili v Belgium*[2017] Imm AR 867 will have to be resolved by the Supreme Court. The Court of Appeal find that *Paposhvili* represents a very modest extension to Article 3 protection (which appears to demonstrate that the Upper Tribunal (UT) decision in *EA & Ors (Article 3 medical cases—Paposhvili not applicable: Afghanistan)* [2017] UKUT 445 is wrong). As Sales LJ says at [38], *'the boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e. likely "rapid" experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state'.*

Points-Based System—evidential flexibility and public law fairness

Mudiyanselage v Secretary of State for the Home Department [2018] EWCA Civ 65, [2018] All ER (D) 04 (Feb) (30 January 2018)

In *Mudiyanselage* the Court of Appeal review the many different versions of the SSHD's Evidential Flexibility Policy which sits alongside the Immigration Rules, Part 6A, para 245AA. The Court holds that in the later versions of the policy there is no longer a general policy to correct minor errors and flexibility will only apply in the circumstances set out in para 245AA. The Court also deals with when a document is a specified document for the purpose of para 245AA.

R (Patel) v Secretary of State for the Home Department [2018] EWCA Civ 229 (15 February 2018)

The Court of Appeal considered public law fairness and the Points-Based System in *Patel*, a case where a Tier 4 student's college had withdrawn his Confirmation of Acceptance for Studies without any notice or reason. The court dismissed the appeal, holding that 'when making an application for leave, the PBS imposes a burden upon an applicant to provide specified supporting documents and information required by the Immigration Rules' ([25]) and that the SSHD 'does not act unfairly in refusing an application under the PBS when, at the time the application is considered, it is not accompanied by all specified documentation. She is not under any obligation to make her own enquiries, or to notify or give the applicant an opportunity to rectify or comments upon deficiencies.' ([26]). The Court relied upon the decision in *EK (Ivory Coast) v Secretary of State for the Home Department [2014] EWCA Civ 1517*. The Court did acknowledge that 'there is an exception to the general rule, when public law fairness requires a period of grace for an individual to identify a new sponsor; but the authorities make clear that that is confined to cases in which the problem that has arisen was of the Secretary of State's own making' ([28]).

SSHD's practice of appealing allowed deportation decisions

Secretary of State for the Home Department v Barry [2018] EWCA Civ 790 (17 April 2018)

The SSHD is known for appealing nearly all of the deportation appeals that are allowed by the tribunal. In *Barry*, Singh LJ robustly dismissed the SSHD's appeal and finds that the decision of the FTT was careful and thorough. The court was troubled by the SSHD obtaining permission on the basis that there was a systemic failure of the UT in cases of this kind, thus raising an issue of general importance, and then abandoning this argument at the appeal. Singh LJ ordered that the SSHD pay costs on an indemnity basis ([82–86]).

Section 94B certification and appeals

Since the landmark judgment of the Supreme Court in *Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42, [2017] 4 All ER 811 there have been a number of decisions from the Court of Appeal and UT determining the questions to be considered in deciding whether an out-of-country appeal would be unlawful and the appellant should be brought back to the UK. The FTT is also testing appeals where appellants who have been deported can give evidence by video link abroad. In *R (Nixon) v Secretary of State for the Home Department* [2018] EWCA Civ 3 (17 January 2018), Hickinbottom LJ refused permission to appeal against a dismissal of judicial review applications challenging section 94B certificates where the applicants had been deported, following those refusals. Hickinbottom LJ summarised the relevant principles to be applied at [75] of his judgment. In *AJ (s 94B: Kiarie and Byndloss questions) Nigeria* [2018] UKUT 115 (IAC) the UT gave guidance as to the step-by-step approach to be adopted by the FTT. In *R (Watson) v Secretary of State for the Home Department & Anor (Extant appeal: s94B challenge: forum)* [2018] UKUT 165 (IAC) (5 April 2018) the UT confirmed that the FTT was the correct forum for deciding if the appeal can be lawfully decided without the appellant being physically present. If the appeal cannot be decided without the appellant being present 'then it is anticipated the Secretary of State will promptly take the necessary action to rectify this position. If this does not happen, then an application for judicial review can be made to the Upper Tribunal to challenge the Secretary of State's decision and compel him to facilitate the appellant's return.'

Protection claims on sexuality grounds

F (area of freedom, security and justice—Judgment) [2018] EUECJ C-473/16 (25 January 2018)

In the CJEU held that Article 4 of Directive 2011/95/EC precluded the use of psychological reports, based upon projective personality tests, to provide an indication of the sexuality of the applicant. However the CJEU did find that an expert's report could be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant, provided that the procedures for such a report are consistent with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, that decision makers do not base their decision solely on the conclusions of the expert's report and that they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation.

Costs in judicial review

The Court of Appeal summarised the law in costs in Judicial Review in *ZN (Afghanistan) & Anor v Secretary of State for the Home Department* [2018] EWCA Civ 1059, [2018] All ER (D) 76 (May) (11 May 2018) stating that, *'the court will have regard to all the circumstances, including the conduct of the parties; whether a party has succeeded on part of its case, even if that party has not been wholly successful; and any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 regarding offers to settle apply.*' In *ZN* costs were not awarded as the appellant had only been removed from the Third Country process due to the SSHD not being able to remove the appellant to the relevant EU member state within the timescale provided by Dublin III. The court went on to consider the relevance of an applicant being on legal aid and found that the fact that a party is publicly funded is not a reason for depriving them of the more attractive rates available on assessment of costs if they succeeded for reasons encompassed in their grounds.

In *Nwankwo v Secretary of State for the Home Department* [2018] EWCA Civ 5, [2018] All ER (D) 80 (Jan) (12 January 2018) the Court of Appeal overturned the guidance of the UT, finding that when appealing a costs order of the UT to the Court of Appeal it is the first appeals test applies, not the

second appeals test, although it will still be difficult to appeal a costs order as it is a discretionary decision.

Trafficking

Secretary of State for the Home Department v MS (Pakistan) [2018] EWCA Civ 594, [2018] All ER (D) 170 (Mar) (23 March 2018)

In *MS (Pakistan)* the Court of Appeal overruled the decision of the President of the UT and found, relying on *AS (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1469, [2013] All ER (D) 266 (Nov) that on a statutory appeal against a removal decision, an appellant can only mount an indirect challenge to a negative trafficking decision by the authority (in the circumstances where the appellant has not challenged it by way of judicial review), where the trafficking decision can be demonstrated to be perverse or irrational or one which was not open to the authority ([69]). However a trafficking decision, whether positive or negative, may well be relevant to the issue before the Tribunal as to the lawfulness of the removal decision ([70]). Any challenge to the trafficking decision must be made by way of judicial review.

R (PK (Ghana)) v Secretary of State for the Home Department [2018] EWCA Civ 98 (8 February 2018)

In the Court of Appeal found that Article 14(1)(a) of the Trafficking Convention requires the identification of the individual's relevant personal circumstances, and then an assessment by the competent authority of whether, as a result of those circumstances and in pursuance of the objectives of the Convention, it is necessary to allow that person to remain in the UK. However, the SSHD's guidance is entirely silent as to the purpose for which it must be necessary for the victim to remain. Therefore as the SSHD's guidance did not reflect the requirements of Article 14(1)(a) it was held to be unlawful.

Deprivation of citizenship

The most recent guidance on deprivation of citizenship appeals was given by the President of the UT in *BA (deprivation of citizenship: appeals) Ghana* [2018] UKUT 85 (IAC) (24 January 2018). Importantly the tribunal held that 'In both section 40(2) and (3) cases, the fact that the Secretary of State has decided in the exercise of her discretion to deprive P of British citizenship will in practice mean the Tribunal can allow P's appeal only if satisfied that the reasonably foreseeable consequence of deprivation would violate the obligations of the United Kingdom government under the Human Rights Act 1998 and/or that there is some exceptional feature of the case which means the discretion in the subsection concerned should be exercised differently.' This case overrules the decision in *Pirzada (Deprivation of citizenship: general principles)* [2017] UKUT 196 (IAC) where it was wrongly held that the tribunal had no power to exercise the discretion of the SSHD.

Adam 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.'

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