Immigration cases 2023 — January to June review

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6 Jul 2023

Immigration analysis: Adam Pipe, barrister at No 8 Chambers, reviews the key cases from January 2023 to June 2023 for immigration advisers, and explains why they are of interest. The review covers EU and EU Settlement Scheme cases, deprivation of citizenship, biometrics policy, Article 8 aspects, Tribunal procedure matters, refugee law, the Tier 1 Investor route and 'control of funds', and whether the Public Sector Equality Duty has extraterritorial effect.

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Surinder Singh, EFMs and lawful residence

The reported decision of *Kutbuddin (reg 9; EEA regs; lawful residence)* [2023] UKUT 76 (IAC) (21 March 2023) was promulgated in February 2022 but was not reported until early 2023. The Secretary of State for the Home Department (SSHD) had sought to argue that the requirement to be 'lawfully resident' in reg 9 (1A)(b) of the Immigration (European Economic Area) Regulations 2016, SI 2016/1052 (the EEA Regs 2016) meant that an Extended Family Member (EFM) of a British citizen exercising free movement rights must have been granted an EEA residence card or leave to remain under the domestic immigration rules of the relevant Member State. The SSHD relied upon the judgment of Lord Justice Sales (as he then was) in *SSHD v Natasha Anne Christy* [2018] EWCA Civ 2378. Upper Tribunal (UT) Judge Bruce rejected the SSHD's contention and held that the requirement that an EFM must show prior lawful residence in another Member State is not a requirement of EU law, nor is it endorsed by the Court of Justice. Judge Bruce relied upon the decision of the Upper Tribunal in *ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan* [2019] UKUT 281 (IAC)which, at para [45], she helpfully summarises as follows:

> '45. In ZA, however, Upper Tribunal Judge Rintoul explains how the word "genuine" has a specific meaning in this context. The First-tier Tribunal had dismissed ZA's appeal, accepting the Secretary of State's case that bad faith was at play, and that the family in question had only ever gone to Ireland in order to take advantage of the Surinder Singh route. Careful analysis of the jurisprudence, in English and French, led the Upper Tribunal to conclude that for the purpose of Regulation 9 motive is irrelevant: it did not matter, on the facts of that case, why the couple in question had chosen to go and live in Ireland. The only legitimate questions were whether they had in fact done so, whether the EEA national sponsor had exercised treaty rights whilst there, and whether family life had been created or strengthened during that period of residence. The term "genuine" is used by the Court of Justice simply in the sense that the exercise of treaty rights must have been real, substantive or effective. Whether there was another ulterior - or primary - purpose is, absent abuse of rights or fraud, of no concern to decision makers.'

EUSS and erroneous applications

In *Siddiqa (other family members, EU exit) Bangladesh* [2023] UKUT 47 (IAC) (10 February 2023) the UT considered the case of an EFM who had made an out-of-country application to join her brother in the UK. The appellant however erroneously selected an EU Settlement Scheme (EUSS) family permit application rather than an application under the EEA Regs 2016. The UT upheld the dismissal of the appeal finding that in the case of an applicant who had selected the option of applying for an EUSS family permit on GOV.UK and whose documentation did not otherwise refer to having made an application for an EEA family permit, the SSHD had not made an EEA decision for the purposes of reg 2 of the EEA Regs 2016. The Upper Tribunal distinguished the unreported case of *ECO v Ahmed* (UI-2022-002804-002809). The UT relied on *Batool (other family members: EU exit)* [2022] UKUT 2019 (IAC) and that Articles 18(1)(e) or (f) of the Withdrawal Agreement did not mean that the SSHD 'should have treated one kind of application as an entirely different kind of application'; and that it was not disproportionate under Article 18(1)(r) for the SSHD to 'determine…applications by reference to what an applicant is specifically asking to be given'. Furthermore Article 18(1)(o) was to be read narrowly and did not require the SSHD to treat the appellant's application as something that it was not stated to be; or to identify errors in it and then highlight them to her.

Third country children of EU citizens, dependency and the Withdrawal Agreement

R (Ali) v SSHD [2023] EWHC 1615 (Admin) (30 June 2023) concerns a third country national (Bangladeshi) child of an EU citizen who had entered the UK in 2014 under an EEA family permit at the age of 19. In 2016 she became estranged from her EEA national mother, and has lived independently since then (and married a Bangladeshi citizen). The UT held that, as she was now over 21 and was no longer dependent on her mother, she was not able to rely on any EU rights of residence as a family member which would count as qualifying time towards an EUSS application. This was also despite the fact that a person granted leave under the EUSS does not need to remain dependent beyond the initial grant (the irrationality challenge).

Under EU law, such a child who is either under the age of 21 or over that age but financially dependent on the EU citizen is a 'family member' within the meaning of Article 2 of Directive 2004/38/EC (the Citizens' Directive). By virtue of Article 7 of the Citizens' Directive, such a child has the right of residence on the territory of another Member State for a period of longer than three months if they are accompanying or joining the EU citizen concerned; provided that that citizen satisfies the conditions referred to in Article 7(1)(a) to (c). The question posed in *Ali* is whether the Immigration Rules correctly reflect the Withdrawal Agreement by providing that, in order to qualify for continuing residence under the Withdrawal Agreement, the third country national child of an EU citizen in the UK must be either under the age of 21 or remain financially dependent on the EU citizen at the end of the transition period. The claimant specifically relied upon Article 17(2) of the Withdrawal Agreement which states, 'The rights provided for in this Title for the family Members who are dependants of Union citizens or United Kingdom nationals before the end of the transition period, shall be maintained even after they cease to be dependants.' Lane J dismissed the claim, rejecting the argument that the judgment of the Court of Justice (and the AG's opinion) in *Reyes v Migrationsverket* (Case C-423/12) was to the effect that a family member aged 21 or more needs to be dependent upon the EU citizen at the point of accompanying or coming to join that citizen in the relevant Member State, but not at any point thereafter (para [56]). Lane J found that this is not what *Reyes* held (para [57]) and that Article 17(2) does not codify what the claimant says is the effect of *Reyes* (para [79]). Lane J also rejected the alternative submission that Article 17(2) is a relieving provision (para [80]) finding at para [92] that 'article 17(2) protects anyone who would lose those rights under the Withdrawal Agreement by reason of ceasing to be a dependant. It ensures that such persons continue to enjoy rights under the Withdrawal Agreement (provided they meet other relevant conditions) after the end of the transition period.' Finally Lane J rejected the claimant's irrationality challenge and states at para [105] that 'the 2016 Regulations and the EUSS rules are distinct legal regimes; and it is in the nature of rules-based systems for there to be "hard edges"'.

Deprivation of citizenship appeals—the correct approach

Chimi (deprivation appeals; scope and evidence) Cameroon [2023] UKUT 115 (IAC) (19 April 2023) is the latest decision from the UT which continues to grapple with the correct approach to deprivation of citizenship appeals following the decision of the Supreme Court in *Begumv Special Immigration Appeals Commission* [2021] UKSC 7. The Presidential panel held that the same approach was to be taken in respect of decisions under BNA 1981, s 40(2) where the condition precedent is that 'the Secretary of State is satisfied that deprivation is conducive to the public good' as in respect of decisions under a 1981, s 40(3)case, where the condition precedent is that 'the Secretary of State is satisfied that registration or naturalisation was obtained by means of fraud, etc'. The Tribunal summarised the steps to be taken on appeal as follows:

- A Tribunal determining an appeal against a decision taken by the respondent under s 40(2) or s 40(3) of the British Nationality Act 1981 should consider the following questions:
    - Did the Secretary of State materially err in law when she decided that the condition precedent in s 40(2) or s 40(3) of the British Nationality Act 1981 was satisfied? If so, the appeal falls to be allowed. If not
    - Did the Secretary of State materially err in law when she decided to exercise her discretion to deprive the appellant of British citizenship? If so, the appeal falls to be allowed. If not
    - Weighing the lawfully determined deprivation decision against the reasonably foreseeable consequences for the appellant, is the decision unlawful under section 6 of the Human Rights Act 1998? If so, the appeal falls to be allowed on human rights grounds. If not, the appeal falls to be dismissed
- In considering questions (1)(a) and (b), the Tribunal must only consider evidence which was before the Secretary of State or which is otherwise relevant to establishing a pleaded error of law in the decision under challenge. Insofar as Berdica [2022] UKUT 276 (IAC) suggests otherwise, it should not be followed
- In considering question (c), the Tribunal may consider evidence which was not before the Secretary of State but, in doing so, it may not revisit the conclusions it reached in respect of questions (1)(a) and (b)'

Unpublished Home Office policy on NHS debts unlawful

In *R(MXK) v SSHD* [2023] EWHC 1272 (Admin) (26 May 2023) Chamberlain J considered challenges brought by two individuals, both mothers of young children, who have limited leave to remain in the UK. Both of the claimants had been stopped, detained and questioned about their NHS debts when re-entering the UK with their children after travelling abroad. Chamberlain J found that the claimants were unlawfully detained from the point when it related only to the NHS debt (para [67]) as this was a purpose other than those specified in paras 2 and 2A of Schedule 2 to the Immigration Act 1971 (para [68]). Chamberlain J also found that the claimants were detained in accordance with an unpublished policy of the SSHD which was unlawful, applying the test in *R (A) v SSHD* [2021] UKSC. At para [76] the Judge said:

> 'The policy was only disclosed in the course of the litigation. Once it was disclosed, and submissions made about it, the errors in the policy were recognised by the Secretary of State and the policy was withdrawn or amended. By that time, however, it is likely that it had been applied to a very large number of people. It would have been much better for all concerned if the policy had been published and its illegality recognised earlier.'

During argument it was submitted that the SSHD had determined that publication of the policy would be contrary to the public interest. However, there was no evidence that it had been determined that publication was contrary to the public interest and it was difficult to see how there could be a compelling reason for non-publication (para [77]). Chamberlain J also found that SSHD was in breach of her duty under section 149 of the Equality Act 2010 to have 'due regard' to the need to eliminate discrimination.

Court of Appeal sets aside UT's unduly harsh assessment

In *Sicwebu v SSHD* [2023] EWCA Civ 550 (19 May 2023) the Court of Appeal once again grappled with the deportation provisions and the unduly harsh test. The UT had set aside the decision of the First-tier Tribunal (FTT) allowing the appeal and remade the decision dismissing the appeal. The Court of Appeal found that the UT had committed cumulative errors in its application of the unduly harsh test and therefore set it aside and remitted the matter for a re-hearing. Simler LJ was critical of the UT's treatment of the expert psychological report describing it in 'inappropriately disparaging terms' (para [54]) and criticising the report and the expert unfairly (para [55]). Furthermore, the UT failed to consider materially relevant considerations in its assessment of the unduly harsh test (paras [59-65]) and adopted a notional comparator test which was disapproved of in *HA (Iraq) v SSHD* [2022] UKSC 22 (affirming what was said by Underhill VP in the Court of Appeal [2020] EWCA Civ 1176). *Sicwebu* typifies the ongoing difficulties with deportation appeals in the Tribunal.

Home Office biometrics policy unlawful

In another decision which was made last year but only reported this year, *R (MRS and FS) v Entry Clearance Officer (Biometrics, Entry Clearance, Article 8)* [2023] UKUT 85 (IAC) (20 June 2022), UTJ Lindsley found that it is open to the SSHD, in line with Article 8 ECHR, to have a biometric discretion policy that gives significant weight to the public interest and proper legitimate aims which justify biometrics and that only exceptional, in the sense of very compelling cases, can outweigh that interest. However, it is incompatible with Article 8 ECHR for the respondent's policy 'Family Reunion: for refugees and those with humanitarian protection policy version 5 31st December 2020' to direct decision-makers that only applicants with extraordinary, and therefore rare, unique or unusual circumstances, can succeed. On 3 May 2023 the SSHD introduced a new policy entitled 'Unable to travel to a Visa Application Centre to enrol biometrics (overseas applications) ' which provided for applicants to request their application to be predetermined before they attempt to travel to a VAC or ask to be excused from having to attend a VAC to enrol their biometrics before travelling to the UK because they claim the journey to the VAC is unsafe.

UT apply too high a standard of proof in refugee claim essentially requiring corroborative evidence

The judgment of Singh LJ in MAH (Egypt) v SSHD [2023] EWCA Civ 216 (28 February 2023) is an important reminder of the lower standard of proof application in asylum claims (but see Nationality and Borders Act 2022, s 32 for protection claims made on or after 28 June 2022) and the lack of a requirement for corroboration. The decision also provides helpful guidance in respect of challenging credibility assessments. The appellant's claim was dismissed due to a lack of credibility not because his account was considered implausible or inconsistent but because the UT considered that there were further steps he could, and should, have taken to adduce evidence which would corroborate his account (para [1]). Singh LJ found at para [4] that the UT had erred 'in particular by applying what in substance was too high a standard of proof, when the law requires no more than a "reasonable degree of likelihood"; that in substance it required the Appellant to produce corroborative evidence to support various aspects of his account, when there is no requirement in law that there must be corroboration' and that the only conclusion that was reasonably open to the UT and the Court of Appeal was that Appellant's protection claim succeeded. Singh LJ provides a very helpful summary of the standard of proof in asylum cases at paras [49]-[56]. At para [51] he states, 'Strictly speaking it could be said that it is not entirely accurate to refer to this as a standard of "proof", because the applicant does not in fact have to prove anything. It could more accurately be described as being an "assessment of risk".'

At paras [57]–[67] Singh LJ considers the legal principles in relation to the assessment of credibility drawing from the decision of Green LJ in *SB (Sri Lanka) v SSHD* [2019] EWCA Civ 160. At paras [68]-[70] Singh LJ summarises the role of the Appellate Court, whilst an appellate court will be slow to interfere with findings of fact made by the tribunal of fact, 'if a judge makes material errors in the evaluation of evidence, for instance because the inference drawn from a fact found is logically not one that properly can be drawn, then an appellate court will interfere.' (para [70]). Singh LJ goes on to analyse Article 4(5) of the Qualification Directive and para 339L of the Immigration Rules and holds at para [77], agreeing with the SSHD's guidance that, 'where certain criteria are met, corroborative evidence is not required. It does not follow from this that, where one or more of those criteria are not met, corroborative evidence is required… In those circumstances the decision-maker (here the tribunal of fact) must still consider whether, on the facts of the case, it is appropriate to give the appellant the benefit of the doubt, bearing in mind the relatively low threshold of "reasonable degree of likelihood".'

Giving evidence by video link from abroad where there was no permission from the foreign state was not unlawful and did not render the hearing a nullity

In *Raza v SSHD* [2023] EWCA Civ 29 (18 January 2023) the Court of Appeal considered the deportation appeal where the appellant's claim had been certified pursuant to section 94B of the Nationality, Immigration and Asylum 2002 (NIAA 2002) and he had been removed to Pakistan prior to his appeal. The appellant gave evidence by video link from Pakistan at his appeal hearing. The evidence was that the SSHD had notified the Pakistani High Commission about the use of video link evidence and the Pakistan authorities had not responded/objected. The primary ground of appeal to the Court of Appeal was that the FTT hearing was unlawful as there was no adequate evidence that the authorities in Pakistan had permitted a hearing by video link. The Court of Appeal rejected this ground holding that para [76]:

> 'The primary question for this Court is whether there is any provision or rule of domestic law which shows that the FTT hearing was unlawful and a nullity. There is none. The 2002 Act expressly requires some appeals to be made from, and some to be continued from, abroad. The 2002 Act does not provide that the lawfulness of such appeals depends on any condition, such as the obtaining of permission from a foreign state. The Rules assume that a hearing can be conducted partly by video link. The Rules do not provide for any further conditions in relation to the taking of evidence from abroad. Neither Nare nor Agbabiaka suggests that the taking of video evidence from abroad without the permission of the state concerned is unlawful, or that it makes the hearing a nullity. Agbabiaka suggests that such a hearing might be contrary to the public interest because of its potential to damage international relations, and, thus contrary to the interests of justice, but that is a different point. I accept Mr Kovats's submission that the sanctions for such conduct are diplomatic, not legal'.

The Court also rejected the second ground of challenge as to the assessment of the unduly harsh test in NIAA 2002, s 117C(5) (paras [79-80]). Practitioners who wish to call oral evidence from abroad should follow the guidance set out in 'Presidential Guidance Note No 4 of 2022: Taking oral evidence from abroad'

The relevance of Chikwamba to appeals today

In *Alam v SSHD* [2023] EWCA Civ 30 (19 January 2023) the Court of Appeal gave guidance on the relevance of *Chikwamba v SSHD* [2008] UKHL 40 to immigration appeals today. Elisabeth Laing LJ noted that the case law on Article 8 in immigration cases has developed significantly since *Chikwamba* was decided. She also noted that *Chikwamba* was decided before the enactment of Part 5A of NIAA 2002 and section 117B(4)(b) now requires courts and tribunals to have 'regard in particular' to the 'consideration' that 'little weight' should be given to a relationship which is formed with a qualifying partner when the applicant is in the UK unlawfully.

When *Chikwamba* was decided there was no provision in the Rules which dealt with Article 8 claims within, or outside, the Rules. By contrast, the Immigration Rules, Appendix FM now dealt with such claims. Para EX.1 of Appendix FM provided an exception to the requirements of Appendix FM in Article 8 cases if the applicant had a relationship with a qualifying partner and there were 'insurmountable obstacles' to family life abroad. In dismissing the appeals Elisabeth Laing LJ came to three conclusions of general principle:

- the decision in *Chikwamba* is only potentially relevant on an appeal when an application for leave to remain is refused on the narrow procedural ground that the applicant must leave the UK in order to make an application for entry clearance
- even in such a case, a full analysis of the Article 8 claim is necessary. If there are other factors which tell against the Article 8 claim, they must be given weight, and they may make it proportionate to require an applicant to leave the UF and to apply for entry clearance
- *a fortiori*, if the application is not refused on that procedural ground, a full analysis of all the features of the Article 8 claim is always necessary.

The decision in *Alam* means that whilst *Chikwamba* arguments may continue to be relevant to the assessment of proportionality, they will rarely be a decisive factor.

Tribunal cannot dispose of an appeal without considering the merits

In *SSGA (Disposal without considering merits; R25) Iraq* [2023] UKUT 12 (IAC) (15 December 2022) the FTT allowed an asylum appeal without considering the merits on the basis that the SSHD had failed to comply with directions or engage with the proceedings (which also led to a wasted costs order being made). In setting aside the decision, the UT held that judges in the FTT do not have power to dispose of an appeal without considering its merits. This is because of the statutory duty under NIAA 2002, s 86 to determine each matter raised as a ground of appeal. Every judge seized of an appeal must reach their own decision on the case and must exercise for themself any available discretion. Judges in the FTT do not have power to treat an appeal as unopposed on the ground that a party has not complied with any requirement of the FTT Rules or a practice direction or any direction(s) of the Tribunal even if the failure to comply is persistent. The UT also gave guidance for when consideration is being given to whether or not an appeal should be disposed of without a hearing. The guidance notes that a hearing should be held whenever credibility is disputed on any material issue or fact. Cases in which it would be appropriate to determine an appeal without a hearing if credibility is materially in issue would be rare indeed.

Tier 1 Investors & funds under control

In *R (Wang) v SSHD* [2023] UKSC 21 (21 June 2023) the Supreme Court considered the Tier 1 (Investor) route which is now closed for new applications and which at the relevant time required individuals to have £1,000,000 under their control in the UK and to have invested at lease £750,000 of such sum in the UK through UK government bonds or in shares in or loans to active and trading UK-registered companies. Ms Wang along with over 100 others was part of a scheme designed to ensure qualification for leave to remain under the Tier 1 (Investor) regime. Under this scheme Ms Wang borrowed the necessary £1m from Maxwell Asset Management Ltd (MAM). This was on terms that it was required to be used for investment in shares in or loans to active and trading UK-registered companies. Ms Wang also signed a 'services agreement' with a company called Maxwell Holdings Ltd (Holdings). Under this agreement Holdings was to provide services including advising on the Tier 1 regime requirements and ensuring that monies were used for authorised investments. To do this Holdings was to have discretion as to how to invest the monies loaned by MAM on behalf of Ms Wang and to act on behalf of Ms Wang under a power of attorney. Holdings also guaranteed repayments of the loan to MAM, and agreed to make all interest payments under the loan to MAM at no expense to Ms Wang. In return for this Ms Wang paid a fee of £200,000, which was repayable if she did not obtain Tier 1 (Investor) migrant status. The £1m was then invested on behalf of Ms Wang (as with all the participants in the scheme) in a company called Eclectic Capital Limited (Eclectic) by way of a loan which was convertible to shares at Eclectic's election. The loan funds were transferred directly from MAM to Eclectic, which invested the money almost exclusively in Russian companies. Each of MAM, Holdings and Eclectic were wholly owned and controlled by two Russian nationals. Ms Wang's Tier 1 (Investor) application was refused by the SSHD on two grounds: (1) that the loan from MAM did not result in her having the £1m 'under [her] control' because she had no choice about where to invest the money; and (2) that the investment in Eclectic was not a qualifying investment because it was an excluded type of company. The UT dismissed Ms Wang's application for Judicial Review (*R (JW) v SSHD (Tier 1 Investor; control; investments)* [2019] UKUT 393 (IAC) (21 October 2019)), however that decision was overturned by the Court of Appeal (*R (Wang) v SSHD* [2021] EWCA Civ 679 (11 May 2021)). The SSHD appealed to the Supreme Court who allowed the appeal and restored the SSHD's decision.

Lord Briggs found that the SSHD was right to conclude that Ms Wang did not have the money 'under [her] control' for the purposes of the Immigration Rules. He explained that the Immigration Rules are to be interpreted in light of their context and purpose, in accordance with the general principles of statutory interpretation (paras [29]-[31]). In applying the Rules the court must take an unblinkered and realistic approach to analysing the facts. In a case such as this, that includes considering the relevant scheme in question as a whole or 'in the round' (paras [2]-[7];[31]). That was the case even though the Tier 1 (Investor) migrant regime was a points-based or 'tick-box' system which sacrifices discretion and perfect fairness for efficiency, transparency and predictability (paras [32]-[35]). Following this approach the Supreme Court considered that the SSHD had correctly interpreted 'under [her] control' as requiring that an applicant has a real choice about the use and disposition of the relevant money (para [47]). The Court of Appeal had erred in interpreting the requirement as only being that the money be available to Ms Wang personally as opposed to as a nominee. This was because the requirement of the money to be 'of [her] own' would already exclude nominees, and so render 'under [her] control' redundant and emasculate its natural and ordinary meaning (paras [42]-[46]). Looking at the terms, commercial rationale, and practical operation of the Maxwell scheme in the round, the Supreme Court agreed with the SSHD that Ms Wang did not have any real choice about the use of the loaned money. It was not therefore necessary for the Supreme Court to consider the Secretary of State's second reason for refusing leave to remain (paras [53]-[54]).

The Public Sector Equality Duty and individuals living outside of the United Kingdom

In *R (Marouf) v SSHD* [2023] UKSC 23 (28 June 2023) the Supreme Court considered whether the public sector equality duty ('PSED') imposed by section 149 of the Equality Act 2010 and whether a public body is required under the PSED to have due regard to people living outside the UK when exercising its functions. The appellant is a woman currently living in Lebanon who wished to be brought to settle in the UK. She is a refugee from the conflict in Syria and asserted that she should be treated as eligible to come to the UK under the Vulnerable Persons Resettlement Scheme instituted by the Government in 2014. The SSHD accepted that she meets the vulnerability criteria for resettlement in the UK. The Resettlement Scheme is currently implemented by the SSHD relying on the UNHCR to identify and recommend refugees within their remit to be resettled in the UK. The Appellant is not within the remit of the UNHCR because she is a Palestinian refugee. Palestinian refugees in Lebanon, Jordan, Syria, the West Bank and Gaza fall within the remit of a different United Nations organisation, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Whereas UNHCR has a specific mandate to assist refugees by local integration in the country where they are living, or by resettlement in a third country, UNRWA has no such mandate. Palestinian refugees are the subject of the exclusive mandate of UNRWA and are therefore outside the remit of UNHCR. It follows that in practice, they cannot take part in the Resettlement Scheme. The Supreme Court, Lady Rose giving judgment, held that the starting point for consideration of the scope of the enactment is the presumption in domestic law that legislation is not intended to have extraterritorial effect (para [36]). There is nothing in the legislation from which one can imply that the presumption against extraterritoriality has been overridden. On the contrary, the scope of the equality goals which public authorities should aspire to achieve suggests there is no such intention (paras [54, 56]). The Supreme Court also rejected the appellant's alternative argument, finding that the procedural duty to have due regard to the need to avoid unlawful discrimination under section 149(1)(a) is not engaged.

Court of Appeal finds Rwanda scheme unlawful

In *R (AAA (Syria)) v SSHD* [2023] EWCA Civ 745 (29 June 2023) the Court of Appeal considered the Government's scheme to remove asylum seekers to Rwanda for their claims to be considered there. In the High Court (*AAA v SSHD (Rwanda)* [2022] EWHC 3230 (Admin)) Lewis LJ and Swift J had found the Rwanda policy lawful but had quashed the decisions in relation to the particular cases on procedural grounds. The appellants' appealed to the Court of Appeal on the basis that that Rwanda is not a 'safe third country' as there are substantial grounds for believing that there is a real risk that any persons sent to Rwanda will be removed to their home country when, in fact, they have a good claim for asylum. Sending them to Rwanda in those circumstances would breach Article 3 of the European Convention on Human Rights. The Court of Appeal by majority (Sir Geoffrey Vos MR, and Underhill VP) allowed the appeal finding that the deficiencies in the asylum system in Rwanda are such that there are substantial grounds for believing that there is a real risk that persons sent to Rwanda will be returned to their home countries where they faced persecution or other inhumane treatment, when, in fact, they have a good claim for asylum. That conclusion is founded on the evidence which was before the High Court that Rwanda's system for deciding asylum claims was, in the period up to the conclusion of the Rwanda agreement, inadequate. The Court was unanimous in accepting that the assurances given by the Rwandan government were made in good faith. The Lord Chief Justice dissented, reaching the opposite conclusion in agreement with the High Court. The Court unanimously dismissed the other grounds of appeal. At the time of writing the Government has publicly indicated that it will seek permission to appeal to the Supreme Court (which is likely to be granted given the split decision and the importance of the issue), but for now removals to Rwanda remain grounded.

Document Information

Published date
06/07/2023

Published date
LexisPSL News Analysis

Jurisdiction
England, Wales