CASE LAW UPDATE

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Edited by David Barr (pupil) and overseen by Samina Iqbal, Sarah Pinder (joint-heads) and Pearl Yong of the immigration team.

KEEPING UP WITH DEVELOPMENTS

In our efforts to help keep you up to date with the latest developments in the field of immigration law, we bring you our second case law update in this series where we are looking back at decisions over the last six months.

You will find in this second case law update, summaries of relevant Court of Appeal Court judgments. Each summary includes a link to the full judgment.

In the next update, we will start to review recent Upper Tribunal (IAC) determinations, which will be grouped by theme from abandonment, appeals and precariousness to vulnerability, country guidance and human rights. So watch this space!

KEEPING IN TOUCH

Remember to sign up to receive our newsletters if you have not already done so: n.dinsdale@goldsmithchambers.com.

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Section 117B(6) of the 2002 Act and *"fact finding" - Runa v SSHD*

Runa v SSHD [2020] EWCA Civ 514

- The Court of Appeal allowed an appeal against a decision of the Upper Tribunal refusing Ms Runa leave to remain as the spouse of a person present and settled in the UK. Ms Runa was married to a British citizen and had two British children under the age of four.

- The heart of the appeal lay in the interpretation of s.117B(6) of the 2002 Act - the public interest will not require the person's removal where (a) there is a genuine and subsisting parental relationship with a qualifying child and (b) it would not be reasonable to expect the child to leave the United Kingdom.

Background

Ms Runa was a Bangladeshi citizen, who entered the UK aged 14 as a visitor in 2006 and subsequently became an overstayer. Ms Runa applied to remain in the UK in 2015 based on her marriage to a British citizen. Ms Runa's first child was born before the decision of the First-Tier Tribunal allowing her appeal. Her second child was born by the time the Home Office had appealed to the Upper Tribunal. Ms Runa appealed to the Court of Appeal against the decision of the Upper Tribunal overturning the First-Tier Tribunal decision.

Decision

(1) The Court of Appeal (at [27]) rejected the notion that s.117B(6) provided for a "*categorical*" approach, that it would not be reasonable for the child to leave the UK with one parent and separating from the other British citizen parent, thereby splitting up the family. Instead the Court held (at [36]) that: "*the provision calls for a fact-finding exercise so that the full background facts must be established against which the only statutory question posed by that provision can then be addressed*."

(2) The only question which fell to be addressed under s.117B(6)(b) was "*whether or not it would be reasonable to expect the child to leave the UK. The focus has to be on the child.*" This stems from the Supreme Court decision in *KO (Nigeria) v SSHD* [2018] UKSC 53.

(3) The judgment settled the question of whether s.117B(6) was to be seen as a "*self-contained*" provision: the answer came in the affirmative, citing Elias LJ at paragraph 17 of *MA (Pakistan)*.

At [33] the Court sets out a framework under section 117B(6) where the only question is: would it be reasonable to expect the child to leave the UK?

- Where the answer is "no", there is no need to consider Article 8(2).

- Where the answer is "yes" then *"there will still be a residual scope for Article 8(2) to be considered."* In practical terms, the Article 8(2) inquiry would include considering the conduct of the parent or parents.

(4) The Upper Tribunal had therefore taken a wrong turn in considering whether it was reasonable for the children to remain in the UK without their mother and whether there would be *"insurmountable obstacles"* to the maintenance of the family unit outside the UK. The Court thankfully allowed the appeal, though remitted the decision back to the FTT for re-making.

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Deportation of foreign criminals & s.117C(4) of the 2002 Act - *"lawful residence", "social and cultural integration",* and *"very significant obstacles"* to integration

CI (Nigeria) v Secretary of State for the Home Department [2019] EWCA Civ 2027

- The Court of Appeal allowed an appeal from the Upper Tribunal, which had dismissed the appellant's case against the SSHD's criminal deportation order. CI is a 'foreign national offender' ('FNO').
- In its judgment, the Court addressed in detail for the first time the requirements of 'Exception 1' to deportation set out in s.117C(4) of the 2002 Act, namely:

  (1) lawful residence (2) social and cultural integration and (3) very significant obstacles.
- The Court also considered whether there were "*very compelling circumstances, over and above those described in Exception 1*", as required by the decision in *NA (Pakistan)* [2016] EWCA Civ 662.
- The matter has been remitted to the FTT for redetermination.

Background

CI is a Nigerian national who came to the United Kingdom with his mother when he was one year old and has lived here ever since. He was 27 at the time of the appeal. He had no family or other ties in Nigeria and had been subjected to severe abuse by his mother, leading him into care aged 15. Aged 20, he committed a number of serious offences and was sentenced to various periods of detention in a Youth Offenders Institute (YOI), two of which exceeded twelve months.

In 2014, the SSHD made a deportation order against CI; CI challenged the order on Article 8 grounds. In an unenviably long journey up to the Court of Appeal, then back down again to the

Upper Tribunal, this appeal came from the second substantive Upper Tribunal decision, some four years after CI's initial success at the First-Tier Tribunal.

Decision

(1) The Court of Appeal considered the Upper Tribunal's approach to the three tests under Exception 1. It found that:

(i) the UT erred in its calculation of the length of lawful residence (albeit in favour of CI);

(ii) the UT erred in its assessment that CI's social and cultural integration had been broken by his offending and had failed to provide reasons for this finding;

(iii) the UT erred in its finding that CI would not face very significant obstacles to integrating in Nigeria by reference to "*assumed knowledge of Nigerian culture*" and a lack of consideration of the effect on CI's mental health.

(2) Firstly in relation to lawful residence, the Court rejected the argument that *SC (Jamaica)* [2017] EWCA Civ 2112 is authority for the proposition that the definition of *"lawful residence"* in paragraph 276A(b) of the Immigration Rules should be applied by analogy in interpreting the phrase *"lawfully resident"* in paragraph 399A and in section 117C(4)(a) of the 2002 Act. It was held that outside of a situation where a person is later successful in their asylum claim (CI had not been successful) lawful residence means where leave to enter or remain has been granted.

(3) On the question of social and cultural integration and the UT's assertion that this had been *"broken"* by his criminal conduct (purportedly applying *Akinyemi v SSHD* [2017] EWCA Civ 236), it was held that the UT's approach had been erroneous. Whilst it was *possible* for such integration to be broken, the UT had erred in considering that CI's offending and imprisonment had *"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 in requiring him *to "demonstrate that integrative links had since been "re-formed""* ([77]). The correct test was *"concerned solely with the person's social and cultural affiliations and identity"* ([80]).

(4) In further rejecting the UT's assessment of *"very significant obstacles to integration"* in Nigeria, the Court of Appeal held that the correct approach was to seek to establish a *"reasonable basis"* for drawing an inference, by reference to evidence, that an immigrant with no memory of his country of origin had *"acquired some knowledge of its culture and traditions through his upbringing"*. The approach taken by the UT had wrongly placed the onus on CI to prove that he was not familiar with Nigerian culture. Moreover, no consideration had been given to the extent of CI's mother's failures as a parent: both her abuse and her neglect were relevant.

(5) The Court went on to criticise the UT for failing to take account of the effect of being deported on CI's mental health. The judge had accepted the psychologist's evidence that "*deportation would have a "devastating effect" on [CI's] mental health and on his prospects for rehabilitation*". The unchallenged evidence in this regard seemed to "*vitiate the judge's inference*" that CI, being of "*some intelligence and ability*" and having acquired work

experience, would find work in Nigeria, access mental health services and/or find accommodation.

(6) Finally, in considering "*very compelling circumstances*" over and above the factors considered under Exception 1, the Court restated the *Maslov* principles (*Maslov v Austria* [2009] INLR 47). The UT had erred in finding that the principles applied only to settled migrants who have had that status (or at any rate have been lawfully present in the host country) for most of their childhood. No such restriction applied.

(7) The matter was once more remitted to the UT for re-making.

Some helpful guidance finally on the approach to *"very signficant obstacles"*, also taking into account medical reports, which outline mental health issues and *"the availability of health/welfare services"*. This judgment will also be key to supporting appeals against decisions, in which the SSHD asserts that a person's social and cultural integration has been broken simply and by virtue of their criminal offending behaviour.

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Challenging the good character naturalisation requirements

R (Al-Enein) v SSHD [2019] EWCA Civ 2024

- The Home Office successfully resisted a further challenge to their good character policy in respect of British citizenship naturalisation applications before the Court of Appeal in an important decision for those advising this area of nationality law.
- The Court dismissed the appeal against a decision which itself dismissed the claim for judicial review of the SSHD's decision not to reconsider her refusal of the Appellant's application for naturalisation.

Background

The Appellant, of Palestinian origin, was stateless but had a Lebanese refugee travel document. He arrived in the UK as a student in 2001 and claimed asylum two days later. He was granted permission to work and provided with an Asylum Registration Card with permission to work. In 2007 his asylum claim was refused. Following unsuccessful applications for reconsideration his appeal rights were exhausted in November 2007. He was then detained pending removal and applied unsuccessfully for judicial review but was not removed. In 2009, he was given Temporary Admission with a condition of not being allowed to work and made an unsuccessful Tier 2 application that was refused in September 2009. A further fresh asylum claim was refused in December 2009 and he accepts that he continued to work despite knowing that he was prohibited from doing so.

In 2010, he was removed to Lebanon and he returned to the UK in 2012 as the fiancé of a British citizen, with the leave of the Secretary of State. After marrying, on 10 September 2014 he was granted indefinite leave to remain in the UK as the spouse of a British citizen, and on 15 June 2015 the Appellant applied for naturalisation. This application for naturalisation was refused in 2016 on the

grounds that he did not meet the good character requirement: he had remained in the UK without valid leave from 20 November 2007 and 27 January 2010, and had worked without permission during that time.

Decision

The long running tension in this area lies in the contrast between the legislative provisions and Home Office policy. Section 6(2) and Schedule 1 of the British Nationality Act 1981 require the individual to have resided in the UK lawfully and not to have been in breach of any immigration law for ***the last three years*** prior to the date of the application (as this case concerned a person married to a British citizen so three years as opposed to five years is the relevant residence requirement). On the other hand, the Home Office good character policy, states that an application *"will normally be refused if,* ***within the previous 10 years*** *(before the date of decision), the person has not complied with immigration requirements"*, which includes working in the UK without permission to do so or remaining in the UK after leave has expired.

(1) The Court of Appeal held that the correct approach is to firstly consider the mandatory statutory requirements to be satisfied before an application for naturalisation can be considered at all: some matters can be modified or waived by the Secretary of State but not the good character requirement (this adopted the approach in *R v Secretary of State for the Home Department, ex parte Fayed* [2001] Imm AR 134).

(2) The Court went on to say that over and above these minimum requirements "*there is no reason in law why the Secretary of State cannot impose an additional or extended requirement relating to breach of immigration laws as properly being a matter which is relevant to the more general question of good character*." This was said to require "*an assessment or evaluation by the Secretary of State of all the relevant circumstances going to that issue*."

(3) The emphasis remains on the over-riding discretion of the Secretary of State to naturalise persons as British Citizens. To this extent, there is no negation of rights conferred by primary legislation.

Therefore, the assessment of an applicant's good character for the purposes of naturalisation applications does for now, remain in the hands of those who set and apply their own policy.

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Appeals out-of-time

Al-Ahmed v Tower Hamlets London Borough Council [2020] EWCA Civ 51

- The Court of Appeal issued useful guidance in the context of an appeal under the Housing Act 1996 against an adverse review decision under homelessness provisions of that Act. The decision offers an insight into the assessment of the concept of *"good reason"* for the delay in bringing an appeal out-of-time and so has useful application to immigration and other public law cases.

Background

The Court had allowed an application for permission to bring an appeal under the Housing Act 1996, when the relevant time-limit had passed. The case concerned a decision that the Appellant was not in priority need for housing. An extension of time had been granted in circumstances where the Appellant:

- was homeless,
- had received no legal advice and,
- was unrepresented.

The Local Authority successfully appealed to the High Court and later, the Court of Appeal reinstated the original order granting permission to appeal out-of-time.

Decision

(1) In the High Court the requirements for bringing a homelessness appeal were described (at [15]) as not being *"especially sophisticated or taxing"* and it was concluded that *"the fact that a party is not professionally represented could play only a very limited, if any, part in the assessment of whether or not there was good reason for a departure from the time limit in bringing the appeal in cases of this sort."* Reliance in this regard had been placed on the decision in *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 (at [43]-[45]) and *Nata Lee Limited v Abid* [2014] EWCA Civ 1652 (at [53]).

(2) The 21-day period for appealing as set out in s.204(2) had, until the insertion of s.204(2A) been absolute. Now an appeal could be brought out-of-time where there was *'good reason'* for the delay. The Court held that "*good reason*" was a "*straightforward statutory test to which no gloss is or should be applied*."

(3) The Court noted that the High Court had not been directed to why the *Mitchell/Denton* principles referred to in *Hysaj* should be distinguished in the present context. Firstly, the CPR rules apply to applications under s.204 but do not define the statutory test of *'good reason'*. Under the *Mitchell/Denton* principles, *'good reason'* is only one factor.

(4) It was further held that the context of s.204 was materially different from other areas where litigants-in-person are generally expected to comply with relevant rules of the court. Given what the Court described as the *"bleak"* situation faced by unrepresented homeless individuals, it said that "*it would be both surprising and unfair if difficulties of that kind*

could not be taken fully into account and given appropriate weight in the assessment of whether there was a good reason for failure to bring an appeal in time."

(5) The Court was at pains to emphasise that this was not giving "*carte blanche to delay*". Where an unrepresented individual was seeking legal aid, careful scrutiny will be required of the diligence with which legal aid was sought. Even where the court is satisfied that there is good reason, this only opens up a discretion that may be exercised in allowing an appeal to be brought out of time.

Whilst this is a welcome decision, it must of course be seen within the context of the approach to delay more generally. In the Court of Appeal in *R (on the application of Kigen & Anor) v Secretary of State for the Home Department* [2015] EWCA Civ 1286, for example, it was made clear that waiting for the outcome of an application for legal aid does not constitute a sufficient reason for missing time limits within public law proceedings.

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Looking at *'insurmountable obstacles'* and *'precariousness'*

Lal v Secretary of State for the Home Department [2019] EWCA Civ 1925

- The Court of Appeal set aside a decision of the UT dismissing the appeal from the refusal of an Article 8 claim in the context of the partner of a British citizen being refused leave to remain.
- This was a further opportunity for the Court of Appeal to consider human rights in immigration appeals and in doing so, it found that Ms Lal, who had entered the UK as a student, had been wrongly refused leave to remain on the basis of the Home Office's concern that she had married a British citizen only four months prior to her leave expiring.
- The UT decision was set aside and the SSHD was invited to consider the case afresh:
    i) Firstly, because the refusal had been made solely on the basis that the marriage did not represent a genuine and subsisting relationship, now found to be an erroneous reason, and
    ii) Secondly, because of a material change of circumstances - namely that the couple had since had a child together, who was a British citizen.

Decision

Section 117A(2) of the 2002 Act requires a court or tribunal, in considering whether an interference with a person's right to respect for private and family life is justified under Article 8(2), to have regard in all cases to the considerations listed in section 117B. That section sets out (at s.117B(4)) that *"little weight"* should be given to a private life or a relationship formed with a qualifying partner when the individual is in the UK unlawfully. In addition, it states (at s.117B(5)) that *"little weight"* should be given to a private life established by a person at a time when the person's immigration status is *"precarious"*.

(1) It was wrong for the judge to conclude that little weight should be attached to the relationship where that relationship was entered into when the individual's immigration status was precarious. An important distinction is drawn between a relationship formed with a qualifying partner when the person is in the UK *unlawfully* (subsection 4) and the private life of a person established when their immigration status is precarious (subsection 5). There is no provision requiring little weight to be given to a relationship formed with a qualifying partner when the individual's immigration status is precarious. The UT judge had acted on the (erroneous) basis that Ms Lal had been in the UK unlawfully when the relationship was formed. This was simply an error of fact: her leave had been extended until 19 April 2015 and had therefore never been in the UK unlawfully.

(2) In assessing the nature of precarious immigration status, the Court said that "*clearly there are degrees of precariousness*" and these ranged from someone being in breach of immigration laws and being liable to removal through to someone with years of lawful residency on the path to settled status but who does not yet benefit from ILR. It would be unreasonable to attach the same weight to these different situations and there was said to be no settled jurisprudence at the European level on this ([57]).

This case follows the helpful guidance given in *GM (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1630, with the added clarification that the *"insurmountable obstacle"* test was objective and should be fully evidenced.

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Court of Appeal find rules must be met in PBS cases (again)

R (Junied) v Secretary of State for Home Department [2019] EWCA Civ 2293

- The Court of Appeal dismissed an appeal brought against a decision of the UT refusing permission to appeal in a case where an application for leave to remain as a Tier 1 (Entrepreneur) Migrant was rejected for failing to comply with the evidential requirements for proof of available funds from a third party.
- The case continues to demonstrate the strict approach taken in relation to compliance with the rules on specified evidence.

Background

Mr Junied was a Pakistani national who applied for leave to remain as a Tier 1 (Entrepreneur) migrant, seeking to rely on 'third party' funds. The third party made a declaration to the effect that he had £200,000 in an identified Halifax bank account and that it was available to Mr Junied to help establish his business in the UK.

In addition to the declaration, the application included a letter signed by the Manager of the Chorlton-cum-Hardy Halifax Branch to the effect that the bank did not provide confirmation of third party funds in the manner prescribed by paragraph 41-SD(c)(i) of Appendix A of the Immigration Rules.

On application to the UT in his judicial review claim, permission was refused due to the failure to produce the required documentation and a similar conclusion reached at the subsequent oral permission hearing.

Decision

(1) The decision of the Court is clearly set out at [36]: "*Given the express wording of the Rules, given the consistent approach which the courts have taken as to the need for precise compliance with the specified requirements under the Rules as to documents for the purposes of the PBS and given the background facts of this case it seems to me that the proper outcome for this appeal is clear: and that is that it must fail.*"

(2) The requirements of the rules had been expressly approved as workable and fair in cases such as *Durrani* [2014] UKUT 00295 (IAC) and *Iqbal* [2015] EWCA Civ 169. There was said to be no reason not to apply the rationale in those cases to this one: the requirements in the Rules were specific and the applicant failed to meet them. Paragraph 245DD stipulated that in such cases the application would be refused. At [40] Davis LJ said "*That, put shortly, is the end of the matter, as I see it.*"

(3) Moreover at [44] the evidence that there was an impossibility of compliance with the rules in this instance was found to be unpersuasive. Whilst the banks may have been unwilling it was said that this did not demonstrate that it was impossible for them to provide the letters in the manner prescribed.

(4) The Court also rejected the argument that the provision was *ultra vires* and did this on procedural as well as substantive grounds. The issue had not been raised at the UT and only points of law arising from a decision of the UT can be the subject of appeal under s.13 of the Tribunal, Courts and Enforcement Act 2007.

With regards to (3) above, the Court's judgment is disappointing indeed. The Court of Appeal in *Iqbal* had found that there had *been "no satisfactory evidence that [...] financial institutions [...] would be unable or unwilling"* to provide the information required in the letters. In *Fayyaz* ([2014] UKUT 296 (IAC)) and *Durrani* the bank letters were either deficient or wholly absent. Now, it would seem that the goal-posts have been moved yet again: the Court here considered whether it was *impossible* for the banks to provide the letter and found (despite the letter from the bank explaining they could not issue the requisite letter) that it was not. Richard Singer of Chambers represented the Appellant in *Junied*, prior to his appointment as a salaried Judge of the FTT (IAC).

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Clarification on *"an offence that has caused serious harm"* in section 117D(2)(c)(ii) of the NIA Act 2002

***R (Mahmood and Ors) v Upper Tribunal and Ors* [2020] EWCA Civ 717**

- The Court of Appeal provided important clarification on the definition of *"an offence that has caused serious harm"* in Part 5 of the Nationality, Immigration and Asylum Act 2020. The determination of this issue was a *"logically prior to question"* to an evaluation of a foreign offender's private and family life article 8 ECHR rights.
- The Court ruled that the Secretary of State must establish with evidence that the offence for which the foreign national had been convicted had caused serious harm.

Background

The Court considered linked appeals by three foreign nationals who had been convicted of criminal offences in the UK.

Mr Mahmood had sent a picture of his penis to a girl aged 14/15 and had caused her to take an intimate picture of herself and send it to him. He was sentenced to a 3-year non-custodial sentence. He was later convicted of failing to comply with the Notice requirement and a breach of the SHPO and sentenced to a total of 12 months' imprisonment. Mr Estnerie was convicted for possession of a false identity document with intent and five offences of seeking leave to remain by deception. He was sentenced to a total of 12 months' imprisonment in aggregate (made up of consecutive sentences). Mr Kadir was convicted of assault occasioning actual bodily harm involving the use of a weapon and was sentenced to 8 months' imprisonment.

Mr Mahmood and Mr Kadir's offending were found to have caused serious harm within the meaning of s.117D(2) whilst Mr Estnerie's was not.

Decision

(1) The Court noted that the three categories of offender under s.117D(2) overlap: "*plainly an offender who has received a sentence of more than 12 months may have done so because he committed an offence which caused serious harm. Equally, an offender who persistently offends is likely to receive a longer sentence (and more than 12 months) because of a poor antecedent history*" [35]. The serious harm category will only apply in instances where the overall sentence is under 12 months.

(2) The Court rejected the definition of serious harm in s.224 of the Criminal Justice Act 2003 (death or serious personal injury, whether physical or psychological). In a broad interpretation it endorsed the view that harm to a specific individual was not required: "*We see no good reason for interpreting the provision in this way. The criminal law is designed to prevent harm that may include psychological, emotional or economic harm. Nor is there good reason to suppose a statutory intent to limit the harm to an individual.*" [41] The harm

could be caused to society at large, but the offence does have to be proven to have *caused* such harm.

(3) It was for the Secretary of State to provide evidence: "*In cases where the Secretary of State relies on the causing of serious harm alone for treating an offender as a 'foreign criminal', we would expect the sentencing remarks (if available) and the victim statement (if it exists) to form part of the Secretary of State's evidence before the tribunal.*"[51]

All three appeals were dismissed: Mr Mahmood and Mr Kadir were found to have committed offences that had caused serious harm. Mr Estnerie, who was represented by Alexis Slatter of Chambers, was found not to have committed an offence that caused serious harm. His appeal was nevertheless dismissed as he was deemed to have fallen under the 'persistent offender' provision.

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