IMMIGRATION AND PUBLIC LAW
GOLDSMITH CHAMBERS

Insurmountable obstacles: An insurmountable test?

And other recent developments

Amarjit Seehra
Barrister, Goldsmith Chambers

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Introduction

- Overview of Article 8 family caselaw, some recent and some well established
- Practical effects of these developments
- Amarjit Seehra will be focusing on EX.1.(b) and the insurmountable obstacles test to family life continuing outside the UK and also briefly considering some case law on section 117B(6) of the Nationality Immigration and Asylum Act 2002 and domestic violence victims
- Jamil Dhanji will be considering wider arguments outside of the rules under Article 8 ECHR and how to tip the balance in your favour

Section GEN: General

Purpose

GEN.1.1. This route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British Citizen, is settled in the UK, is in the UK with limited leave as a refugee or person granted humanitarian protection (and the applicant cannot seek leave to enter or remain in the UK as their family member under Part 11 of these rules), is in the UK with limited leave under Appendix EU, or is in the UK with limited leave as a worker or business person by virtue of either Appendix ECAA Extension of Stay or under the provisions of the relevant 1973 Immigration Rules (or Decision 1/80) that underpinned the European Community Association Agreement (ECAA) with Turkey prior to 1 January 2021.

It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others (and in doing so also reflects the relevant public interest considerations as set out in Part 5A of the Nationality, Immigration and Asylum Act 2002).

It also takes into account the need to safeguard and promote the welfare of children in the UK , in line with the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009.

GEN 1.2 Definition of partner

GEN.1.2. For the purposes of this Appendix "partner" means-

(i) the applicant's spouse;

(ii) the applicant's civil partner;

(iii) the applicant's fiancé(e) or proposed civil partner; or

(iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless a different meaning of partner applies elsewhere in this Appendix.

Requirements for limited leave as a partner

Requirements for limited leave to remain under R-LTRP.1.1. include that:

- Both the Applicant and partner must be in the UK
- Must have made a valid application for limited or indefinite leave to remain as a partner
- Must not fall foul under the suitability requirements (Section S-LTR: Suitability-leave to remain)

AND EITHER

- Meets all of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner

OR

- Meets the requirements of paragraphs E-LTRP.1.2-1.12 and E-LTRP.2.1-2.2, and paragraph EX.1. applies

Immigration status requirements

E-LTRP.2.1. The applicant must not be in the UK-

- (a) as a visitor; or
- (b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings

E-LTRP.2.2. The applicant must not be in the UK –

- (a) on immigration bail, unless:
- (i) the Secretary of State is satisfied that the applicant arrived in the UK more than 6 months prior to the date of application; and
- (ii) paragraph EX.1. applies; or
- (b) in breach of immigration laws (except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded), unless paragraph EX.1. applies.

Section EX: Exceptions to certain eligibility requirements

EX.1 This paragraph applies if:

- (a)
- (i) the applicant has a genuine and subsisting parental relationship with a child who-
- (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
- (bb) is in the UK;
- (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
- (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or

- (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave, or humanitarian protection, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), **and there are insurmountable obstacles to family life with that partner continuing outside the UK.**
- **EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.**

Lal v SSHD [2019] EWCA Civ 1925 - the test (1)

Paragraph 36

- In applying this test, a logical approach is first of all to decide whether the alleged obstacle to continuing family life outside the UK amounts to a **very significant difficulty**
- If it meets this threshold requirement, the next question is whether the difficulty is one which would make it **impossible** for the applicant and their partner to continue family life together outside the UK.
- If not, the decision-maker needs finally to consider whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail **very serious hardship** for the applicant or their partner (or both)

Lal v SSHD [2019] EWCA Civ 1925 – subjective or objective test? (2)

Paragraph 37

- To apply the test in what Lord Reed in the *Agyarko* case at para 43 called "a practical and realistic sense", it is relevant and necessary in addressing these questions to have **regard to the particular characteristics and circumstances** of the individual(s) concerned.

- We do not accept, however, that an obstacle to the applicant's partner moving to India is shown to be insurmountable – in either of the ways contemplated by paragraph EX.2. – just by establishing that the individual concerned would perceive the difficulty as insurmountable and would in fact be deterred by it from relocating to India. **The test cannot, in our view, reasonably be understood as subjective in that sense. To treat it as such would substantially dilute the intended stringency of the test and give an unfair and perverse advantage to an applicant whose partner is less resolute or committed to their relationship over one whose partner is ready to endure greater hardship to enable them to stay together**.

Lal v SSHD [2019] EWCA Civ 1925 – detailed examination required (3)

- 38. On the basis of the evidence of Mr Wilmshurst and his children, we accordingly consider that the FTT judge was entitled to find, given the general knowledge that India has a hot climate, that Mr Wilmshurst's sensitivity to hot weather would represent a very significant difficulty if he were to move to India but not that it would make it impossible for him to move there. To decide whether the obstacle would entail very serious hardship for Mr Wilmshurst and was for that reason "insurmountable", **it was necessary in our view to examine the facts in more detail and to consider questions…**
- **The ultimate question is whether, in all the circumstances, the climate would entail not merely a significant degree of hardship or inconvenience for Mr Wilmshurst but "very serious hardship".**

- **Level of detail required?**
  - Where could the couple reasonably live in India?
  - What were the average temperatures in that part of India during different periods?
  - What steps could be taken to mitigate the heat e.g. air conditioning?
  - How adequate would such steps be to meet the difficulty?
  - Were there cooler places where they could live for all or part of the year?

Lal v SSHD [2019] EWCA Civ 1925 – The Upper Tribunal decision (4)

Paragraphs 39 – 43

- UTJ entitled to find an error in the FTT's decision
- No evidence on important matters (see the questions posed in [38])
- Criticisms were made of the UTJ decision [41]

> …Equally, if the judge was intending to suggest that very serious hardship could not be established without medical evidence of a condition that would make exposure to hot weather medically harmful, we cannot accept this. The question is one of fact and there is nothing wrong in principle with basing a finding about a person's sensitivity to heat on evidence given by the person concerned and members of their family, as the FTT judge did in this case, if such evidence is regarded as sufficiently compelling

Lal v SSHD [2019] EWCA Civ 1925 – The Upper Tribunal fell into error (5)

The Court found that the Upper Tribunal failed to consider the **cumulative impact** of all the factors

45. It seems to us that, at this stage of his analysis, Upper Tribunal judge went wrong in his approach by considering the matters relied on separately from each other without also assessing their cumulative impact. What the judge ought to have done was to identify all the significant difficulties which Mr Wilmshurst would face if required to move to India and to ask whether, **taken together,** they would entail very serious hardship for him.

46. Had the judge approached the issue in that way and considered in combination Mr Wilmshurst's age, his proven sensitivity to heat, the fact that he has lived all his life in the UK, and his ties to friends and family including his four children and six grandchildren in the UK, we do not think that the answer to the question whether moving to India would entail very serious hardship for him is a foregone conclusion.

Insurmountable obstacles test distinct from proportionality assessment

***AA (AP)* [2019] CSOH 56**

- [3] **There was equally little dispute in relation to the applicable tests for insurmountable obstacles in terms of the Immigration Rules as distinct from a proportionality assessment for the purposes of article 8 ECHR**. The differences between the two tests were explained by Lord Reed in *R (Agyarko)* v *SSHD*[2017] 1 WLR 823 at paragraph 45 as follows:

"By virtue of paragraph EX.1(b), 'insurmountable obstacles' are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. **Even in the case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in 'exceptional circumstances', in accordance with the Instructions: that is to say, in 'circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate'**

- Immigration control considerations irrelevant to the test [15]

Further examples (1) – *AS (AP)* [2019] CSOH 43

Insurmountable obstacles assessment distinct

- [19]…In relation to an insurmountable obstacles assessment, all factors require to be taken into account, but it is not a proportionality assessment of the type envisaged by consideration of article 8 outside the rules.

Relevant matters

- [20]…There was no dispute that the report would be admissible and would require to be considered by an Immigration Judge. On the face of it Mr Puri is a well-qualified British educated advocate qualified and practising in his own jurisdiction, namely India….Importantly, on the issue of violence against women there is considerable consistency between Mr Puri's report and the Home Office's own Country Guidance on violence against women in India. It was not suggested that the examples given in Mr Puri's report of women, including western women, being assaulted and raped were anything other than accurate. The report runs to some 33 pages and gives considerable detail on the issues of visas, financial obstacles, absence of comprehensive medical care provided by the state and lack of eligibility of foreigners for such services as are available, in addition to that issue of gender violence. It is not for me to decide whether this new material will in fact ultimately persuade an Immigration Judge that the petitioner and his wife would face very serious difficulties if they tried to continue their family life in India. **However, it is on the face of it relevant material that goes to the heart of whether a British citizen who has lived here all of her life, does not normally travel and has certain medical conditions would be able to cope with the considerable challenges of attempting to settle in a country where her legal ability to do so is no higher than having a right to apply for a visa, the threshold test for which is "very high" (Puri report page 32) and where significant linguistic and cultural barriers would be faced. Those are matters which are squarely raised by the new material such that an adjudicator could interpret it as supporting an insurmountable obstacles claim…**

Further examples (2) – *Mendirez* [2018] CSIH 65

- **Cultural / religious barriers**

[29]…The appellant's wife was born in Scotland and has lived in Scotland all her life; she has family and friends here. It seems likely that the appellant will have developed a private life in the UK since his arrival in 2007. The relationship between the appellant and the lady who married him in 2014 has subsisted since 2009. The FTT judge makes no findings in fact about that relationship, nor about any private life in Scotland. There are no findings in fact about the effect that moving back to Turkey (with or without his wife) might have on the appellant's private life in Scotland or his relationship with his wife. There are no findings in fact relating to how easy or difficult it would be for the appellant (with or without his wife) to find accommodation and employment in Turkey nor how easy it would be for them to be absorbed into Turkish society, standing the appellant's status as a non-practising Muslim and his wife's status as a non-Muslim who has objections to wearing the hijab.

- **Anxious scrutiny**

The Court also observed a finding from *MN (Somalia)* [2014] SC (UKSC) when considering the expression "anxious scrutiny":

"32…It has by usage acquired special significance as underlining the very special human context in which such cases are brought, **and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account**."

Distinction between mere assertion and evidence

- See ***R (Kaur)*** [2018] EWCA Civ 1423 *and* ***R (Mudibo)*** [2017] EWCA Civ 1949
- Importance of detailed and supporting evidence highlighted
- Clear distinction between evidence and mere assertion
- Paragraph EX.1(b) stringent test
- Level of detail required:

> 54. Mrs Kaur's application asserted that there were insurmountable obstacles to family life continuing outside the UK because Mr Singh had established a life in this country over many years, had acquired British citizenship, had worked and contributed to society, and could not reasonably be expected to return to India. It also asserted that Mrs Kaur had integrated herself into British society and did not have any means of support in India. The evidence in support of those assertions was however limited to features of the lives of Mrs Kaur and Mr Singh in the UK, and it seems to me that no real attempt was made to provide a foundation for the assertions that there were insurmountable obstacles to their family life in India. **Nothing was put forward in support of the assertion that Mrs Kaur would have no means of support in India. That was in my view a significant omission. In the circumstances of this case, Mrs Kaur could and should have explained where she had lived and how she had supported herself and her children in India after Mr Singh came to this country, and why her situation would be different if she now had to return. Nor was any attempt made to explain what the financial position of the couple would be if they returned to India; again a significant omission, when on the face of it Mr Singh (even if it were correct that he could not obtain work) would have a pension from his employment in this country…**

Home office policy guidance on EX.1

- *Family Policy, Family life (as a partner or parent), private life and exceptional circumstances Version 13.0 28 January 2021*
- Not a standalone provision
- Non-exhaustive list of factors:
  - Whether parties can lawfully enter and remain in the proposed country
  - Where the Sponsor has status through the refugee route and the partner is of the same nationality
  - National laws, attitudes, country situation
  - Serious cultural barriers to relocation
  - Mental / physical disability, serious illness requiring ongoing treatment, lack of adequate healthcare
  - Absence of governance or security in the proposed country
  - Unusual or exceptional dependency between extended family members
  - Being separated from a child from a former family relationship could be relevant

Other factors to consider

- Consider issues arising as a result of the pandemic e.g. FCO advice for Sri Lanka states that entry for non-nationals is prohibited
- Consider obtaining evidence from the FCO and other health websites (e.g. travel health pro)
- Economic impact of continuing family life outside the UK? Are they able to support and house themselves?
- Is there background evidence that can show the proposed country is in a state of deep economic recession?
- Would there be an impact on the parties' ability to earn a living for example as a result of any medical issues?
- Are there medical / general health issues? Ensure that in so far as is possible, any information put forward is comprehensively evidenced e.g. medical reports, GP records, counselling records, witness evidence
- Is there an impact on other family members in the UK e.g. because the Applicant / partner is the main carer?
- Are there other issues of dependency / relevant social or other ties?

Note

- If the rules are met then refusal of leave is disproportionate and incompatible with Article 8 – *TZ (Pakistan) and PG (India)* [2018] EWCA Civ 1109

Not reasonable to expect the child to leave the UK – *Runa* [2020] EWCA Civ 514 (1)

- Question is the same under EX.1(a)(ii) and section 117B(6) NIAA 2002

- ***Runa*** **[2020] EWCA Civ 514**

Self contained provision

32…It seems to me both to be right in principle and also to be consistent with the analysis of section 117B(6) given by Elias LJ in *MA (Pakistan)*, at para. 17, where he said that that subsection "must be read as a **self-contained provision** in the sense that Parliament has stipulated that where the conditions specified in the subsection are satisfied, the public interest will not justify removal."

Not reasonable to expect the child to leave the UK – *Runa* [2020] EWCA Civ 514 (2)

Focus on child

33. This is important because a conventional Article 8(2) inquiry can take into account, as part of the overall proportionality exercise, other public interest considerations, including the conduct of the parent or parents. Under section 117B(6) there is no room for such an inquiry to take account of the conduct of the parents: that is the effect of the decision of the Supreme Court in *KO (Nigeria)*, which overruled the earlier decision of this Court in *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 617; [2016] Imm AR 954 and in that respect approved what had been said by Elias LJ in *MA (Pakistan)* (as that case was known before it became *KO (Nigeria)* when it went to the Supreme Court), at para. 36. **Under section 117B(6) the only question is focussed on the child: would it be reasonable to expect the child to leave the UK? If the answer to that is No, there is no need to go on to consider Article 8(2) more generally. However, as a matter of principle, and as Mr Anderson rightly submitted, if the answer is Yes, there will still be a residual scope for Article 8(2) to be considered.**

36. I would therefore reject Mr Biggs's primary submission as to the interpretation of section 117B(6). I would, however, accept his alternative submission, 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. I would emphasise again, as the Supreme Court did in *KO (Nigeria)* and this Court did in *MA (Pakistan)* and *AB (Jamaica)* that, once all the relevant facts have been found, the only question which arises under section 117(6)(b) is whether or not it would be reasonable to expect the *child* to leave the UK. **The focus has to be on the child.**

Not reasonable to expect the child to leave the UK – *Runa* [2020] EWCA Civ 514 (3)

Impermissible approach

41. In those passages the DUTJ appeared to contemplate the possibility of two alternatives arising on the facts. The first was that the entire family unit would go overseas. The other scenario, however, was that the children would remain in the UK only with their British citizen father and that the Appellant would leave the UK. If those facts were to arise, there would inevitably be a disruption of the family unit. This would be contrary to the best interests of the children. The DUTJ appeared to ask the question whether it would be reasonable for the children to remain with their British citizen father in the UK. This is why he asked such questions as whether he could cope with bringing them up, with the support of family here.

42. In my judgement, that was fundamentally the wrong approach under section 117B(6), which poses the question whether it would be reasonable to expect the children to leave the UK. That is not, as Mr Biggs submitted, a hypothetical question but it is a normative question, not merely an exercise in prediction: see *AB (Jamaica)*, at paras. 73-75 (Singh LJ), approving what was said by UTJ Plimmer in *SR (Pakistan) v Secretary of State for the Home Department* [2018] UKUT 334 (IAC), at para. 51; and see also *AB (Jamaica)*, at para. 116 (Underhill LJ).

43. Furthermore, I would accept Mr Biggs's submission that the UT wrongly focussed on the question whether there would be "insurmountable obstacles" to the maintenance of the family unit outside the UK: see in particular para. 27 of the judgment. This was contrary to what is required even in an ordinary Article 8(2) case as made clear by this Court in *GM*, drawing on long established Strasbourg caselaw. That would be all the more the wrong approach in a case arising under section 117B(6).

Not reasonable to expect the child to leave the UK – *Runa* [2020] EWCA Civ 514 (4)

Single question always had to be asked

30. In *AB (Jamaica)* the error into which the Secretary of State had fallen was not the one which is said to arise in the present appeal. In that case the Secretary of State submitted that, in circumstances where it was not expected that a child would in fact leave the UK, there was no need to ask the question posed by section 117B(6). This Court rejected that submission and **held that the question is a single question which always has to be asked but that, in such circumstances, the answer would be No.**

Children – other relevant principles / arguments (1)

***SD (British Citizen children – entry clearance) Sri Lanka* [2020] UKUT 00043**

Headline points

- Children dual British Citizen / Sri Lankan nationals
- No equivalent to section 117B(6) relating to entry clearance Applicants
- *SD* in a worse position applying for entry clearance
- Rights and benefits flowing from the children's other nationality to be considered
- British Citizenship relevant but not necessarily a powerful factor

[104] Whilst the effect of the refusal decision on the appellant's children is to deprive them of the opportunity to enjoy the rights and benefits of British citizenship that flow from residence in the UK, we take into account that such deprivation is time-bound, since once they turn 18 they will be entitled to move to and reside in the UK as they choose.

Children – other relevant principles / arguments (2)

***UT (Sri Lanka)* [2019] EWCA Civ 1095**

29…I do not think there is any substance in the DUTJ's criticism. The FTTJ referred to the difficulties which would be involved in moving the family to Sri Lanka, namely that the children have lived all their lives here, were settled in schools in this country, were British citizens and were at an age where it was questionable whether they could adjust to life in Sri Lanka at all. She also referred to the length of time that the parents had spent in the United Kingdom. Finally, she reminded herself entirely correctly that A's use of deception to re-enter the UK was a problem which was not of their making. It is clear to a reader of the decision that the FTTJ had concluded that it was not reasonable to expect Mrs A and the children to give up their life in the UK and join their father in Sri Lanka.

Consequences needed to be assessed in the real world

33. The second point was that the judge had wrongly treated this as a separation case, when in truth it was not such a case because Mrs A and the two children were free to leave the UK and return to Sri Lanka. It was a matter of choice that they decided to remain here. I do not accept this submission. **From the point of view of the two children, whose best interests lay in continuing their education in this country and for whom the difficulties of adjusting to life in Sri Lanka were sufficient to make it unreasonable for them to follow their father there, this was indeed a separation case.** It was no less so for their mother who was faced with the dilemma of staying with the children in the UK or uprooting the children and joining their father in Sri Lanka. **The consequences of the decision appealed against need to be assessed in the real world, and not stripped of their context.** The FTTJ did not commit any error of law by approaching the issues in this way

Children – other relevant principles / arguments (3)

***UT (Sri Lanka)* [2019] EWCA Civ 1095 continued…**

Errors of law

19…**Secondly, although "error of law" is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one.** Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in *AH (Sudan) v Secretary of State for the Home Department* at [30]: "Appellate courts **should not rush to find such misdirections** simply because they might have reached a different conclusion on the facts or expressed themselves differently."

26…If an error of law based on inadequate reasoning is to be identified, however, one must venture beyond general, literary criticism of this kind. In *R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19, Lord Hope said (at paragraph 25): "It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. **The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it."**

Victim of domestic abuse, *MY (refusal of human rights claim) Pakistan* [2020] UKUT 00089 (1)

- Settlement application under Section DVILR of Appendix FM and a human rights claim in the covering letter

- UT considered
  - *AT* [2017] EWHC 2589 - Kerr J held that some domestic violence claims are also human rights claims and he did not consider it fair or lawful that domestic violence victims should be required to make two separate applications
  - *Shrestha* [2018] EWCA Civ 2810
  - *Balajigari* [2019] EWCA Civ 673 - the Court could see no reason in principle why a human rights claim could not be raised in the covering letter or by ticking a box on the application form. The refusal of the application would constitute a refusal of the claim and could be appealed

Victim of domestic abuse, *MY (refusal of human rights claim) Pakistan* [2020] UKUT 00089 (2)

Human rights claim not considered

56. Section 82(1)(b) requires there to have been a decision on the claim. That, in turn, at least strongly suggests there must have been engagement with the claim. The outcome of that engagement must have been to "refuse" the claim. In the light of paragraph 55 above, a decision to refuse a human rights claim requires the respondent to reach a decision that the person concerned does not have a case for remaining in the United Kingdom by reference to his or her, or anyone else's, human rights.

57.The use of the word "refuse" indicates that the legislature did not intend to cover the case where the respondent's position is that she will not consider the claim. This point was forcefully made by First-tier Tribunal Judge Kelly.

Victim of domestic abuse, *MY (refusal of human rights claim) Pakistan* [2020] UKUT 00089 (3)

Remedy judicial review not appeal

59. Even if the respondent's reason for not considering the human rights claim was legally erroneous, it would still be the case that the human rights claim had not been considered by her. Any such error would be judicially reviewable, on public law grounds...

66…If she maintains her current stance of engaging with human rights claims only if made by way of particular forms and in particular circumstances, the respondent faces the prospect of the First-tier Tribunal becoming the primary decision-maker in what may be a significant number of human rights cases…

68…We are, accordingly, satisfied that the respondent is entitled, as a general matter and subject to her overriding public law duties, to adopt the position whereby, even if a communication is given to her which satisfies the definition of a "human rights claim" in section 113, she is not for that reason alone necessarily obliged to engage substantively with the claim in order to decide whether it should be granted or refused. **The respondent can, therefore, as a general matter lawfully respond to a human rights claim by declining to consider it**

Victim of domestic abuse, *MY (refusal of human rights claim) Pakistan* [2020] UKUT 00089 (4)

83. **For the reasons we have given, the mere fact that leave to remain is refused, in circumstances where a person has submitted what satisfies the statutory definition of a human rights claim, is not sufficient to create a right of appeal**. As a general matter, the respondent is entitled to operate a system whereby she can withhold substantive consideration of a human rights claim that has not been made in a particular manner. There is nothing inherently unlawful in such a system. In particular, one can understand the respondent's need to maintain orderly decision making by requiring separate applications in the case of certain human rights claims.

84. In any event, any challenge to this system (or to any specific refusal to engage with a human rights claim) has to be by judicial review. There is no justification for the present practice in the First-tier Tribunal, which involves an impermissible reading of section 82(1)(b)…

Not the last word

The Court of Appeal has granted *MY* permission to appeal

"*well arguable that a human rights claim is refused both if it is considered and rejected on its merits and if the Secretary of State refuses to consider it at all*" (Garden Court North Chambers website). The appeal is floating to be heard in May 2021.

Requirements of Appendix FM not met (1)

- GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

- (2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, **a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences** for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.

Requirements of Appendix FM not met (2)

The relevant question

Lal

68. A further error of law in the reasoning of the Upper Tribunal (quoted at paragraph 48 above) is that the judge applied the wrong test by asking whether the couple would be able to live in India "without serious hardship". As discussed earlier, that is a relevant criterion in deciding whether there are "insurmountable obstacles" to continuing family life outside the UK. In considering, **however, whether there are "exceptional circumstances", the applicable test is whether refusing leave to remain would result in "unjustifiably harsh consequences" for the applicant or their partner, such that refusal would not be proportionate**: see the passage from the Secretary of State's instructions to officials quoted at paragraph 11 above and the *Agyarko* case at paras 54-60. **The essential difference (reflected in the word "unjustifiably") is that the latter test requires the tribunal not just to assess the degree of hardship which the applicant or their partner would suffer, but to balance the impact of refusing leave to remain on their family life against the strength of the public interest in such refusal in all the circumstances of the particular case.**

Also consider factors arising under the pandemic

How does the pandemic impact upon cross border travel and arguments on proportionality in the context of *Chikwamba* [2008] UKHL 40?

ARTICLE 8 ECHR "OUTSIDE THE RULES": Tipping the balance in your favour

Jamil Dhanji
Barrister, Goldsmith Chambers

18th March 2021

IMMIGRATION AND PUBLIC LAW
GOLDSMITH CHAMBERS

Objective

- Review recent (and some historic) caselaw in the context of the issues that frequently arise when article 8 ECHR rights are considered "outside the Immigration Rules"
- Help you update/restock your "toolkit" for representing in cases raising article 8 issues

The existence of family life

Uddin v The Secretary of State for the Home Department [2020] EWCA Civ 338 at para 40:

"Accordingly, the following principles can be described from the authorities:

i. The test for the establishment of Article 8 family life in the Kugathas sense is one of effective, real or committed support. There is no requirement to prove exceptional dependency.

ii. The test for family life within the foster care context is no different to that of birth families: the court or tribunal looks to the substance of the relationship and no significant determinative weight is to be given to the formal commerciality of a foster arrangement. It is simply a factual question to be considered, if relevant, alongside all others.

iii. The continued existence of family life after the attainment of majority is also a relevant question of fact. No negative inference should be drawn from the mere fact of the attainment of majority, while continuing cohabitation after adulthood will be suggestive of ongoing real, effective or committed support which is the hallmark of a family life."

Interference in family life cases with a British partner

Ali & Bibi v SSHD [2015] UKSC 68 at para 52 (per Lady Hale)

"52. The interference with the article 8 rights of the British partners of the people who face these obstacles is substantial. They are faced with indefinite separation, either from their chosen partner in life, or from their own country, their family, friends and employment here. It is worth recalling that the interference in Aguilar Quila, which was termed "colossal", was merely temporary, whereas the interference here may be permanent."

Fair balance

GM (Sri Lanka) v The Secretary of State for the Home Department (Rev 1) [2019] EWCA Civ 1630 at para 29

"…the test for an assessment outside the IR is whether a "fair balance" is struck between competing public and private interests. This is a proportionality test: Agyarko (ibid) paragraphs [41] and [60]; see also Ali paragraphs [32], [47] - [49]. In order to ensure that references in the IR and in policy to a case having to be "exceptional" before leave to remain can be granted, are consistent with Article 8, they must be construed as not imposing any incremental requirement over and above that arising out of the application of an Article 8 proportionality test, for instance that there be "some highly unusual" or "unique" factor or feature: Agyarko (ibid) paragraphs [56] and [60].

Balance sheet approach

Hesham Ali (Iraq) (Appellant) v Secretary of State for the Home Department (Respondent) [2016] UKSC 60 (per Lord Thomas) at para 83:

"One way of structuring such a judgment would be to follow what has become known as the "balance sheet" approach. After the judge has found the facts, the judge would set out each of the "pros" and "cons" in what has been described as a "balance sheet" and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders."

Setting the scales

Kaur (children's best interests / public interest interface) [2017] UKUT 00014 (IAC) at point 6 of the headnote:

"(6) In every balancing exercise, the scales must be properly prepared by the Judge, followed by all necessary findings and conclusions, buttressed by adequate reasoning."

S.117B(1) NIAA 2002: Always in the negative side of the balance sheet?

"117B Article 8: public interest considerations applicable in all cases

(1)The maintenance of effective immigration controls is in the public interest…"

Ss.117B(2) & (3) NIAA 2002: Financial independence and ability to speak English are neutral factors

Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58) at para 57:

"The further submission on her behalf is and has been that the effect of section 117B(2) and (3) is to cast her ability to speak English and her financial independence as factors which positively weigh in her favour in the inquiry under article 8. But the further submission is based on a misreading of the two subsections and was rightly rejected by Judge Blundell, upheld by the Court of Appeal, just as an analogous submission was rejected in para 18 of the decision in the AM case, cited at para 38 above. **The subsections do not say that it is in the public interest that those who are able to speak English and are financially independent should remain in the UK. They say only that it is in the public interest that those who seek to remain in the UK should speak English and be financially independent; and the effect of the subsections is that, if claimants under article 8 do not speak English and/or are not financially independent, there is, for the two reasons given in almost identical terms in the subsections, a public interest which may help to justify the interference with their right to respect for their private or family life in the UK**. In seeking to portray the strength of their private or family life by reference to all their circumstances, claimants may wish to highlight their ability to speak English and/or their financial independence; but the legitimate deployment of such factors in that context is to be contrasted with the erroneous further submission that the subsections propel a conclusion that, where those factors exist, there is a public interest in favour of the claims."

Section 117B(4): Only applies to unlawful stay (1)

"117B Article 8: public interest considerations applicable in all cases

(4)Little weight should be given to—

(a)a private life, or

(b)a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully."

Section 117B(4): Only applies to unlawful stay (2)

GM (Sri Lanka) at para 36:

"…In Rhuppiah the Court clarified that the "little weight" provision in section 117B(4) applied only to private life, or a relationship formed with a qualifying partner, established when the person was in the United Kingdom unlawfully. It did not therefore apply when family life was created during a precarious residence ie. a temporary, non-settled, but lawful, residence, which is the case in this appeal."

Section 117B(5): Only applies to private life (1)

“117BArticle 8: public interest considerations applicable in all cases

[…]

(5)Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.”

Section 117B(5): Only applies to private life (2)

GM (Sri Lanka) at para 37:

"The Court [in Rhuppiah] also clarified that section 117B(5) applied only to private life and not family life:

"37. It is obvious that Parliament has imported the word "precarious" in section 117B(5) from the jurisprudence of the ECtHR to which I have referred. But in the subsection it has applied the word to circumstances different from those to which the ECtHR has applied it. In particular Parliament has deliberately applied the subsection to consideration only of an applicant's private life, rather than also of his family life which has been the predominant focus in the ECtHR of the consideration identified in the Mitchell case. The different focus of the subsection has required Parliament to adjust the formulation adopted in the ECtHR. Instead of inquiry into whether the persistence of family life was precarious, the inquiry mandated by the subsection is whether the applicant's immigration status was precarious. And, because the focus js upon the applicant personally and because, perhaps unlike other family members, he or she should on any view be aware of the effect of his or her own immigration status, the subsection does not repeat the explicit need for awareness of its effect.""

The relevance of knowledge of precariousness to family life

GM (Sri Lanka) at paras 39-40:

"A further argument advanced…concerned the subjective knowledge of the family as to the persistence of their family life in the United Kingdom. In *Ali* Lord Reed described this as an "*important consideration*" (ibid paragraph [28]). This is a point arising out of the Strasbourg case law and first principles. In *Rhuppiah* (paragraph [28]) the Supreme Court articulated the point as follows: "*…the question became whether family life was created at a time when the parties were aware that the immigration status of one of them was such that the persistence of family life within the host state would from the outset be precarious*". Mr Jafferji points out that this is a different test from the normal precariousness test as applied to an applicant's own, personal, private life interest (as set out in section 117B(5)). This is because the awareness referred to by the Supreme Court concerns the position of all the relevant parties, and in a family life case would include the partner of an Appellant or applicant and any children capable of being relevant on the facts to such an awareness.

This must be right and flows directly both from the logic of collective family life cases as distinct from individualised, private life cases, and is a distinction drawn in the case law. Indeed, in *Rhuppiah*, at paragraph [37], Lord Wilson referred to the "*explicit need for awareness*" when distinguishing between a precariousness analysis of an individual applicant (under section117B(5)) and the analysis of a family. The same point was made in *Ali* paragraphs [28] and [33] citing the judgment of the Strasbourg Court in *Jeunesse* (ibid) with approval."

The relevance of knowledge of precariousness where no leave held

Birch (Precariousness and mistake; new matters) [2020] UKUT 00086 (IAC) at para 16:

"As we have seen, s 117B(5) introduces precariousness as a statutory concept applicable in cases where a person has leave (so contrasted with cases where the person has no leave, governed by s 117(4)): the meaning of precariousness in this context is settled by Rhuppiah. But the introduction of the statutory notion in the case of a person who has leave does not of itself remove the applicability of any non-statutory notion, given the same name, in the case of those who do not have leave. The sentiment in paragraph 108 of Jeunesse does not appear to be limited to those who have some sort of permission to be in the country in question; and the notion of mistake embraced in paragraph [53] of Agyarko is precisely a mistake about whether there is permission or not. In our judgment it would be quite wrong to confine that notion to cases where a person in fact has some leave and refuse to apply it to a person who in fact has no leave."

Tribunal not *required* to attach little weight

Rhuppiah at para 49:

"…But, as both parties agree, the effect of section 117A(2)(a) is clear. It recognises that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under article 8 inconsistently with the article itself. Inbuilt into the concept of "little weight" itself is a small degree of flexibility; but it is in particular section 117A(2)(a) which provides the limited degree of flexibility recognised to be necessary in para 36 above. Although this court today defines a precarious immigration status for the purpose of section 117B(5) with a width from which most applicants who rely on their private life under article 8 will be unable to escape, section 117A(2)(a) necessarily enables their applications occasionally to succeed. It is impossible to improve on how, in inevitably general terms, Sales LJ in his judgment described the effect of section 117A(2)(a) as follows:

"53. … Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in [the specified] circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question …"

The concept “little weight” involves a spectrum

Kaur at point 5 of the headnote:

“(5) The "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.”

The "Chikwamba" line of caselaw (1)

Chikwamba v SSHD [2008] UKHL 40 at para 44

"…Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad…"

The "Chikwamba" line of caselaw (2)

Hayat v Secretary of State for the Home Department [2012] EWCA Civ 1054 at para 30

"30 In my judgment, the effect of these decisions can be summarised as follows:

a) Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of the claim on the procedural ground that the policy requires that the applicant should have made the application from his home state may (but not necessarily will) constitute a disruption of family or private life sufficient to engage Article 8, particularly where children are adversely affected.

b) Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so.

c) Whether it is sensible to enforce that policy will necessarily be fact sensitive; Lord Brown identified certain potentially relevant factors in Chikwamba. They will include the prospective length and degree of disruption of family life and whether other members of the family are settled in the UK.

d) Where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant has no lawful entry clearance.

e) It will be a very rare case where it is appropriate for the Court of Appeal, having concluded that a lower tribunal has disproportionately interfered with Article 8 rights in enforcing the policy, to make the substantive Article 8 decision for itself. Chikwamba was such an exceptional case. Logically the court would have to be satisfied that there is only one proper answer to the Article 8 question before substituting its own finding on this factual question."

The "Chikwamba" line of caselaw (3)

Chen, R (on the application of) v Secretary of State for the Home Department) ((Appendix FM – Chikwamba – temporary separation – proportionality) (IJR) [2015] UKUT 189 (IAC) in headnote:

"(i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40.

(ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a case involving children (per Burnett J, as he then was, in R (Kotecha and Das v SSHD [2011] EWHC 2070 (Admin)).

The “Chikwamba” line of caselaw (4)

R (on the application of Agyarko) (Appellant) v Secretary of State for the Home Department [2017] UKSC 11at para 51:

“51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in Chikwamba v Secretary of State for the Home Department.”

The “Chikwamba” line of caselaw (5)

Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC) at point 1 of headnote:

“(1) An appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) including section 117B(1), which stipulates that “the maintenance of effective immigration controls is in the public interest”. Reliance on Chikwamba v SSHD [2008] UKHL 40 does not obviate the need to do this.”

The "Chikwamba" line of caselaw (6)

- Consider the relevance of current Home Office policy guidance
- Policy published at https://www.gov.uk/guidance/coronavirus-covid-19-advice-for-uk-visa-applicants-and-temporary-uk-residents, states:

"Coronavirus (COVID-19): advice for UK visa applicants and temporary UK residents

This is advice for visa customers and applicants in the UK, visa customers outside of the UK and British nationals overseas who need to apply for a passport affected by travel restrictions associated with coronavirus.

[…]

If you intend to stay in the UK

If you decide to stay in the UK, you should apply for the necessary permission to stay to regularise your stay. You'll be able to submit an application form from within the UK, whereas you would usually need to apply for a visa from your home country…"

Delay in enforcing immigration control (1)

EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41; [2009] AC 1159 at para 15:

"Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in *R (Ajoh) v Secretary of State for the Home Department* [2007] EWCA Civ 655, para 11, it was noted that "It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status". This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: "whether the spouse knew about the offence at the time when he or she entered into a family relationship" see *Boultif v Switzerland* (2001) 33 EHRR 50, para 48; *Mokrani v France* (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal."

Delay in enforcing immigration control (2)

Agyarko at para 52:

"It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish - or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase - if there is a protracted delay in the enforcement of immigration control. This point was made by Lord Bingham and Lord Brown of Eaton-under-Heywood in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41; [2009] AC 1159, paras 15 and 37. It is also illustrated by the judgment of the European court in Jeunesse."

Historical injustice

Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351(IAC) at point 3 of headnote:

"B. Historical injustice

(3) Cases that may be described as involving "historical injustice" are where the individual has suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions. Examples are where the Secretary of State has failed to give an individual the benefit of a relevant immigration policy (eg AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12); where delay in reaching decisions is the result of a dysfunctional system (eg EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41); or where the Secretary of State forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken (eg Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009). Each of these failings may have an effect on an individual's Article 8 ECHR case; but the ways in which this may happen differ from the true "historic injustice" category."

SSHD's duty to draw attention to its policies

BH (policies/information: SoS's duties) Iraq [2020] UKUT 00189 (IAC) at point (a) of headnote:

"(a) The Secretary of State has a duty to reach decisions that are in accordance with her policies in the immigration field. Where there appears to be a policy that is not otherwise apparent and which may throw doubt on the Secretary of State's case before the tribunal, she is under a duty to make a relevant policy known to the Tribunal, whether or not the policy is published and so available in the public domain. Despite their expertise, judges in the Immigration and Asylum Chambers cannot reasonably be expected to possess comprehensive knowledge of each and every policy of the Secretary of State in the immigration field."

Contact Details

- Thank you

Amarjit Seehra – a.seehra@goldsmithchambers.com

Jamil Dhanji - j.dhanji@goldsmithchambers.com

Clerks: Neil Dinsdale & Jordan Lloyd – immpublic@goldsmithchambers.com

Tel: 0207 353 6802

GOLDSMITH CHAMBERS