# A Year in Immigration and Asylum Law:

# Case law review

## The relationship between Article 8 and nationality law

*R (SA) v SSHD* [2015] EWHC 1611 (Admin)

Successful claim for judicial review against SSHD's decision to refuse British citizenship to the claimant under provisions for the registration of minors [ie registration at discretion under s.3(1) of the British Nationality Act 1981]. The refusal was on good character grounds.

The Deputy Judge held:

- ECtHR case law does not preclude a claim under Article 8 in respect of nationality decisions where the necessary threshold for the engagement of Article 8 is met (see especially *Genovese v Malta* [2012] FLR 10).
- Article 3 of the UN Convention on the Rights of the Child [ie the best interests principle] is relevant to the Article 8 enquiry. The judge regarded the approach to Article 8 in *Maslov v Austria* [2009] INLR 47 (which concerned the potential expulsion of a long settled migrant who had committed offences as a minor) as being appropriate in the nationality context.
- There may be little room for justifying an interference with Article 8 where reliance is placed on (at least) non-violent offences committed when a minor, having regard to the terms of Article 40 of the UNCRC. (Article 40 of the UNCRC concerns the reintegration of children who have infringed the criminal law.)
- On the facts, the judge found that Article 8 was engaged:

> 'Article 8 captures the right to develop and maintain relationships with others...for the claimant that included with his siblings, mother and foster carer. In some cases it may also cover social identity (*Maslov*, paragraph 63), something which may be especially important in the case of the grant of citizenship...The refusal of the claimant's application in my view interfered with both his family life and his private life given his close family ties to the UK and the sense of identity and belonging that would

inevitably be fostered by the grant of citizenship and undermined by its refusal. I accept that not every refusal of citizenship will engage Article 8 but the claimant's ties to the UK were particularly strong – his future plainly lies in the UK, a matter which is said by the defendant to be of first importance in the case of a minor (paragraph 19.17.2 of the [Nationality] Instructions...) – and the stability and sense of belonging that would likely follow the grant of citizenship would be especially important in a young person who had experienced such disruption in his childhood' (at [77]).

- The interference with Article 8(1) rights was arbitrary under Article 8(2) because the Nationality Instructions treat older teenagers differently from other children (in certain respects) for good character purposes whereas the UNCRC makes no distinction: everyone under 18 is a child. The arbitrariness caused the decision to breach Article 8.

See also *AHK v SSHD* SN/5/2014 (SIAC) and *FM v SSHD* SN/2/2014 (SIAC).

## The relationship between Article 8 ECHR and other international obligations

The Court of Appeal has confirmed that Article 8 has to be interpreted and applied in light of the UN Convention on the Rights of the Child though the best interests principle does not provide a trump card: *SS (Congo) v SSHD* [2015] EWCA Civ 387 at [39(iv)]

See also *Jeunesse v Netherlands* (2015) 60 E.H.R.R. 17 at para 109.

## The relationship between Article 8 ECHR and the Immigration Rules

### *Two-stage approach is confirmed as being the law*

In 2015, the courts have continued to grapple with the 'new' Immigration Rules on private and family life.[1]

[1] New Rules came into effect on 9 July 2012 and brought major changes to the criteria for admission and stay on family and private life grounds. The objective of the new Rules was to ensure that only in exceptional circumstances would a claim under Article 8 succeed which did not meet the requirements of the Rules. *Cf* 'The aim was to limit the scope for free-standing Article 8 claims by requiring the decision maker applying the Rules

In 2012/2013, both UTIAC and the Administrative Court held that a two-stage approach must be adopted in Article 8 cases. In the first stage, the decision-maker must consider the case under the Rules on private and family life. If the claim does not succeed under the Rules, then there may be a second-stage decision as to whether the claimant has a freestanding Article 8 claim outside the Rules: *Izuazu* v SSHD [2013] UKUT 45 (IAC); [2013] Imm. A.R. 453 and *R (Nagre) v SSHD* [2013] EWHC 720 (Admin) which considered the approach to be adopted in appeals to the tribunal.

The two-stage approach has been confirmed as follows:

- There is no need for decision-makers to conduct a full separate examination of Article 8 outside the Rules, where, in the circumstances of the case, all the issues have been addressed under the Rules. In other words, the second stage can be satisfied by the decision-maker concluding that all family/private life issues have already been addressed at the first stage: *R (Singh) v SSHD* [2015] EWCA Civ 74.
- Whether the second stage needs to be undertaken is to be determined by 'conscious decision' and is not to be determined by a simple assumption: *R (Singh) v SSHD* [2015] EWCA Civ 74; *R (Ganesabalan) v SSHD* [2014] EWHC 2712 (Admin).
- The decision-maker must in every case where Article 8 is raised consider whether the first stage addresses all the issues, even if the decision itself merely states that it does: *R (Singh) v SSHD* [2015] EWCA Civ 74.
- Article 8 claims will not be saved simply by reference to a failure on the part of the decision–maker to say expressly that the first stage addresses all Article 8 issues: the court will not allow appeals if the claimant does not have an arguable Article 8 claim and will allow appeals if the claimant does have an arguable Article 8 claim: *R (Singh) v SSHD* [2015] EWCA Civ 74.

***Gaps between Immigration Rules and Article 8***

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to give weight to the factors which would be relevant to the test of proportionality' (*R (Sunassee) v UTIAC and SSHD* [2015] EWHC 1604 (Admin) at [19]).

- In *SSHD v SS (Congo)* [2015] EWCA Civ 387, the Court of Appeal held that the 'width of the gap' between the requirements of the Immigration Rules and the requirements of Article 8 is 'highly relevant in certain contexts' (at [14]). As expressed by the court (at [17]):

> 'If the gap between what Article 8 requires and the content of the Immigration Rules is wide, then the part for the Secretary of State's residual discretion to play in satisfying the requirements of Article 8 and section 6(1) of the HRA will be correspondingly greater. In such circumstances, the practical guidance to be derived from the content of the Rules as to relevant public policy considerations for the purposes of the balance to be struck under Article 8 is also likely to be reduced: to use the expression employed by Aikens LJ in *MM (Lebanon)* in the Court of Appeal, at [135], the proportionality balancing exercise "will be more at large"'.

It follows that:

> 'If the Secretary of State has not made a conscientious effort to strike a fair balance for the purposes of Article 8 in making the Rules, a court or tribunal will naturally be disinclined to give significant weight to her view regarding the actual balance to be struck when the court or tribunal has to consider that question for itself. On the other hand, where the Secretary of State has sought to fashion the content of the Rules so as to strike what she regards as the appropriate balance under Article 8 and any gap between the Rules and what Article 8 requires is comparatively narrow, the Secretary of State's formulation of the Rules may allow the Court to be more confident that she has brought a focused assessment of considerations of the public interest to bear on the matter. That will in turn allow the Court more readily to give weight to that assessment when making its own decision pursuant to Article 8'.

***No test of exceptionality in the second-stage test***

In *SS (Congo)*, the court also confirmed that it is not the law that leave outside the Rules should only be granted in exceptional cases. However, the court held:

- The <u>proper application of Article 8</u> itself may mean that the legal test for grant of leave to enter (LTE) or leave to remain (LTR) outside the Rules is a test of exceptionality, as in 'precarious' cases (ie applications for LTR outside the Rules on the basis of family life

established in the UK at a time when the claimant's presence was known to be precarious (where no children are involved)). [2]

- In those LTR cases where the test is not exceptionality, 'compelling circumstances' need to be identified in order to succeed under Article 8 outside the Rules (at [33]).
- The same approach does not apply in leave to enter cases because in such cases the requirements on the State are 'less stringent' (at [38]).
- 'It is not appropriate to refer to the LTR Rules and the position under Article 8 in relation to LTR,...and seek to argue that Article 8 requires that the same position should apply in relation to applications for LTE' (at [38]). (See next section, below.)

**The application of Article 8 (family life) in LTE cases**

*SS (Congo)* also lays down principles governing the application of Article 8 in relation to applications for LTE on the basis of family life:

- 'Precarious' cases: If someone from the UK marries a foreign national or establishes a family life with them when they know that their partner does not have a right to come here, the relationship will have been formed under conditions of known precariousness. It will be appropriate to apply a similar test of exceptional circumstances before a violation of Article 8 will be found to arise outside the Rules (at [37]). (LTE cases and LTR cases are the same to this extent.)
- A person outside the UK may have a good claim under Article 8 for LTE to join family members already here so as to continue or develop existing family life (citing *Gül v Switzerland* (1996) 22 EHRR 93 and *Sen v Netherlands* (2001) 36 EHRR 7) [at [39]).
- Drawing together the Strasbourg authorities and the UK case law, the court held that the State has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted than in LTR for persons with a family life already established in the UK (at [40]).

[2] *Cf Jeunesse v Netherlands* (2015) 60 E.H.R.R. 17 at para 113: 'Having made numerous attempts to secure regular residence in the Netherlands and having been unsuccessful on each occasion, the applicant was aware—well before she commenced her family life in the Netherlands—of the precariousness of her residence status'.

- Given this wider margin, the LTE Rules maintain a 'reasonable relationship' with the requirements of Article 8 'in the ordinary run of cases' (at [40]).
- However, 'it remains possible to imagine' cases where 'the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules' (at [40]).
- Such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave (at [40]). It is a 'fairly demanding test', but it is not as demanding as the exceptionality or 'very compelling circumstances' test applicable in 'precarious cases' and the deportation of foreigners convicted of serious crimes. It is a formulation which has the benefit of simplicity (at [41] – [42]).

**The application of Article 8 in relation to the 'evidence rules' in Appendix FM-SE**

- Same principles apply as in respect of the substantive LTE and LTR Rules ie 'compelling circumstances' must be demonstrated before leave falls to be granted where the claimant has not complied with Rules governing the evidence to be submitted with applications for LTE/LTR: *SS (Congo)* at [51]. The court explains this conclusion by reference to principles of administrative fairness (at [53]):

> 'Good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence than other applicants would expect to receive under the Rules. Moreover, in relation to the proper administration of immigration controls, weight should also be given to the Secretary of State's assessment of the evidential requirements needed to ensure prompt and fair application of the substantive Rules: compare Stec v United Kingdom , cited at para. [15] above. Again, if an applicant says that they should be given more preferential treatment with respect to evidence than the Rules allow for, and more individualised consideration of their case, good reason should be put forward to justify that.

**Precariousness: the application of Article 8 where the claimant does not have lawful residence**

*Jeunesse v Netherlands* (2015) 60 E.H.R.R. 17: The applicant had been in the Netherlands for over 16 years but had only ever held a 45-day tourist visa. The ECtHR held that her stay in the Netherlands could not be equated with a lawful stay where the authorities have granted a person permission to settle:

> 'As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country—albeit in the applicant's case after numerous applications for a residence permit and many years of actual residence—are not the same, the criteria developed in the Court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with art.8 cannot be transposed automatically to the situation of the applicant. Rather, the question to be examined in the present case is whether, having regard to the circumstances as a whole, the Netherlands authorities were under a duty pursuant to art.8 to grant her a residence permit, thus enabling her to exercise family life on their territory. The instant case thus concerns not only family life but also immigration. For this reason, the case at hand is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation under art.8 of the Convention' (para 105).

- Given her precarious status, the question was whether there were any exceptional circumstances which would warrant a finding that the immigration authorities had failed to strike a fair balance in denying her residence.

- The ECtHR found that a number of factors, viewed cumulatively, gave rise to exceptional circumstances:

  - *Status of other family members:*[3] All other members of the applicant's family were Netherlands nationals and her spouse and their three children had a right to enjoy their family life with each other in the Netherlands. She herself had held Netherlands nationality at birth (later lost by operation of Surinam law).

[3] Subheadings not in the original.

- *Tolerated presence:* The applicant had been in the Netherlands for more than 16 years. She had no criminal record. Her presence was tolerated by the Netherlands authorities for a lengthy period of time, and this tolerance enabled the applicant to establish family and other ties in the Netherlands. Her address had always been known to the Netherlands authorities.
- *Hardship in relocating:* The applicant and her family would experience a degree of hardship if they were forced to relocate outside the Netherlands. It is necessary to take account of the situation of all members of the family, as Article 8 guarantees protection to the whole family.
- *Best interests of children:* The applicant was 'the primary and constant carer' (para 119) of the children who were deeply rooted in the Netherlands and who had never been to the applicant's country of origin.

See also *Dube v SSHD* [2015] UKUT 00090 (IAC) at para 32, which discusses the *Jeunesse* case.

**Refugees and asylum seekers**

*A and others v Staatssecretaris van Veiligheid en Justitie* [2015] 1 W.L.R. 2141

The claimants had applied for asylum in the Netherlands on the basis that they feared persecution on grounds of their sexual orientation. The CJEU held:

- It is settled law that the Refugee Convention constitutes the cornerstone of the international legal regime for the protection of refugees.
- The Qualification Directive (QD) was adopted to guide the member states in the application of the Convention on the basis of common concepts and criteria, so that the Directive must be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Convention.
- The QD must also be interpreted in a manner consistent with the rights recognised by the Charter of Fundamental Rights of the European Union.

- The competent authorities examining an application for asylum based on a fear of persecution on grounds of sexual orientation of the applicant for asylum are not bound to hold the declared sexual orientation to be an established fact on the basis solely of the declarations of the applicant. Rather, the applicant's declarations are the starting point in the process of assessment of the facts and circumstances of the asylum claim.
- It is generally for the applicant to submit all elements needed to substantiate the application because the applicant is best placed to provide evidence to establish his/her own sexual orientation. However, it is the duty of the member state to co-operate with the applicant at the stage of assessing the relevant elements of the application.
- In the present case, the competent authorities had assessed the applicant's credibility by relying on 'stereotypes as regards homosexuals or detailed questioning as to the sexual practices of an applicant for asylum and the option, for those authorities, to allow the applicant to submit to "tests" with a view to establishing his homosexuality and/or of allowing him to produce, of his own free will, films of his intimate acts and, second, the option for the competent authorities of finding a lack of credibility on the basis of the sole fact that the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the grounds for persecution' (para 59 of the CJEU's Judgment).
- The CJEU found that such stereotypical questioning was incompatible with the right in EU asylum law (particularly the QD and the Procedures Directive) to individual status determination.
- Moreover, questions concerning details of sexual practices are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect for private and family life in Article 7 of the Charter.
- The use of 'tests' and films infringes human dignity which is guaranteed by Article 1 of the Charter (and such evidence lacks probative value).
- Owing to the to the sensitive nature of questions relating to a person's sexuality, it cannot be concluded that the claim lacks credibility simply because, due to reticence, an asylum applicant did not declare his sexual orientation at the outset.

## Practice and procedure in the domestic courts

### *Appeal rights*

*Mostafa v SSHD* [2015] UKUT 00112 (IAC)

In an appeal which is limited to human rights grounds, the tribunal no longer has jurisdiction to entertain the appeal on grounds that the decision is 'not in accordance with the law', so that there is no point in the tribunal addressing the question. But the tribunal in this case was right to decide whether the claimant met the requirements of the Immigration Rules because a decision whether the claimant met the Rules may illuminate the proportionality balancing exercise under Article 8:

> 'the underlying merits of an application and the ability to satisfy the Immigration Rules, although not the question before the Tribunal, may be capable of being a weighty factor in an appeal based on human rights but they will not be determinative. They will only become relevant if the interference is such as to engage Article 8(1) ECHR and a finding by the Tribunal that an appellant does satisfy the requirements of the rules will not necessarily lead to a finding that the decision to refuse entry clearance is disproportionate to the proper purpose of enforcing immigration control. However it may be capable of being a strong reason for allowing the appeal that must be weighed with the others facts in the case' (para 23).

See also *Kaur (visit appeals; Article 8)* [2015] UKUT 00487 (IAC).

*R (Ali) v SSHD* [2015] EWCA Civ 744:

- Conformation that a claimant must demonstrate 'special or exceptional factors' before a court will permit a substantive challenge to a removal decision under s.10 of the Immigration and Asylum Act 1999 to proceed by judicial review, rather than by out-of-country appeal. It is a fact-sensitive question.
- Questions of procedural fairness can be considered in the appellate process and are rarely likely to constitute 'special or exceptional factors'.

- The inconvenience of being required to leave the jurisdiction in order to exercise an appeal right is not 'special' or 'exceptional': it is inherent in the statutory provision for out-of-country appeals enacted by Parliament.
- Serious ill-health or 'some other exigency' might qualify as an 'exceptional' factor, but the threshold would be high (at [71]).

See also *R (Sood) v SSHD* [2015] EWCA Civ 831 which followed *Ali*.

***Damages***

*R (S) v SSHD* [2015] EWCA Civ 652

- If a person who applies for JR of his/her detention is released during the course of proceedings, then any claim for damages for false imprisonment may be better suited to trial in the QBD or the County Court rather than the Administrative Court, in which disputes usually turns on questions of law and are tried on documents alone.
- In addition, the court encouraged the parties to explore the possibility of resolving the dispute through mediation rather than spending more time and money pursuing litigation.

See also *Patel v SSHD* [2015] EWCA Civ 645.

***Bringing a claimant back to the UK***

*XB v SSHD* [2015] EWHC 2557 (Admin): Collins J comments that, where a claimant succeeds in challenging the certification of a claim under s.94(2) of the Nationality, Immigration and Asylum Act 2002 and is out of country, 'the usual order would be that the claimant be returned to the UK' (at [42]). In this case, the claimant had a valid permit to exit her country of origin such that it would be relatively simple to enable her to return because SSHD could grant leave to enter for the purpose of attending her appeal (at [43] – [44]).

**Watch this space...**

*SJ v Belgium* (2015) 61 E.H.R.R. 21 (19 March 2015)

The applicant had been refused leave to remain on medical grounds, as she was HIV positive. Following a friendly settlement, the ECtHR struck the case out of the list. Notably, Judge Pinto de Albuquerque dissented on the basis that the case would have been a good opportunity for the ECtHR to reconsider the principles of *N v UK* (2008) 47 E.H.R.R. 39, so that it should not have been struck out.[4]

The dissenting opinion is a strongly worded criticism of the CJEU's and Strasbourg's approach to 'naturally occurring illness' cases. The reasoning in cases such as *N v UK* is said to be illogical and unclear, and to undermine the status of Article 3.

The opinion ends as follows:

> It is a sad coincidence that in the present case the Grand Chamber decided, on the World Day of the Sick, to abandon these women and men to a certain, early and painful death alone and far away. I cannot desert those sons of a lesser God who, on their forced path to death, have no one to plead for them.

Judith Farbey QC
www.doughtystreet.co.uk
September 2015

[4] The essence of the judgment in *N v UK* was that a decision to expel a person who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may only raise an issue under Art 3 ECHR in a very exceptional case, where the humanitarian grounds against the removal are compelling.