Comment: implications for extending the *CP* principle in Care Act 2014 cases

Sometimes the person will just go without care; sometimes relatives will step up for free, whatever the consequences for themselves, for want of legal awareness. If informal care becomes *unwilling*, and is not continued, but no explicit statement of the perceived coercion and no challenge to review the care plan is even intimated, the service user will either be left in need, or looked after – but probably without restitution for the carer.

But where someone has paid out money for something that was missing, the necessity has long been clearly asserted in writing, and the council is shown to have known, such that it can fairly be said it has been *knowingly* taking the benefit of that provision, despite the paying person's objection of unwillingness, then restitution will follow. Even where the client has only incurred a *liability* to pay (eg, a person lacking in capacity to have validly contracted) then a reasonable sum for that service is the measure of what the council would have to reimburse, as a matter of both public and private law principle, because of the law of unjust enrichment and Mental Capacity Act 2005 s7.

People in similar situations should refer their council to para 10.86 of the statutory guidance (*Care and support statutory guidance*, Department of Health and Social Care, last updated 26 October 2018) and demand the management review of 'earlier elements of the … process' referenced there, so that the council can put right any non-compliance with legislation, without further ado. If litigation is to be contained, councils' monitoring officers will need to engage properly with referrals that identify breaches of the Care Act 2014, or they may have to answer in one court or another for failure to discharge their own duties under their own governing legislation.

Further reading

Rebecca Williams, 'Unjust enrichment and public law', *Judicial Review*, vol 19, 2014, no 4, page 209.

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Immigration case law: update

A new format has been adopted for this immigration case law update. Rather than attempting to present an overview of all significant immigration case law developments, this update focuses on a smaller number of cases in specific areas, analysing in more detail their impact on the law and their relevance to everyday practice. It is hoped that the new format will be useful to practitioners.*

David Neale

Cessation of refugee status

There have been some key developments as regards cessation of refugee status under article 1C(5) of the Refugee Convention. In July/August 2018 *Legal Action* 16, we covered the case of *Secretary of State for the Home Department v MA (Somalia)* [2018] EWCA Civ 994, in which the Court of Appeal applied a 'mirror image' approach to cessation. When considering cessation, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which they would be held to be a refugee.

The Court of Appeal has now clarified, in *Secretary of State for the Home Department v MS (Somalia)* [2019] EWCA Civ 1345, 29 July 2019, that, applying the 'mirror image' approach, the new availability of an internal relocation alternative in the country of origin *can* in principle be a basis for cessation of refugee status, provided that the change is significant and non-temporary. It reversed the decision of the Upper Tribunal (UT) (UTJ Kopieczek) which was to the opposite effect.

Hamblen LJ explained that the size of the area of relocation will be relevant to the reasonableness of being expected to relocate there and also to whether the change in circumstances is significant and non-temporary. He did not accept that there is any requirement that it be a substantial part of the country. He referred approvingly to the guidance given by the Court of Appeal in *AS (Afghanistan) v Secretary of State for the Home Department* [2019] EWCA Civ 873, 24 May 2019, as regards the reasonableness of internal relocation. Recently, in *SB (refugee revocation; IDP camps) Somalia* [2019] UKUT 358 (IAC), 14 October 2019, the UT has affirmed that *MS (Somalia)* is binding authority that the availability of an internal relocation alternative may be a basis for cessation.

Thus it seems that the 'mirror image' approach has been taken to its logical conclusion. After *MA (Somalia)* and *MS (Somalia)*, where the secretary of state invokes article 1C(5) in relation to a person previously recognised as a refugee, the exercise for a tribunal to perform is now little different in practical terms from the exercise it performs when an appellant seeks recognition as a refugee for the first time. Although the burden of proof is on the secretary of state to justify cessation, the arguments will otherwise be much the same as in any other asylum appeal; risk on return, sufficiency of protection, and internal relocation.

It must be questioned whether the Court of Appeal's draconian approach is really consistent with the protections afforded by the text of the Refugee Convention to those already recognised as refugees. The framers of the convention, in drafting article 1C(5), could simply have said that a person ceases to be a refugee when they no longer meet the definition in article 1A(2); but they did not do so.

Another key controversy in the law of cessation concerns those appellants who, under former Home Office policy, were automatically recognised as refugees in line with their family member when they came to the UK as family reunion dependants, without there having been an individual determination of whether they themselves had a well-founded fear of persecution. Previously, confusion in this area had been created by *Secretary of State for the Home Department v Mosira* [2017] EWCA Civ 407, in which the Court of Appeal had dismissed the secretary of state's appeal in a case of this kind, accepting that, since Mr Mosira had been recognised as a refugee as a dependant of his mother – who had herself been recognised as a refugee on the basis of her medical condition, and not on the basis of a well-founded fear of persecution – the change in the threat posed by the authorities in Zimbabwe could not be a basis for cessation. While expressing sympathy with the argument that individuals in Mr Mosira's circumstances were not in law refugees at all and that article 1C(5) did not apply to them, the court refused the secretary of state permission to make that argument because of its lateness.

Recently, however, there have been two new Court of Appeal cases on this point. In *Secretary of State for the Home Department v KN (DRC)* [2019] EWCA Civ 1665, 9 October 2019, KN had been recognised as a refugee in 1994 as a family reunion dependant of his father, who had fled political persecution in the Democratic Republic of Congo (DRC). The UT had allowed

his appeal on the basis that he had not been recognised as a refugee in his own right but because his parents were recognised as refugees; and that, as a result, any political changes in the DRC had no bearing on the circumstances in connection with which he had been recognised as a refugee, meaning that cessation was not justified.

The Court of Appeal allowed the secretary of state's appeal, noting that KN's father had been recognised as a refugee as a result of his well-founded fear of persecution – distinguishing the case from *Mosira,* where (strangely) Mr Mosira's mother had apparently been recognised as a refugee on the basis of her medical condition and not any fear of persecution. In this regard, Baker LJ held that:

… given that the respondent has been granted refugee status, the onus of proving that the circumstances in connection with which he was recognised as refugee have ceased to exist lies on the secretary of state. He must show that, if there were any circumstances which in 1994 would have justified the respondent fearing persecution in DRC, those circumstances have now ceased to exist and that there are no other circumstances which would now give rise to a fear of persecution for reasons covered by the Refugee Convention. As stated by Sales LJ in MM (Zimbabwe)*, the circumstances under consideration are likely to be a combination of the general political conditions in the individual's home country and some aspect of his personal characteristics. What is clear from that decision, and the Home Office policy document to which we were referred by the respondent's counsel, is that the focus of the investigation must be on the current circumstances of the individual and conditions in his home country* (para 36).

The Court of Appeal subsequently confronted the issue directly in *Secretary of State for the Home Department v JS (Uganda)* [2019] EWCA Civ 1670, 10 October 2019. JS had been recognised as a refugee in 2005 as a family reunion dependant of his mother, who had been recognised as a refugee on the basis that she had a well-founded fear of persecution on account of her imputed political opinion. The First-tier Tribunal (FtT) found that the case for cessation was made out and he had no well-founded fear of persecution or real risk of European Convention on Human Rights (ECHR) article 3 harm on return. The UT upheld the FtT's findings as to risk on return, but allowed his appeal nonetheless on the ground that the circumstances in connection with which he had been recognised a refugee – namely, that he was the son of a recognised refugee – had not ceased to exist.

Allowing the secretary of state's appeal, the Court of Appeal held starkly that JS had never been a refugee as defined in article 1A(2) of the Refugee Convention; the convention confers rights only on those who themselves satisfy the article 1A(2) definition, and not on their family members. It also rejected the submission that the Refugee Convention, interpreted in light of subsequent practice, could be construed as creating a 'derivative' refugee status for family members. Further, even if JS had been a Refugee Convention refugee, the secretary of state would have been entitled to invoke article 1C(5), Haddon-Cave LJ holding that:

… on its true construction, article 1C(5) requires consideration of ***relationship*** *and* ***risk****. It follows from [the FtT's] unchallenged findings of fact that, in the language of article 1C(5) of the Refugee Convention, 'the circumstances in connexion with which [JS] has been recognised as a refugee… have ceased to exist', since his mother can no longer have a well-founded fear of persecution in Uganda* (para 172, emphasis in original).

However, the Court of Appeal also allowed JS's cross-appeal in relation to the finding that there was no article 3 risk, and remitted that issue to the FtT.

KN (DRC) and *JS (Uganda)* were decided on consecutive days, but by different constitutions of the Court of Appeal, and the reasoning in each case is quite different; *KN (DRC)* proceeded on the basis that KN was indeed a refugee, while *JS (Uganda)* concluded that JS was not one. But neither case offers any encouragement to appellants in this situation. The issue is one with wide implications. There are significant numbers of people who have been recognised as refugees in line with a family member, either having been dependants on their asylum claim or having arrived as family reunion dependants. The consequence of these authorities is that such people may not be Refugee Convention refugees at all (following *JS (Uganda)*), and that even if they are refugees, the issue of cessation will fall to be considered according to the 'mirror image' approach.

Asylum

There have been other key developments in the field of asylum law. In *AS (Afghanistan) v Secretary of State for the Home Department* [2019] EWCA Civ 873, 24 May 2019, the Court of Appeal set aside the UT's Country Guidance on internal relocation to Kabul, on the basis that it had made a factual error, wrongly stating that civilian casualties amounted to less than 0.01 per cent, rather than less than 0.1 per cent, of the population of Kabul city. It went on, however, to dismiss AS's second ground of appeal, which concerned whether internal relocation would be unreasonable.

Underhill LJ endorsed what the UT had said in *AAH (Iraqi Kurds – internal relocation) Iraq CG* [2018] UKUT 212 (IAC) about the test of reasonableness:

'The fact that an applicant may endure the same living conditions as a "significant minority" of his countrymen cannot of itself render his internal relocation "reasonable". The test is, and remains, whether those living conditions are, for the individual concerned, "unduly harsh": that is an assessment to be made taking account of "all relevant circumstances pertaining to the claimant and his country of origin"' (see para 54 of the present judgment).

Although decision-makers must ask themselves whether the returnee could lead 'a relatively normal life without facing undue hardship … in the context of the country concerned', and relocation might not be unduly harsh even if conditions in the place of relocation were very bad by the standards of the country of refuge, this did not mean that it would be reasonable for a person to relocate to a place of relocation, however bad the conditions they will face there, as long as such conditions are normal in their country. However, contrary to AS's submission, Underhill LJ concluded that the UT had not fallen into the error of treating the 'significant minority' test as determinative. The court remitted the appeal to the UT on a limited basis, but noted that the scope of the hearing might need to be widened in light of new UNHCR guidelines that post-dated the previous UT hearing.

In *PK (Ukraine) v Secretary of State for the Home Department* [2019] EWCA Civ 1756, 22 October 2019, an UT decision in respect of a Ukrainian draft evader was set aside because it had not adequately dealt with the important legal question of whether a draft evader facing a non-custodial punishment, where the army into which they would be drafted regularly commits acts contrary to international humanitarian law, is entitled to refugee status. The Court of Appeal did not decide that question for itself but remitted it to the UT. Meanwhile, in *AAR and AA (Non-Arab Darfuris – return) Sudan* [2019] UKUT 282 (IAC), 7 August 2019, existing Country Guidance was reaffirmed to the effect that non-Arab Darfuris in Sudan are generally at risk.

Finally, there has been a key case on the ambit of asylum appeals: *DC (Trafficking, Protection/Human Rights appeals: Albania)* [2019] UKUT 351 (IAC), 3 September 2019. This case grapples with the controversial Court of Appeal decision in *Secretary of State for the Home Department v MS (Pakistan)* [2018] EWCA Civ 594, and the subsequent apparent clash of authority between *AUJ (Trafficking – no conclusive grounds decision) Bangladesh* [2018] UKUT 200 (IAC) on the one hand and *ES (s82 NIA 2002; negative NRM) (Albania)* [2018] UKUT 335 (IAC) and *R (MN) v Secretary of State for the Home Department* [2018] EWHC 3268 (QB) on the other hand.

The issue, in summary, is what status a previous negative decision made by the competent authority within the National Referral Mechanism for victims of human trafficking should have in a subsequent protection and/or human rights appeal. Flaux LJ's judgment in *MS (Pakistan)* has at times been read as saying that the findings of fact made by the competent authority should be treated as binding on FtT judges unless the FtT is satisfied that those findings of fact are irrational.

However, the determination in *DC* represents a welcome clarification that the position is not as stark as this. *MS (Pakistan)* was concerned with the circumstances in which a tribunal may *directly* critique a decision made by the competent authority, in circumstances where the issue was whether the decision was 'not in accordance with the law' because the secretary of state had not properly applied her policies on human trafficking. In those circumstances, it was indeed necessary to show that the competent authority's decision was irrational. Although there is no longer a power to allow appeals on the ground that the decision is 'not in accordance with the law', the UT contemplated that the same situation could arise today in a human rights appeal where the competent authority's failure to make a rational decision could lead to a conclusion that removal would be disproportionate in ECHR article 8 terms; but it doubted that this scenario would be commonly encountered in practice.

By contrast, in a protection and/or ECHR article 3 appeal, the assessment of risk on return is for the tribunal to determine, applying the lower standard of proof. In *that* context, the competent authority's decision will merely be part of the evidence the

tribunal will have to assess, giving it such weight as is due, and bearing in mind the different standards of proof.

This clarification of the position should be of assistance to those representing appellants and to FtT judges, who can rest assured that in protection appeals FtT judges are not bound by the competent authority's findings of fact and can reach their own conclusions on the basis of all the evidence before them, including evidence post-dating the competent authority's decision.

Deportation and article 8

In recent years, a large proportion of immigration case law has concerned people seeking to resist deportation on the basis of their private and/or family life under ECHR article 8. Today, courts and tribunals are obliged to decide such cases with reference to Nationality, Immigration and Asylum Act (NIAA) 2002 ss117A–117D, including the restrictive rules in s117C that apply to 'foreign criminals'. There have been some important new cases on this topic in recent months.

In *CI (Nigeria) v Secretary of State for the Home Department* [2019] EWCA Civ 2027, 22 November 2019, CI was a Nigerian citizen who had come to the UK at the age of one and had, after a long delay, eventually been granted indefinite leave to remain in line with his mother. His mother had been abusive and neglectful. As a young adult he had committed crimes which had led to deportation proceedings. In dealing with CI's human rights appeal. Leggatt LJ made several important points of general application.

First, it is generally unnecessary for a court or tribunal to refer to Immigration Rules paras 398–399A; it is sufficient to apply NIAA 2002 s117C, which is primary legislation and directly governs decision-making by courts and tribunals.

Second, a period spent on immigration bail or temporary admission where leave to enter or remain is subsequently granted does not necessarily qualify as 'lawful residence' within the meaning of s117C(4)(a). The definition of 'lawful residence' in Immigration Rules para 276A cannot be read across. The ratio of *Secretary of State for the Home Department v SC (Jamaica)* [2017] EWCA Civ 2112 is limited to circumstances where an *asylum-seeker* on temporary admission is subsequently granted asylum; it cannot be extended to cover other types of cases where leave to enter or remain is subsequently granted. This is because 'upholding an asylum claim involves acknowledging a pre-existing status rather than exercising a discretion to grant permission to stay in the country' (para 44).

Third, Leggatt LJ gave important guidance on the meaning of 'socially and culturally integrated in the UK' in Exception 1 in s117C. Drawing inspiration from the Strasbourg decisions in *Üner v The Netherlands* App No 46410/99, 18 October 2006; (2007) 45 EHRR 14 and *Maslov v Austria* App No 1638/03, 23 June 2008; [2009] INLR 47, he observed that:

Relevant social ties obviously include relationships with friends and relatives, as well as ties formed through employment or other paid or unpaid work or through participation in communal activities. However, a person's social identity is not defined solely by such particular relationships but is constituted at a deep level by familiarity with and participation in the shared customs, traditions, practices, beliefs, values, linguistic idioms and other local knowledge which situate a person in a society or social group and generate a sense of belonging. The importance of upbringing and education in the formation of a person's social identity is well recognised, and its importance in the context of cases involving the article 8 rights of persons facing expulsion because of criminal offending has been recognised by the European court (para 58).

He went on to consider the relevance of offending and imprisonment to the issue of social and cultural integration. He observed at para 60 that 'the person facing deportation cannot place positive reliance on associations with criminals or pro-criminal groups to demonstrate social and cultural integration,' citing *Binbuga v Secretary of State for the Home Department* [2019] EWCA Civ 551 as an example. Criminal offending and time spent in prison could also be relevant insofar as they could indicate that the person lacked (legitimate) social and cultural ties in the UK.

He accepted in principle that a person who had been socially and culturally integrated in the UK could cease to be so, and that there was no inherent unreality in a finding that a person was not socially and culturally integrated anywhere in the world, citing *AM (Somalia) v Secretary of State for the Home Department* [2019] EWCA Civ 774 (an example of a homeless and jobless appellant with little or no private or family life) as an example of this. However, critically, he held that the UT in CI's case had erred in holding that CI's offending and imprisonment had broken his social and cultural integration in the UK. He observed that:

The judge should not, as he appears to have done, have treated CI's offending and imprisonment as having 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 required him to demonstrate that integrative links had since been 're-formed'… (para 77).

A clue to why the Upper Tribunal judge approached the question in the way that he did seems to me to lie in his repeated use of the phrase 'anti-social behaviour' and the suggestion in the passage quoted at paragraph 66 above that a person who exhibits anti-social behaviour over a significant period of time cannot be socially integrated in the UK because 'anti-social' is the opposite of 'social'. Given the range of meanings that the word 'social' can bear, this linguistic argument seems to me fallacious. The phrase 'socially and culturally integrated in the UK' is a composite one, used to denote the totality of human relationships and aspects of social identity which are protected by the right to respect for private life. While criminal offending may be a result or cause of a lack or breakdown of ties to family, friends and the wider community, whether it has led or contributed to a state of affairs where the offender is not socially and culturally integrated in the UK is a question of fact, which is not answered by reflecting on the description of criminal conduct as 'anti-social'… (para 78).

The judge's many references to integration being 'broken' by anti-social behaviour give the impression that he saw the relevant question as being whether, through the nature and seriousness of his offending, a 'foreign criminal' has broken the social contract which entitles him to the protection of the state. That, however, is not the relevant test, which should be concerned solely with the person's social and cultural affiliations and identity (para 80).

Leggatt LJ's reasoning here constitutes an important corrective. The concept of social and cultural integration in Exception 1 is *not* a moral judgment on whether a person has broken their contract with society, as it has been wrongly understood by some decision-makers. It is a factual assessment of whether a person has sufficient social and cultural ties with the UK.

Fourth, Leggatt LJ made clear that the UT had erred in drawing an inference, on the basis of no evidence, that CI (who left Nigeria at the age of one and had been raised by an abusive and neglectful mother) must have acquired some knowledge of his Nigerian culture through his upbringing. For this reason, and because of having disregarded aspects of the expert evidence as regards CI's mental health, the UT's conclusion on whether there were very significant obstacles to CI's reintegration into Nigeria was flawed.

Fifth, as regards whether there were 'very compelling circumstances' over and above Exceptions 1 and 2, Leggatt LJ accepted that the delay in granting indefinite leave to remain to CI (which was not his fault) was a relevant factor to be taken into account in the proportionality assessment, albeit that he did not think it was properly characterised as a 'historic injustice' as CI's counsel had argued. The UT had been right not to apply to CI the 'little weight' provisions in section 117B(4).

Sixth, critically, Leggatt LJ accepted that the decision in *Maslov* (requiring 'very serious reasons' for the expulsion of a settled migrant who has lawfully spent all or the major part of their childhood and youth in the host country) was relevant to CI's case, even though technically the greater part of his childhood and youth had not been spent in the UK lawfully. He was a 'settled migrant', having had indefinite leave to remain, and it was wrong to treat *Maslov* as inapplicable.

Another key decision is *Akinyemi v Secretary of State for the Home Department* [2019] EWCA Civ 2098, 4 December 2019, the case of an appellant who was born in the UK and had never left it. (His case had previously reached the Court of Appeal in *Akinyemi v Secretary of State for the Home Department* [2017] EWCA Civ 236, in a landmark judgment which clarified that Mr Akinyemi had not been present 'unlawfully' within the meaning of NIAA 2002 s117B(4), despite never having had leave to remain.) The latest case is to be welcomed for Sir Ernest Ryder's recognition that the public interest in deportation is not a fixity. He held that:

The correct approach to be taken to the 'public interest' in the balance to be undertaken by a tribunal is to recognise that the public interest in the deportation of foreign criminals has a moveable rather than fixed quality. It is necessary to approach the public interest flexibly, recognising that there will be cases where the person's circumstances in the individual case reduce the legitimate and strong public interest in removal. The number of these cases will necessarily be very few ie they will be exceptional having regard to the legislation and the Rules … (para 39).

[T]he Supreme Court has clearly identified that the strength of the public interest will be affected by factors in the individual case, ie it is a flexible or moveable interest not a fixed interest … Applying this approach to the weight to be given to the public interest in deportation on the facts of this case could lead to a lower weight

being attached to the public interest (para 50).

CI (Nigeria) and *Akinyemi* may give some hope to those representing long-term settled migrants who are facing deportation, having spent all or most of their childhoods in the UK. These decisions should clarify for judges that: whether a person is socially and culturally integrated in the UK is a fact-sensitive assessment of their social and cultural ties, not a judgement of their moral character; the public interest in the deportation of serious criminals is not necessarily a force that overwhelms all other factors; judges should not assume without evidence that a person raised in the UK will be able to adapt to a country and culture they have never known; and *Maslov* applies to long-term settled migrants even where they lacked leave to remain for part of their childhood.

Some less helpful – and arguably wrong – guidance as to the application of NIAA 2002 ss117A–117D was recently given by the UT in *MS (British citizenship; EEA appeals) Belgium* [2019] UKUT 356 (IAC), 15 October 2019. The UT held, inter alia, that an EEA national who had no continuing legal basis under the Immigration (European Economic Area) Regulations 2016 SI No 1052 or EU law for remaining in the UK *was* unlawfully present within the meaning of section 117B(4), distinguishing *Akinyemi* [2017] EWCA Civ 236.

The UT acknowledged (rightly) that such a person commits no criminal offence under Immigration Act (IA) 1971 s24, since they have neither entered illegally nor overstayed a period of limited leave. But it held that such a person was nonetheless in breach of a legal obligation by being here (unlike Mr Akinyemi) because of 'the interaction' of IA 1988 s7 and the IA 1971, which require an EU national to have leave once they no longer benefit from EU rights.

The author regards this conclusion as distinctly questionable. The UT did not refer to *Chief Adjudication Officer v Wolke* [1997] 1 WLR 1640, in which Lord Hoffmann's judgment (in which the majority concurred) appears to support the contrary view. The 1971 Act is a system of control on *entry;* it prohibits entering without leave and overstaying a grant of leave; but it imposes no freestanding prohibition on merely being present in the country without leave to do so. In this author's view, there is therefore a strong argument that *MS* is wrong, and that a person who entered lawfully as an EEA national and subsequently ceased to exercise EEA rights is not unlawfully present within the meaning of s117B(4)

The Court of Appeal has also offered new guidance on the meaning of 'unduly harsh' in Exception 2 in NIAA 2002 s117C, following the Supreme Court's judgment in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, which clarified that it does not involve weighing the interests of the partner and/or child against the seriousness of the offending. In *Secretary of State for the Home Department v PG (Jamaica)* [2019] EWCA Civ 1213, 11 July 2019, Holroyde LJ held that the question was whether there was for the partner and/or children 'a degree of harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation' (para 38). On the facts of that case, the answer was that the distress and suffering which PG's partner and children would experience did not go beyond the necessary and expected consequences of deportation.

In *Secretary of State for the Home Department v KF (Nigeria)* [2019] EWCA Civ 2051, 22 November 2019, Baker LJ expanded on this:

The First-tier Tribunal judge found that the respondent's son would be deprived of his father at a crucial time in his life. His view that 'there is no substitute for the emotional and developmental benefits for a three-year-old child that are associated with being brought up by both parents during its formative years' is indisputable. But those benefits are enjoyed by all three-year-old children in the care of both parents. The judge observed that it was a 'fact that being deprived of a parent is something a child is likely to find traumatic and that will potentially have long-lasting adverse consequences for that child' and that he was entitled to take judicial notice of that fact. But the 'fact' of which he was taking 'judicial notice' is likely to arise in every case where a child is deprived of a parent. All children should, where possible, be brought up with a close relationship with both parents. All children deprived of a parent's company during their formative years will be at risk of suffering harm. Given the changes to the law introduced by the amendments to [the] 2002 Act, as interpreted by the Supreme Court, it is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances (para 30).

He added that '[f]or those lawyers, like my Lord and myself, who have spent many years practising in the family jurisdiction, this is not a comfortable interpretation to apply. But that is what parliament has decided' (para 31).

These cases illustrate two things. First, the reinterpretation of the phrase 'unduly harsh' in *KO (Nigeria)* does not necessarily work to the advantage of appellants; those who could previously have relied on the relative non-seriousness of their offending in the assessment of 'undue harshness' can no longer do so. Such appellants should not necessarily lose hope, since it remains open to them to rely on 'very compelling circumstances, over and above those described in Exceptions 1 and 2' where the relative seriousness or otherwise of the offending remains a relevant factor, as affirmed recently by the UT in *MS (s117C(6): 'very compelling circumstances') Philippines* [2019] UKUT 122 (IAC), 4 March 2019. In such cases all factors can be considered in the round, including factors which could also fall within Exceptions 1 or 2, but the threshold of 'very compelling circumstances' is a very high one.

Second, Baker LJ's rueful observation in *KF (Nigeria)* illustrates the vast gulf between the approach taken in family law – where the child's best interests are, or should be, at the heart of decision-making – and the approach now taken in deportation cases, where the needs, wants, hopes and futures of children are routinely sacrificed on the altar of the (perceived) public interest in deporting their parents. This radical imbalance, consciously shaped by parliament in ss117A–117D, can only be altered by parliament.

British nationality in Northern Ireland

The UT waded into a politically controversial topic in *De Souza (Good Friday Agreement: nationality) United States of America* [2019] UKUT 355 (IAC), 14 October 2019, when it confirmed that, notwithstanding the terms of the Good Friday Agreement, an Irish woman born in Northern Ireland who met the criteria of section 1 of the British Nationality Act (BNA) 1981 was, as a matter of law, a British citizen, notwithstanding that she did not wish to be British and identified only as Irish. The Good Friday Agreement had not altered the effects of the BNA 1981. Accordingly, her spouse was not entitled to an EEA residence card. If she did not wish to be a British citizen, the proper course was renunciation of her British citizenship under BNA 1981 s12.

Practice and procedure

Finally, there have been important developments in tribunal practice and procedure. *Smith (appealable decisions; PTA requirements; anonymity: Belgium)* [2019] UKUT 216 (IAC), 28 June 2019, provides welcome clarification on two key points. First, where an appeal succeeds on some grounds and fails on other grounds, it is *not* necessary for the winning party to apply for permission to appeal on the grounds on which they failed, if a determination of that ground in their favour would not have conferred on them any tangible benefit. In such circumstances, if the other party appeals, it is open to the winning party to argue in their 'rule 24' response that they should have succeeded on the grounds on which they failed.

Second, the UT *does* have jurisdiction to grant permission to appeal even where no application for permission to appeal has been made to the FtT, although it is unlikely to be sympathetic to a request to do so in favour of a party who could and should have applied for permission to appeal.

One of the most important observations in *Bhavsar (late application for PTA: procedure: South Africa)* [2019] UKUT 196 (IAC), 12 April 2019, is not foreshadowed in the headnote. In the determination, the UT points out that Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 SI No 2604 r33(2) was amended with effect from 14 May 2018 (by the Tribunal Procedure (Amendment) Rules 2018 SI No 511) so that the time for applying for permission to appeal now runs from the date the party was *sent* the written reasons for the decision; it previously ran from the date the party was 'provided with' those reasons.

The explanatory note to the amending statutory instrument plainly contemplated that it was merely a clarificatory change, but the UT in *Bhavsar* concluded that a substantive change had in fact been made. The UT took the view that under the old version of the rule, time had run from the date of receipt and not the date of sending. This may come as a surprise to many practitioners who assumed that the date a party was 'provided with' the determination under the old rule was the date it was sent out by the tribunal administration. Regardless, in light of the rule change all practitioners should now be aware that time begins to run when the tribunal sends out the determination, regardless of when it is received.

* We'd love to receive feedback on the new format, please email your thoughts to: lheath@lag.org.uk.

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