Current/Recent House of Lords Cases

By Naina Patel

1. **Introduction.** There have been 36 decisions in the last 10 years, over a quarter (10) of which have been in the last 12 months. The increased activity of the Appellate Committee in this area reflects a growing confidence in the use of the HRA 1998 to regularize the status of those whose asylum claims have failed and in regulating the removal of foreign nationals involved in criminal activity, as well as being the ultimate domestic arbiter of traditional claims under the Refugee Convention. Some recent examples are considered below.

2. **Article 8 since *Huang*.** *Huang v SSHD* [2007] UKHL 11 was a landmark case: appellate authorities were not restricted to a secondary reviewing function and there was no requirement of exceptionality for an applicant for leave to remain to avoid the need for entry clearance by having his application determined here, as indicated in *R (Mahmood) v SSHD* [2001] WLR 840. And yet cases continue to be decided under a mistaken understanding of the test, for example, *Chikwamba v SSHD* [2008] UKHL 40 at [27], *Beoku Betts v SSHD* [2008] UKHL 39 at [16], *EM (Lebanon) v SSHD* [2008] UKHL 40 and *AS (Somalia) v Entry Clearance Officer (Addis Ababa)* [2008] EWCA Civ 149. New changes in the landscape include:

- Considering the manner in which claims are processed and any resulting delay (*EB (Kosovo) v SSHD* [2008] UKHL 41). Consider the effect of delay on the establishment of relationships, their sense of permanence and the weight to be accorded to firm and fair immigration control, particularly in cases where there are (1) arguably material implications for status (a change in policies or country conditions); and (2) there are relevant

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comparators. See, for example, *WB (Pakistan) v SSHD* [2009] EWCA Civ 215 and *Tekle v SSHD* [2008] EWHC 3064 (Admin).

- Giving consideration to the family unit as a whole in appeals under section 65 of the IAA 1999 (*Beoku Betts v SSHD* [2008] UKHL 39). See, for example, *AS (Pakistan) v SSHD* [2008] EWCA Civ 1118 and *AM (Jamaica) v SSHD* [2008] EWCA Civ 1408.
- Considering the rationale of policies such as entry clearance requirements that are reflected in the Immigration Rules when assessing the proportionality of removal (*Chikwamba v SSHD* [2008] UKHL 40). If the rationale for the policy is deterrence of entry without clearance, consider its use in cases where (1) arrival was for good reason; (2) there has been delay or removal is impracticable; and (3) there are children or other vulnerable dependants (cf. *Beoku Betts v SSHD* [2008] UKHL 39 where the policy was not invoked). See, for example, *VW (Uganda) v SSHD & Ors* [2009] EWCA Civ 5.

Of most recent significance is *EM (Lebanon) v SSHD* [2008] UKHL 64, the first example of a successful challenge to removal of the kind envisaged in *R (Ullah) v Special Adjudicator*, where the facts do not also give rise to a claim under Art. 3 ECHR. It is remarkable as a result, in light of cases such as *F v UK* (14341/03) 22.6.04, *Z and T v UK* (27034/05) 28.2.06 and *N v UK* (26565/05) 27.5.08; it is also disappointing for its lack of guidance as to when *"flagrant breach"* will be established, and why it was established in this case but not in those, beyond the existence of *"compelling humanitarian grounds"* and *"exceptionality"*.

3. **Deportation and assurances after *RB (Algeria) and OO (Jordan).*** Assurances have their origin in the field of extradition (*Soering v UK* (1989) 11 EHRR 439) but are increasingly being used outside this context in cases of expulsion and deportation (*Chahal v UK* (1997) 23 EHRR 413). There are important differences for the adherence to the principle of non-refoulement in Art. 33 of the Refugee Convention and other standards such as Art. 3 ECHR and Art. 3 UNCAT:

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- Refugees and asylum-seekers protected by Art. 33(1) should not be refouled to their country of former residence, even under cover of assurances as this would be to look to the very agent of persecution for comfort that the refugee will be well-treated on return cf. Arts. 32 and 33(2) (UNHCR Note on Diplomatic Assurances and International Refugee Protection, para [30]).
- The very fact of requesting assurances from the agent of persecution can expose an asylum-seeker or those associated with him to a risk of persecution and breach his right to privacy, cf. *Z v SSHD & Ors*, High Court, 27.1.09, unreported.
- Extradition requires the formal acts of two States where the wanted person is transferred to a formal process whereas expulsion and deportation are unilateral procedures of the sending State with obvious consequences for the monitoring of compliance with the assurances.

Foreign nationals who seek asylum and are also involved in criminal activity therefore raise a special conundrum which the ruling in *RB (Algeria) v SSHD* [2009] UKHL 10 has not assisted with. All of RB, U and OO sought asylum, although only OO was granted asylum, and he was later deprived of it by virtue of Art 1F(c), failing which the House of Lords held he would in any event have been deprived by virtue of Art 33(2) (at [129]). The question was therefore the effect of deportation on their rights under the ECHR, and the House of Lords held:

- Section 7(1) of the SIAA 1997 has been held to be consistent with section 6 of the HRA 1998 in its limiting of appeals against SIAC's decisions to grounds of failure to consider some rule of law or other relevant matter, consideration of irrelevant matters or other irrationality or procedural unfairness.
- Assurances do not need to eliminate all risk, only the substantial grounds for believing that there is a real risk of violation of Art. 3 ECHR, which is

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a question of fact, considering general country conditions at the time assurances are give, the attitude of the authorities to human rights, the degree of control exercised over key state actors and the manner in which the performance of assurances could be verified, whether through monitoring or otherwise (at [123-124]).

- For deportation proceedings to violate Art. 6 ECHR there must be substantial grounds for believing that there was a real risk there would be a fundamental breach of the principles of a fair trial guaranteed by Art. 6 and that failure would lead to a miscarriage of justice which would itself constitute a violation of the deportee's fundamental rights, but what violates Art. 6 in a domestic case need not amount to a flagrant breach of Art. 6 in a foreign case and the risk of the use of evidence obtained by torture will not amount to such a breach.

This makes it all the more important for such individuals to avail themselves of protection under the Convention, and for root and branch attacks to be made on the use of assurances at an early stage. Consider, for example, the interplay between Art. 1F(b), section 72 of the NIAA 2002 and the Qualification Directive.

4. **Safe third countries after *Nasseri* and other decisions awaited.** For an example of a different use of assurances, see *SSHD v Nasseri* [2008] EWCA Civ 464. The claimant's appeal from that decision was heard on 16 March 2009. The case concerns the compatibility of the Secretary of State's list of safe third countries, operated pursuant to Sch.3, Pt 2, para.3 to the AITCA 2004, with Art. 3 ECHR. The Court of Appeal held that although the list system rendered the UK's compliance with Art. 3 fragile, the Secretary of State's obligation to monitor the countries on the list and the court's ability to investigate whether any particular state infringed Art.3 meant that it was not incompatible with Art. 3, and nor did the specific listing of Greece infringe that obligation, in spite of evidence from UNHCR that asylum seekers who left Greece and subsequently returned might be subject to immediate removal without substantive examination of their claims

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(contrary to the Reception and Procedures Directives), as at that time there were no reports of unlawful refoulement. See also *H (Iran) & Ors v SSHD* [2008] EWCA Civ 985 and cf. *R (Yogathas) v SSHD* [2003] 1 AC 920 and Lord Bingham's view of section 11(1)(b) of the IA 1999, the precursor to the deeming provision in *Nasseri*, which was lawful only by virtue of section 65 of the IA 1999 which preserved the possibility of a challenge on human rights grounds. Interesting issues, in light of *KRS v UK* (32733/08) 2.12.08, will be the approach to:

- The interplay between obligations under Art. 3 ECHR and the Reception and Procedures Directives.
- The treatment of assurances given by the Greek Government.
- The possibility of future claims against Greece domestically or to the ECtHR.

Other pending decisions include:

- The claimant's appeal against *Odelola v SSHD* [2008] EWCA Civ 308 [2009] 1 WLR 126 was heard on 17 March 2009. The case concerns the applicable Immigration Rules when there is a change in the Rules between the time of the making of an application and its determination. The Court of Appeal held that the Rules were statements of policy rather than rules of law (see, most recently, *R (BAPIO Action) v SSHD* [2008] UKHL 27), and the limit of the Secretary of State's obligation was to act in accordance with that policy. There was therefore no basis for arguing that the repeal of the old Rules did not affect the claimant's accrued rights pursuant to section 16(1)(c) of the Interpretation Act 1978 or that the new Rules were not intended to have retrospective effect.

- The claimant's appeal against *AS (Somalia) v Entry Clearance Officer (Addis Ababa)* [2008] EWCA Civ 149 was heard on 18-19 March 2009. The case concerns an out-of-country appeal against refusal of entry clearance by a

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Somalian brother and sister on the basis of the Secretary of State's family reunion policy and whether an IJ could take into account matters in the two years since the refusal. The Court of Appeal held that sections 85(4) and (5) of the NIAA 2002 contained an express prohibition on taking later matters into account and this prohibition could not be read down pursuant to section 3 of the HRA 1998 to make it conform to Art. 8 ECHR.

- *SM (Eire) v SSHD* [2008] EWCA Civ 641 will not be heard this term. The case concerns entitlement to residence permits under the Immigration (European Economic Area) Regulations 2006 and the correct interpretation of *"lawful residence"* in Directive 2004/ 38 which they implemented. The Court of Appeal held that the Directive created and regulated rights of movement and residence for EU citizens, therefore the *"lawful residence"* contemplated there was residence which complied with Community law requirements specified in the Directive and did not cover residence lawful under domestic law by reason of UK nationality, see Art. 3 of the Directive. Accordingly, a UK resident in the UK could not, by virtue of also having Irish nationality, claim a permit which might by granted by virtue of the Directive.

5. **Concluding thoughts.** On a more general level, what can we learn from these cases? An increasing focus by the courts on efficiency in the appeals systems (*Chikwamba v SSHD* [2008] UKHL 40 and *Beoku Betts v SSHD* [2008] UKHL 39); growing criticism of inefficiencies in the Secretary of State's system for handling claims (*EB (Kosovo) v SSHD* [2008] UKHL 41 and *Chikwamba v SSHD* [2008] UKHL 40); and the ultimate appeal of merits (*EM (Lebanon) v SSHD* [2008] UKHL 64 and *RB (Algeria) v SSHD* [2009] UKHL 10).

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Refugee Convention Extracts

Article 32

(1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

(2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

(3) The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33

(1) No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

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