GARDEN COURT
CHAMBERS

Development of human rights law in the migration context

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Key cases under the Human Rights Act 1998

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All human rights articles potentially available

- Ullah and Do[2004] UKHL 26 establishes definitively in UK law that all of the articles of the ECHR can potentially be relied on in foreign cases.

- Soering v UK (1989) 11 EHRR 439 and Chahal v UK (1996) 23 EHRR 413 had already established that Article 3 could operate to prevent removal where there was a real risk of a future breach of human rights.

- Re non-absolute Articles necessary to show that there would be a 'flagrant breach' of the right or rights in question, or that the right or rights would be completely nullified: EM (Lebanon) [2008] UKHL 64.

Huang and proportionality

- House of Lords was asked whether judges in immigration statutory appeals could assess proportionality for themselves?
- And if they could, did immigration control have any inherently greater weight than the private and family life interests when the two were weighed in the scales?
- “an applicant's failure to qualify under the Rules is for present purposes the point at which to begin, not end, consideration of the claim under article 8. The terms of the Rules are relevant to that consideration, but they are not determinative.”
- “the judgment of the primary decision-maker, on the same or substantially the same factual basis, is always relevant and may be decisive”.
- “the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted … [which] must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention.”

Huang and family life

- “Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant.”

- “the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted … [which] must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention.”

The scope of family life

Singh v ECO New Delhi [2004] EWCA Civ 107

- “this boy and his adoptive parents come from a society and embrace a faith which hold to a view of adoption sufficiently different from our own that our law refuses to afford recognition to what I have no doubt was in their eyes, as in the eyes of their community generally, a ceremony of the most profound emotional, personal, social, cultural, religious and indeed legal significance … the Strasbourg court has never sought to define what is meant by family life, nor has it even sought to identify any minimum requirements that must be shown if family life is to be held to exist. That is hardly surprising … in our multi-cultural and pluralistic society the family takes many forms.”
- *Singh* is the gateway to recognition of a fact specific test most recently seen in *Uddin* [2020] EWCA Civ 338: “The irreducible minimum of what family life implies [is] whether support is real or effective or committed.”

Zoumbas and children

Zoumbas [2013] UKSC 74

(1) The best interests of a child are an integral part of the proportionality assessment;

(2) Best interests of a child are a primary consideration, although not always the only one: not paramount;

(3) Best interests of a child can be outweighed by other considerations but none is inherently more significant;

(4) A judge must ask the right questions in an orderly manner to avoid undervaluing them;

(5) And obtain a clear idea of a child's circumstances and their best interests before weighing them

(6) Careful examination of all relevant factors

(7) Must not be blamed for conduct of a parent or other circumstances beyond their responsibility

Children as British citizens

ZH (Tanzania) [2011] UKSC 4 emphasises the special importance of British citizenship:

- The right to have rights
- A country's protection and support, socially, culturally and medically
- Social and linguistic disruption of their childhood as well as the loss of their homeland
- loss of educational opportunities
- isolation from the normal contacts of children with the UK settled family
- the children in this case … are British children; they are British, not just through the "accident" of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country.

Weighted public interest

- *MM (Lebanon)* [2017] UKSC 10
- the SSHD was wrong to suggest that the Rules could capture all cases: that would represent
- “a negation of the evaluative exercise required in assessing the proportionality of a measure under article 8 of the Convention which excludes any “hard-edged or bright-line rule to be applied to the generality of cases”” (*EB (Kosovo)* [2009] AC 1159, para 12, per Lord Bingham).
- Tribunals and government should work together in a collegiate partnership, rather than a confrontation
- There is a distinction between the constitutional responsibility to set policy and the implementation of that policy in individual decision making
- A compelling case under the Rules could succeed

Deportation

- *Hesham Ali* [2016] UKSC 60:
- where the SSHD has adopted a policy based on a general assessment of proportionality then judges should attach considerable weight to that assessment: a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life
- There are multiple public interest considerations:
- - Recidivism
- - General deterrence

Statutory presumptions not absolute: *Rhuppiah*

- Statutory presumptions re English language, financial independence, and precarious immigration status: section 117B NIAA 2002
- Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious
- When is residence precarious?
- it was still necessary to find scope within the legislation for the evaluative proportionality exercise which Strasbourg demanded. Both the notion of "*little weight*" and the language of section 117A(2) provided the limited degree of flexibility necessary: thus "*such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question.*"

Human Rights of Migrant Women

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Aydin v Turkey (1997)

- Recognition of rape by security forces as a form of torture: *Aydin v Turkey*

'83…Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.'

Opuz v Turkey (2009)

- Landmark judgment on domestic violence: Breaches of arts 2,3 and 14
- failure to protect a woman and her mother from attacks perpetrated by her husband directly and in the form of failure to tale effective deterrence measures
- Victims of domestic violence fall within a group of vulnerable individuals entitled to state protection [66]
- Physical violence and psychological pressure of the type occurring within domestic violence amounts to 'ill treatment' within the meaning of Article 3
- Domestic violence may be regarded as gender based violence which is a form of discrimination against women (200)
- Court recognised for the first time that the failure of states to address gender- based domestic violence can amount to a form of discrimination under the ECHR

Gender Based Persecution

- **Social exclusion**: extra marital affair, risk of domestic violence following expulsion (IC articles 60-61 *N. v. Sweden* (2010) (on specific facts if deported to Afghanistan, the applicant would face various cumulative risks of reprisals from her husband, his family, her own family and from the Afghan society which fell under Article 3 of the Convention)

- **Forced marriage**: *W.H. v. Sweden* (2015) (Grand Chamber, residence permit granted by national authorities and therefore not determined) see also *AA and ors v Sweden* (2012)

- **Female Genital Mutilation**: Where the ECHR finds a real risk of FGM it would be very likely to make a finding of breach of article 3 however in most cases currently considered either it has found individuals would not in fact face such a real risk or a friendly settlement has been reached the most recent example being *Bangura v Belgium* (2016) struck out on grounds that no foreseeable risk)

Detention and removal

- **Detention**: extended detention of a woman with vulnerability owing to her health without access to outdoor exercise, lack of female staff, little privacy, lack of specific measures to counter cold amounted to breach of article 3: *Abdi Mahmud v Malta* (2016)

- **Assistance to persons due to be removed**- *Shioshvili and ors v Russia (2017)* First applicant was pregnant and travelling with her 4 children. Prevented from continuing their travel out of Russia, not provided state assistance, of limited means and temperatures below -5. Breach of article 3 owing to very vulnerable status, living conditions and indifference of authorities

Areas for the future?

Istanbul Convention: increasingly relied on by ECtHR to develop jurisprudence in respect of women. Affects migrant women in four substantive ways:

- Art 4.3: All principles and standards within the convention applicable without discrimination including on migration status whilst woman is in the territory (Art 4.3)
- Art 59: Specific provision for residence permit to be granted in a variety of circumstances including where residence was dependant on spouse/partner and that relationship has broken down through domestic violence and in respect of forced marriage
- Art 60: Detailed provision for gender based asylum claims including reception and accommodation, identification and determination of claims and provision of gender guidelines
- Art 61: Non-refoulment including to a situation of gender based violence

Protection: Art 3 ECHR positive obligations

Summarised in Volodina v Russia (2019):

- (a) the obligation to establish and apply in practice an adequate legal framework affording protection against ill-treatment by private individuals;
- (b) the obligation to take the reasonable measures that might have been expected in order to avert a real and immediate risk of ill-treatment of which the authorities knew or ought to have known, and
- (c) the obligation to conduct an effective investigation when an arguable claim of ill-treatment has been raised

The ECtHR and the operational duty to protect against GBV

- Is the form of GBV recognised in the country of origin and sufficiently penalised in law? (IC arts 29-48, ECHR articles 3, 8, *ZB v Croatia* (2017)

- All relevant victims are covered by such legislation (*X and Y v Netherlands* (rape)(1985), *MG v Turkey* (domestic violence)(2016)

- Welcome development in art. 3 cases recognising the particular context of domestic violence and taking into account **recurrence of episodes and likely escalating nature of violence** when assessing whether risk is 'real and immediate' (see e.g. *Talpis*, *Volodina*, IC art. 46)

Reasonable measures to avert ‘real and immediate’ risk

- Failure to **conduct adequate risk assessments** and put in place **protective measures** throughout the proceedings and **engage in rehabilitation work with perpetrators** led to a finding of state responsibility for GBV resulting in death in *Branko Tomašić and Others v. Croatia* (2009), *Halime Kilic v Turkey* (2016), *Talpis v Italy* (2017) (IC art 16 (perpetrator programmes), art 18 general obligations, art 50 (immediate response and protection and art 51 (risk assessments) , *Hajduova v Slovakia* (breach of art 8,)

- Are immediate protection measures such as restraining orders, protection orders, safety orders available in home country? (IC arts 50-53, *Volodina, ES v Slovakia* (2009)) Standard of proof must not be too high (see eg *VK v Bulgaria* communication no. 20/2008 CEDAW)

GENDER-BASED ASYLUM CLAIMS
AND *NON-REFOULEMENT*:
ARTICLES 60 AND 61
OF THE ISTANBUL CONVENTION

A collection of papers
on the Council of Europe Convention
on preventing and combating violence
against women and domestic violence

The Changing Approach to Health

Greg Ó Ceallaigh, Garden Court Chambers

17 November 2020

Article 3 ECHR – expulsion cases

- Article 3 ECHR provides:

  “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

- Traditionally, this was considered to apply only to the consequences of actions in contracting states.

- However in *Soering v United Kingdom* (1989) 11 EHRR 439 and *Chahal v United Kingdom* [1997] 23 EHRR 413 it was held that Article 3 ECHR should also apply in expulsion cases where treatment abroad was either: (i) due to intentionally inflicted acts of the public authorities there; or (ii) from non-State bodies from whose actions the authorities could not provide protection.

D v United Kingdom [1997] 24 EHRR 423

- The applicant was a national of St Kitts arrested on arrival in the UK with a large quantity of cocaine, and sentenced to 6 years' imprisonment. In prison he was diagnosed with HIV.
- His prognosis was very poor (8-12 months), and would be reduced by half if removed from his support.
- The Court found that removal would present a real risk of a breach of Article 3 ECHR having regard to the effect of withdrawal of medical support in hastening his death, and the conditions of adversity he would face in St Kitts, which might lead to acute mental and physical suffering.
- The Court bore in mind the critical stage of his illness and his exceptional circumstances, and the fact that there was some assumption of responsibility for his care.

N v United Kingdom (2008) 47 EHRR 39

- *N v United Kingdom* came a decade after *D* and at a stage when AIDS drugs had improved.
- The applicant was a Ugandan woman living with HIV. Hers was not a deathbed case – her condition was stable, but without treatment she would deteriorate and die within a few years.
- The government argued forcefully that finding for the applicant would place a burden on contracting states that went well beyond what was agreed to when the Convention was signed.
- The Court accepted that if the applicant were deprived of her medication "*her condition would rapidly deteriorate and she would suffer ill-health, discomfort, pain and death within a few years*".
- However, the "*rapidity*" of that deterioration, and the extent to which she would be able to obtain treatment, involved "*a certain degree of speculation*" particularly given advances in HIV treatment. It did not therefore, amount to "*very exceptional circumstances*" – unlike *D*.

Move away from N

- The decision in *N* was not uncontroversial - there was a powerful dissent from three of the Judges in the judgment itself.

- There were hints at an obligation on states to investigate the facts on the ground where an allegation of an Article 3 ECHR breach was alleged, e.g. in *Tarakhel v Switzerland* [2014] ECHR 1185 and *M.S.S. v Belgium and Greece* (2011) 53 EHRR 2.

- In *Mwanje v Belgium* (2013) 56 EHRR 35 (10486/10) a concurring judgment of the Court expressed the hope that the Grand Chamber would revisit the decision in N as it was "*hardly consistent with the letter and spirit of Article 3*".

- Not a single case succeeded in Strasbourg applying the *N* threshold.

Paposhvili v Belgium [2017] Imm AR 867

- The applicant was a Georgian national suffering from leukaemia. By the time of the hearing he had passed away.

- A claim may succeed where substantial grounds have been shown for believing that an applicant, whether at risk of imminent death or not, would face a real risk of being exposed:

  - <u>either</u> on account of the absence of appropriate treatment;

  - <u>or</u> due to the lack of access to it:

    - <u>to either</u> to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering;
    - <u>or</u> to a significant reduction in life expectancy.

Paposhvili v Belgium (continued)

- The Court held that where an applicant had adduced evidence that supported an arguable risk of ill-treatment the duty was on the returning state to dispel that doubt. It was necessary to:

  "…consider the foreseeable consequences of removal for the individual concerned in the receiving State, in the light of the general situation there and the individual's personal circumstances." (§187)

- Contrary to the approach in *N*, the fact that the appropriate healthcare was not available to the general population was not a defence:

  "the authorities… must verify… whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3… it is not a question of ascertaining whether the care in the receiving State would be equivalent or inferior to that provided by the health-care system in the returning State…"

AM(Zimbabwe) v SSHD [2020] 2 WLR 1152

- Because decisions of Strasbourg are not directly binding here there was a period where *Paposhvili* was Convention law but UK courts remained bound by the decision of the House of Lords in *N v SSHD* [2005] 2 AC 296.

- The Court of Appeal initially interpreted *Paposhvili* in a highly restrictive manner.

- However in *AM(Zimbabwe) v Secretary of State for the Home Department* [2020] 2 WLR 1152 the Supreme Court overturned the judgment of the Court of Appeal and gave an authoritative ruling on the correct approach under the Convention to medical cases.

- The Court held that the effect of *Paposhvili* was that it was in fact possible for an Article 3 ECHR claim to succeed in circumstances other than "death-bed cases" such as in *D v United Kingdom* (§22) and that *Paposhvili* was not a mere clarification of the decision in *N v United Kingdom*, but a departure from it (§32).

Future steps?

- In *Savran v Denmark* (57467/15) the Fourth Section found a breach of Article 3 ECHR in the context of man with paranoid schizophrenia and complex mental health needs who was facing return to Turkey where adequate support to prevent him relapsing might not be available.

- The decision was by four votes to three and there was a strong dissenting judgment.

- That case was referred to the Grand Chamber in January 2020.

Thank you

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