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Welcome to Landmark Chambers'

Asylum and human rights update webinar

The recording may be accessed here.

Your speakers today are…

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Fiona Scolding QC (Chair)

Admas Habteslasie

Topic:
Asylum and ECHR case law update

Alex Shattock

Topic:
Machine learning and the future of asylum claims

Chris Jacobs

Topic:
Article 31 of the Refugee Convention and the right to settle

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Asylum and ECHR caselaw update

Admas Habteslasie

SOME THEMES

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- Is it possible to obtain refugee status derivatively, e.g. through parent?
- Scope of expert medical evidence on torture
- Displacing assurances given by state officials – Art.3 prison conditions
- Internal relocation in Afghanistan (Kabul)
- Can SSHD rely on the availability of internal relocation as the basis for cessation of refugee status?
- Dublin III:
  - failure to make an earlier asylum claim by an unaccompanied minor
  - ECHR compatibility of expedited procedure for unaccompanied children in wake of demolition of migrant camp in Calais
- Academic claims

JS (Uganda)

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- ***JS (Uganda)*** [2019] EWCA Civ 1670, 10 October 2019
- JS recognised as refugee under family reunion policy on basis his mother was a refugee

- SSHD decided to cease C's status under 1C(5) of Refugee Convention: Convention will cease to apply where refugee can *"no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality".*

- SSHD: circumstances in connection with which he had been recognised as a refugee in Uganda had ceased to exist

JS (Uganda)

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- Following dismissal of appeal by FtT, UT allowed JS's appeal on the basis that Art1C(5) did not apply because *"the circumstances in which he had been recognised as a refugee"* were that he was the son of a recognised refugee; and those circumstances still pertained.

- SSHD appealed to CoA.

JS (Uganda)

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- CoA allowed appeal:
    - Status of refugee was only accorded to a person who themselves had a well-founded fear of persecution; therefore, could not derive refugee status from the refugee status of another person;
    - Acceptance under family union policy did lead to acquisition of status; and JA had never been recognised as a refugee under the Convention

- Further, even if JA had been able to obtain status through his mother, the *"circumstances"* referred to in Art 1C(5) were broader than understood by UT, and extended to the basis on which his mother had sought refugee status

JS (Uganda)

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- Procedural point: JS had been granted leave to enter as if he were a refugee; and in pre-action correspondence and in litigation below, SSHD had proceeded on basis that JS was a refugee. At CoA sought to reverse position. JS argued this should not be permitted.

- CoA allowed SSHD to "withdraw concession"; see [89] *"First, there is no evidence that particular consideration was given to JS's actual status by the SSHD's officials. …Second, the point as to JS's status is a difficult one and it is not altogether surprising that the SSHD's presenting officer and legal advisers did not appreciate it until a late stage in the proceedings. The point is not " Robinson obvious" …Third, the point in question is a pure point of law as to the definition of "refugee" under article 1A(2) of the Refugee Convention and requires no fresh evidence. Fourth, there is no material prejudice to JS in allowing the point to be taken on appeal."*

KV (Sri Lanka)

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- ***KV (Sri Lanka)*** [2019] UKSC 10 [2019] 1 W.L.R. 1849, 6 March 2019
- Appeal against the refusal of an asylum claim by a Sri Lankan national who alleged that he had been tortured by the Sri Lankan authorities

- Before UT, medical expert gave evidence that the appearance of scars on the claimant's right arm and back were “highly consistent” with the claimant's account of how he had been tortured, which was that hot metal rods had been applied to his right arm while he was conscious and then applied to his back while he was unconscious.

- *“highly consistent”* per §187(c) of Istanbul Protocol = lesion could have been caused by the trauma described, and there are few other possible causes

KV (Sri Lanka)

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- The Upper Tribunal dismissed the claimant's appeal, finding that his scars had been inflicted by someone at the claimant's own invitation.

- KV appealed to CoA; who held that, by stating that the scars were *"highly consistent"* with the claimant's account, rather than simply that the scars were highly consistent with the mechanism by which they were said to have been caused, the expert had trespassed beyond his remit into the area where it was for the Upper Tribunal to make an assessment of all the evidence.

- KV appealed to Supreme Court

KV (Sri Lanka)

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- Supreme Court allowed the appeal

- when analysing whether scars had been established to be the result of torture, decision-makers could legitimately receive assistance which was often valuable from medical experts who felt able, within their expertise, to offer an opinion about the consistency of their findings with the asylum seeker's account of the circumstances in which the scarring had been sustained, not limited to the mechanism by which it had been sustained;

- §187(c) did not limit an expert's role as the CoA had indicated

SSHD v Devani

- ***SSHD v Devani*** [2020] EWCA Civ 612, 7 May 2020
- Approach to evidence contrary to state assurances

- C was subject of extradition request by Kenyan government. This was challenged in domestic courts unsuccessfully on basis of non-compliance of prison conditions in Kenya with Art.3 ECHR. Divisional Court found that prison conditions were not Art.3 compliant, but held that, in light of formal assurances made by Kenyan Commissioner for Prisons and DPP to Home Office, challenge should be rejected

- C subsequently made asylum & human rights claim on basis of Art.3

SSHD v Devani

- C's case was based on an earlier case involving a Mr Deya, who had been extradited to Kenya on basis of equivalent assurances. Mr Deya was extradited to Kenya to face charges of child trafficking in connection with a "miracle babies" scam." Per BBC *"claimed he created miraculous pregnancies, to Kenya to face child-trafficking charges"*

- C relied on a news story drawing principally on Mr Deya's account which indicated that specific assurances regarding the conditions in which he would be detained had not been followed through

- UT allowed C's appeal. SSHD appealed. **Issue: could an 'unverified' news report constitute a sound basis to undermine the Kenyan assurances?**

SSHD v Devani

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- Court found the following principles from relevant case law:
- *i) Courts will, as a general rule, be reluctant to question the reliability of assurances in relation to prison conditions;*
- *ii) An argument that a foreign State will not honour assurances represents a very serious allegation of bad faith and the evidence required to displace good faith must possess "special force"*
- *iii) No principle that assurances must eliminate all risk of inhuman treatment before they can be relied upon; the issue is whether no reasonable tribunal, properly instructed as to the relevant law, could have reached the same conclusion on the evidence;*
- *iv) There is a fundamental presumption that a requesting State is acting in good faith and the burden of showing an abuse of process is on the person who asserts it, with the standard of proof being the balance of probabilities*

SSHD v Devani

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- Appeal allowed.

- Nicola Davies LJ held that the news report was *"unverified",* based on *"no more than anecdotal evidence",* the main source being a witness *"whose reliability was highly questionable";* the news report *"does not begin to provide the evidential weight required to undermine the specific assurances given by senior office holders in Kenya"*: [63]-[64]

SSHD v Devani [2020] EWCA Civ 612

- Case also raised a procedural point arising from the fact that FtT Judge misrecorded the final decision.

- This is what the judge intended to record in the Notice of Decision:

The Appeal is allowed (Article 3 only)

SSHD v Devani [2020] EWCA Civ 612

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- This is what the judge actually record in the Notice of Decision:

The Appeal is dismissed (Article 3 only)

SSHD v Devani [2020] EWCA Civ 612

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- C understood that error was beyond slip rule, relying on ***Katsonga*** [2016] UKUT 228 (IAC)

- SSHD could not appeal against FtT decision because technically was the successful party; and did not file a response to Devani's appeal

- C argued, successfully, that it was not open to SSHD, in absence of a response, to argue the substantive point

- CoA held slip rule **did** apply – could have been corrected as an error. Correct that SSHD should have filed response, but

SUMMARY

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- ***KV (Sri Lanka)***: expert medical evidence on torture can deal with consistency with account, not just described mechanism by which injuries sustained

- ***JS (Uganda)***: [2019] EWCA Civ 1670: Refugee status could not obtained on a derivative basis; an applicant had to satisfy the criteria themselves; treatment of concessions

- ***SSHD v Devani*** [2020] EWCA Civ 612:
  - unverified news report not enough to displace assurances given by state officials
  - Slip rule does extent to misrecording result

Other cases of note

- ***AS (Afghanistan)*** [2019] EWCA Civ 873: internal relocation in Afghanistan, errors of fact and reinstatement of principles
- ***KA (Afghanistan)*** [2019] EWCA Civ 914: a failure to make an earlier asylum claim by an unaccompanied minor
- ***SSHD v R (MS (a child))*** [2019] EWCA Civ 1340: academic claims, refusal of a take charge request
- ***FTH v SSHD*** [2020] EWCA Civ 494: No Art.8 breach on basis of expedited procedure for unaccompanied children in wake of demolition of migrant camp in Calais
- ***MS (Somalia)*** [2019] EWCA Civ 1345 : SSHD could rely on the availability of internal relocation as the basis for cessation of refugee status

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Machine learning and the future of asylum claims

Alex Shattock

This talk

- What is machine learning?
- Machine learning in the immigration context
- Machine learning and asylum claims
- Legal issues on the horizon

What is machine learning?

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- A subset of Artificial intelligence (AI)
- UK Government Guidance, *A guide to using artificial intelligence in the public sector* (January 2020):

  "AI can be defined as the use of digital technology to create systems capable of performing tasks commonly thought to require intelligence."

  "AI is constantly evolving, but generally it involves machines using statistics to find patterns in large amounts of data…[it can] perform repetitive tasks without the need for constant human guidance"

What is machine learning?

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- Machine learning is a process by which digital systems improve their performance on a given task over time through repetitive experience and feedback
- Can be used to train AI algorithms to categorise data and spot patterns in large data sets
- Applications for e.g. facial recognition, speech-to-text translation, driverless cars, fraud detection
- Particularly interesting applications for public sector decision-making

Example

- Let's say we want to train an algorithm to sort images into two categories using machine learning:

  Category 1 (sloths)

  Category 2 (pastries)
- First we ask the algorithm to sort e.g. 500 images
- A human "trainer" will mark the algorithm's homework
- This feedback is put back into the algorithm
- The process is repeated
- Over time, the algorithm "learns" how to distinguish between sloths and pastries through repetition/ trial and error

Public sector applications of machine learning

- Enormous potential benefits to public sector decision-makers
- Tasks that these algorithms can help with:
  - Categorisation
  - Tailored public services (e.g. e-mail alerts/ reminders)
  - Disclosure in civil proceedings
  - Repetitive tasks e.g. data entry
  - Contact tracing and risk modelling
  - Decision making?
- AI systems are currently being used to assist DVLA, local councils, Home Office, National Crime Agency etc

Machine learning in the immigration context: visa decisions

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- The Home Office has created an AI streaming tool that contributes to immigration policy decisions
  - The tool allocates people to one of three categories based on a series of risk categories
  - Historically this is a task that would be carried out by an immigration caseworker
- The Home Office also uses a separate AI tool to check DWP and HMRC data to verify residence within the Settled Status Application process

Machine learning and asylum decisions

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- 2017 study: *Chen and Eagel*
- Created an algorithm to classify applications into two categories (i.e. binary decision): grant of asylum or not?
- Analysed 492,903 asylum hearings from 336 different hearing locations, rendered by 441 unique judges over a 32 year period from 1981-2013
- Their algorithm was able to correctly classify 82% of the decisions into the decision category that was actually reached
- *"We have shown that through a complex non-linear learning system we can predict with a high degree of accuracy whether an asylum applicant would be granted refugee status."*
- Applications for advising clients on prospects and assisting decision making

Machine learning and asylum decisions

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- Canada and Germany are known to be experimenting with algorithmic decision-making in the immigration field
- Since 2014, Canada has been in the process of developing a “predictive analytics” system to automate activities currently conducted by immigration officials.
- As of June 2018, Canada has been using an automated system to “triage” certain applications into two streams, with “simple” cases being processed and “complex” cases being flagged for review
- Seems reasonable in principle, but once an algorithm starts assisting immigration officials with seemingly harmless “sorting” tasks there are potential legal difficulties…

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Potential legal issues

Discrimination

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- Very easy for AI algorithms to discriminate if they are left to make decisions without human oversight e.g. who is a fraud risk for the purposes of awarding benefits
- If AI algorithms are trained using skewed or incomplete information, or designed in a biased way, then the results may be off which happens fairly often as their designers and testers are often not particularly diverse
- E.g. Some local authorities now use AI risk-based verification processes in relation to Housing Benefit and Council Tax Benefit applications to identify fraudulent claims
- Central Bedfordshire Council are using one such system. CBC's Audit Committee report, 9 April 2018: a random sample of 10 "high risk" applicants sorted through the AI system were all working women

Discrimination: the Visa system challenge

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- Recent legal challenge to the Home Office's visa streaming tool under the EA 2010, on the basis that it uses nationality as a risk factor (unclear where this has got to)
- The allegation is that this is no different to the unlawful scheme the Home Office used to run, where Roma applications were treated with increased scrutiny because Romas were deemed to be higher risk (*R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55)
- It appears that under the current scheme applicants from "high risk countries" are automatically subject to intensive scrutiny
- Government have refused to publish its list of suspect nationalities
- Claim filed this month by JCWI

Discrimination: asylum claims?

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- The decision-making process is opaque but it appears that algorithms are already being used to co-ordinate and compile data between different government departments and agencies- unclear whether this is yet happening in the asylum context
- If the Visa categorisation system survives challenge or court guidance is provided on how it can be modified, a wider rollout is very likely
- It seems like only a matter of time before machine-learning becomes integrated into asylum decision making

Accountable decision-making

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- The opaqueness of these algorithms raises accountability issues
- House of Lords AI Committee:

  "The number and complexity of stages involved in these deep learning systems is often such that even their developers cannot always be sure which factors led a system to decide one thing over another. We received a great deal of evidence regarding the extent and nature of these so-called 'black box' systems."
- How does one JR an AI-assisted decision?
- Duty of candour and algorithmic decision-making?
- FOI/disclosure of an AI methodology/code? Potential issues with third-party copyright and commercial confidentiality

Possible solutions

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- Equality auditing of datasets and algorithm design
- Greater transparency regarding when decisions are reached with the help of an algorithm, and what assistance is provided
- Standard procurement contracts for AI systems with built-in transparency and accountability clauses
- Ringfencing certain decisions from fully-automated decision-making. See e.g. GDPR Article 22: *"The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her."*

References

- UK Government Guidance, A guide to using artificial intelligence in the public sector (January 2020)
  https://www.gov.uk/government/publications/a-guide-to-using-artificial-intelligence-in-the-public-sector
- House of Lords AI Committee:
  https://www.parliament.uk/ai-committee
- Can Machine Learning Help Predict the Outcome of Asylum Adjudications? (2017)
  https://users.nber.org/~dlchen/papers/Can_Machine_Learning_Help_Predict_the_Outcome_of_Asylum_Adjudications.pdf
- Bots at the gate: a human rights analysis of automated decision-making in Canada's immigration and refugee system
  https://citizenlab.ca/wp-content/uploads/2018/09/IHRP-Automated-Systems-Report-Web-V2.pdf

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Article 31 of the Refugee Convention and the right to settle

Christopher Jacobs

R (ota) SE v SSHD

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- To have been heard on 29 January 2020.
- Respondent conceded judicial review proceedings.
- Point of public importance. Professor Goodwin Gill expert report.
- Whether Art 31 relates to prosecution/ criminal/ penal sanctions or *other immediate or incidental sanctions or disadvantages were also to be included, where they were clearly linked to irregular entry or presence.*

Article 31 Refugee Convention

- Article 31(1) of the 1951 Convention relating to the Status of Refugees sets out as follows:

- *‘The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.’*
-

Asfaw [2008] 1AC 1061

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- *“The Refugee Convention had three broad humanitarian aims. The first was to ensure that States acceding to the Convention would afford a safe refuge to those genuinely fleeing from their home countries to escape persecution or threatened persecution [...]. Such refugees were not to be returned to their home countries. The second aim was to ensure reasonable treatment of refugees in their countries of refuge, an aim to which most of the articles in the Convention were addressed.* ***The third aim, broadly expressed, was to protect refugees from the imposition of criminal penalties for breaches of the law reasonably or necessarily committed in the course of flight from persecution or threatened persecution.”***

Section 31 Immigration and Asylum Act 1999

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- The refugee defence

- The consequence of the judgment in Adimi, was that section 31 of the Immigration and Asylum Act 1999 was implemented. The refugee defence was modelled on article 31(1).

Criminal Cases Review Commission and Court of Appeal

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- Refugees have been entitled to CCRC for a review of their convictions for irregular entry and stay.
- In *Nori,* in 2016, Court of Appeal indicated that such cases should be referred directly to it with a view to quashing convictions.
- Not always available to refugees.
-

Immigration Rules – potentially ultra vires?

- ***“Requirements for indefinite leave to remain for persons granted refugee status or humanitarian protection***
-
- *339R. The requirements for indefinite leave to remain for a person granted refugee status or humanitarian protection, or their dependants granted refugee status or humanitarian protection in line with the main applicant or any dependant granted leave to enter or remain in accordance with the requirements of paragraphs 352A to 352FJ of these Rules (Family Reunion), are that:*
- …….

Contd.

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- *(iii) the applicant has not:*
- *a. been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years; or*
- ***b. been convicted of an offence for which they have been sentenced to imprisonment for at least 12 months but less than 4 years, unless a period of 15 years has passed since the end of the sentence**; or*
- *c. been convicted of an offence for which they have been sentenced to imprisonment for less than 12 months, unless a period of 7 years has passed since the end of the sentence; or*
- Text

Immigration Rules

- *339S. Indefinite leave to remain for a person granted refugee status or humanitarian protection will be granted where each of the requirements in paragraph 339R is met.*
-
- *Refusal of indefinite leave to remain for a person granted refugee status or humanitarian protection*
-
- ***339T. (i) Indefinite leave to remain for a person granted refugee status or humanitarian protection is to be refused if any of the requirements of paragraph 339R is not met.***

Section 2 Asylum and Immigration Appeals Act 1993

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- "*nothing in the immigration rules (within the meaning of the [Immigration Act 1971] shall lay down a practice which would be contrary to the convention*."

UNHCR view

- UNHCR Expert Round Table Conclusions (Geneva, November 2001) [at 10(h)] that : "*The term 'penalties' includes, but is not necessarily limited to, prosecution, fine, and imprisonment.*"

- *Other jurisdictions.*

Article 31 Vienna Convention

- ***Article 31 General rule of interpretation***
- *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

Conclusions

- ‘Penalties’ must be understood in a wider sense that includes the right to settle.
- Art 31 should not only relate to the period immediately after arrival
- Scope and meaning of Art 31 must be considered in the light of the object and purpose of the Convention.
- Immigration Rules are arguably ultra vires in their unamended form

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Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the chat section which can be found along the top or bottom of your screen.

Thank you for listening

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