Landmark Chambers

Asylum and ECHR caselaw update

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SOME THEMES

Landmark Chambers

- 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)

Landmark Chambers

- ***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)

Landmark Chambers

- 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)

Landmark Chambers

- 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)

Landmark Chambers

- 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)

Landmark Chambers

- ***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)

Landmark Chambers

- 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)

Landmark Chambers

- 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

Landmark Chambers

- 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

Landmark Chambers

- 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

Landmark Chambers

- 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

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

SUMMARY

Landmark Chambers

- ***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