
GARDEN COURT
CHAMBERS

Albania: not a safe State

David Neale, Garden Court Chambers

21 March 2023

The LEGAL 500 UNITED KINGDOM TOP TIER SET 2023

Chambers TOP RANKED UK Bar 2023 Garden Court Chambers

Blood feuds

- EH (blood feuds) Albania CG [2012] UKUT 00348 (IAC) acknowledges that *"The Albanian state has taken steps to improve state protection, but in areas where Kanun law predominates (particularly in northern Albania) those steps do not yet provide sufficiency of protection from Kanun-related blood-taking if an active feud exists and affects the individual claimant"*.
- Home Office would need *"very strong grounds supported by cogent evidence"* to depart from this.
- September 2022 and January 2023 CPINs argue for a departure from *EH* and argue that blood feud claims can be certified as clearly unfounded.
- This is wrong; see my reviews of the CPINs https://miclu.org/assets/uploads/2022/12/Albania-review-of-new-blood-feud-CPIN1.pdf and https://miclu.org/assets/uploads/2023/02/Albania-blood-feud-CPIN-review-February-2023.pdf

Trafficking

- *TD and AD (Trafficked women) CG* [2016] UKUT 92 (IAC) and *AM & BM* (Trafficked women) *Albania CG* [2010] UKUT 80 (IAC) deal with trafficked women and girls.
- Risk factors:
    1) The social status and economic standing of her family
    2) The level of education of the victim of trafficking or her family
    3) The victim of trafficking's state of health, particularly her mental health
    4) The presence of an illegitimate child
    5) The area of origin
    6) Age
    7) What support network will be available.
- Asylos/ARC research (2019) shows that similar risk factors apply to trafficked men and boys. Risk factors include poverty, low education, suffering from physical or mental disabilities, domestic violence and/or sexual abuse within the family or a pre-existing blood feud, being LGBT and for children, being Roma or Egyptian or homeless.
- Most trafficked men and boys display some or all of these risk factors.

Trafficking (continued)

- December 2022 and February 2023 CPINs assert that men's and boys' claims can be certified.
- This is wrong: see my reviews https://miclu.org/assets/uploads/2023/01/Albania-trafficking-CPIN-response.pdf and https://miclu.org/assets/uploads/2023/02/Albania-trafficking-CPIN-addendum.pdf
- They do not assert that girls' and women's claims can be certified.

Internal relocation

- Accepted in *AM and BM* at [186]-[187] that traffickers can track down their victims in other parts of Albania through family/community ties. Dr Stephanie Schwandner-Sievers (the expert whose evidence was accepted in *AM and BM*) made similar points in the Asylos/ARC report in relation to boys and men.
- Other sources confirm the same in relation to families in blood feud – it is easy to trace people in Albania through word of mouth, and internal relocation does not bring safety.
- Some such sources were cited in the September 2022 blood feud CPIN but mysteriously omitted from the January 2023 blood feud CPIN!

The duty to remove, destinations for removal and designation of Albania as a safe country

David Jones and David Neale, Garden Court Chambers

21 March 2023

In brief …

Under the Removal provisions there is –

- a blanket duty on the Home Secretary to remove people who have entered or arrived in the UK illegally from a safe country
- and deem inadmissible protection and human rights claims made by the same

Duty to make arrangements for removal – Clause 2

- If 4 conditions described in **Clause 2** are met the SSHD **must** make arrangements for removal
- Persons affected are those who -

Condition 1:

- Need leave to enter but don't have it
- Obtained leave to enter *by means including deception by any person*
- Entered in breach of a Deport Order
- Required entry clearance but arrived without it
- Required an Electronic Travel Authorisation (ETA), but don't have one

Condition 2: Entered on or after 7/3/23

Condition 3: Did not come directly from a country where life and liberty were threatened for a Refugee Convention reason (ie came via a safe third country)

Condition 4: Requires leave to enter or remain but doesn't have it

- Exceptions are made –
  - For UASC's (under **Clause 3**, however, there is a discretionary power to remove, and under **Clause 5(1)** protection only lasts till a UASC is 18)
  - VOT's recognised under s61-62, and
  - Further by way of Regulations

Disregard of certain claims – Clause 4

- Where the Clause 2 duty operates **Clause 4** specifies it applies regardless of whether –
    a) a person make claim to protection
    b) a human rights claim
    c) claims to be a Victim of Trafficking
    d) an application for JR in respect of removal
- Under Clause 4 the SSHD **must** deem such protection and Human Rights claims inadmissible
- A claim deemed inadmissible cannot be considered under the Immigration Rules and is not appealable under s82 NIAA
- Claims are defined for the purposes of Clause 4 as those:
    - Made on or after 7 March 2023
    - Which have not been decided by the SSHD at the time the provision comes into force

Note - Whilst issuing Judicial Review proceedings may not preclude operation of the Clause 2 duty, it will enable applications for interim relief which can be used to bar removal

Removal in Clause 2-3 cases – Clause 5 (1)

- Under Clause 5(1) the Secretary of State is obligated to remove ***as soon as reasonably practicable*** after entry OR after person ceases to be a UASC (ie post 18th birthday)
- Removal is permitted to a persons –
    - country of nationality
    - Embarkation
    - where possess passport, or
    - a place SSHD has reason to believe will be admitted
- s80AA safe countries nationals can be removed to their own country or a third country
    - Clause 50 amends the inadmissibility criteria in the NIAA to introduce s80AA
    - It creates an inadmissibility list of Safe States and includes all EU States, plus Switzerland, Iceland etc and **Albania**
- Nationals of a country not on the s80AA list who seek protection or make a HR claim can only be removed to a safe 3C

Removal in Clause 2 and 3 cases – Exceptions (2)

- **Clause 5(4)** specifies that removal s80AA nationals to their own country can be resisted where it can be argued there are ***exceptional circumstances*** for nationals of safe countries as defined by s80AA(1) 2002 Act
- If the test is met it will only prevent removal to country of nationality or passport **not** a 3C
- Clauses 37 to 48 describe a regime for challenging removal on the basis that they would suffer ***serious irreversible harm*** in the intervening period or there were **factual mistakes** made when deciding to remove
- The Bill doesn't define serious irreversible harm, it allows the SSHD the facility to do so
- In current Guidance (eg Regulations 33 and 41 of the Immigration (European Economic Area) Regulations 2016 (Version 8.0, 21 December 2021 (Regulations 33 and 41 of the Immigration (European Economic Area) Regulations 2016.docx (publishing.service.gov.uk)), she describes the test and its application saying -
    - *Serious' indicates that the harm must meet a minimum level of severity, and 'irreversible' means that the harm would have a permanent or very long lasting effect*
    - That it may cover - a sole carer for serious ill partner or child; where there is a Court order for care of a child in favour of the Applicant; for a seriously ill Applicant where no medical provision available in the country of return, or; where an Applicant's health is such it may prevent them pursuing an appeal
- The process in brief - 7 days are allowed within which to seek a suspension; There is no right of appeal if submissions are deemed clearly unfounded, though a person can seek a judicial review; if not certified there is an appeal on a limited basis to the Upper Tribunal, to be exercised within 6 days of refusal of any submissions

The Section 80AA safe country list – Clause 6

- **Clause 6** describes the process for addition or removal of countries from the list
- When deciding whether to add a country to the Schedule SSHD must -
    - Must ***have regard to the circumstances of the country and information from appropriate sources***
- In the Home Office Memorandum it is also noted that -
    - The Secretary of State, when deciding whether to add a country to the Schedule must ensure that ***all relevant issues are considered***, which includes compatibility with the ECHR and section 6 of the Human Rights Act 1988

Removal of family members – Clause 8

- **Clause 8** allows for removal of family members in line with a principle applicant
- Any protection or human rights claims will be disregarded
- A broad definition of family member is applied, it includes –
    - Spouses/partners etc
    - children
    - dependent adult relatives
    - members of household
- Persons can be **excepted** if they have Leave to enter or leave to remain or are British, Irish or have a right of abode

Access to support – Clause 9

- Amends IAA 1999 and NIAA 2022 so that those who make asylum claims and are caught within the duty to remove can access asylum support

- Where a person has not claimed asylum –
  - They may access support under immigration bail as per paragraph 9 of Schedule 10 IA 2016
  - Children will be supported by local authorities under sections 17 and 20 of the Children Act 1989

The legality of the Removal provisions

- Suella Braverman says in the Bill she is unable to say that its provisions are compatible with the ECHR
- Statement is made under section 19(1)(b) HRA 1998
- Government's accepts there is a more than 50% chance provisions of the Bill are not compatible with the UK's human rights obligations
- Home Secretary says she makes that statement because –
    - Her approach is *robust and novel* (which it is if copying the Australians immigration model is robust and novel)
    - Not because she considers the provisions of the Bill are actually incompatible with ECHR
- Home Office assesses potential breaches in its 'Illegal Migration Bill: European Convention on Human Rights Memorandum' (7 March 2023) (colloquially known as 'A beginners guide to litigating the Bill'), in which it accepts
    - The majority of clauses in the removal sections (particularly clauses 4, 5, 6, 7) **may variously engage Articles 2, 3, 4, 8, 13 and 14**
    - Fortunately for the rule of law and the preservation of fundamental human rights the Home Office proceeds to express the view that no breaches are made out
- Just in case she's wrong Ms Braverman has signalled a fall back position - leaving the ECHR is *not off the table*

Government position on potential breaches – A2 and 3

On Articles 2-3 EHCR -

- Considers these will not be infringed because it must be read in conjunction with **clause 5** -
  - For non-section 80AA nationals a protection or human rights claim will prevent refoulement
  - In respect of section 80AA safe country nationals there is an **exceptional circumstance** test which may prevent removal to that country
- Additionally, A3 will not be infringed as an applicant can make **a serious harm suspensive claim** under the provisions in clauses 37 to 48 (suspensive claims), which makes the provision compliant with Article 13 ECHR

Government position on potential breaches – A8

- Article 8 will not be infringed as –
  - Any family members may be removed along with the Applicant (**clause 8**)
  - Persons removed can make an application under **clause 29** for re-entry and limited leave where it would be necessary for the UK to comply with its obligations under the ECHR
  - For private life cases, family life outside of the definition of family member, and for those from safe countries generally the Government's view is that any interference is justified under A8(2)

Government position on potential breaches – A14

- Home Office accepts Article 14 may be engaged based on differential treatment as between -
    a) *section 80AA nationals and non-section 80AA nationals*
    b) *both of the above groups and those with claims predating the Bill and those who arrive after 7 March 2023 but have had their claims decided before the section comes into force*
- **BUT** finds there will be no breach –

    For a) *there is no differential treatment since such nationals will either be sent to their country of origin or to a Schedule country, so the treatment is the same*

    For b) whilst claim could be fixed on *other status* will not establish differential treatment because –

    - The difference in treatment does not arise due to a distinction between two groups of people but rather **due to a factual event**, namely when a person made their asylum claim
    - Alternatively any difference in treatment was in pursuit of a legitimate aim and objectively justifiable

Challenging Albania as a safe country and removal of Albanian protection applicants

- There is precedent for challenges to inclusion of countries on such safe country lists

  R (JB (Jamaica)) v SSHD EWCA Civ 666, the Court of Appeal found the designation of Jamaica to be **unlawful** because of the accepted evidence of serious violence targeted at the LGBT community and of a general lack of state protection for that community.

- When considering a challenge to inclusion of Albania –
  - Seek disclosure of material relied upon to designate (as per Clause 6)
  - If CPIN expose identify inadequacies of the same as a source, and variations in position on risk over time /absent any material changes in country conditions
  - Collate other alternative reputable sources of country evidence
  - Highlight country guidance decisions where the Tribunal has identified a potential protection (blood feuds, victim of trafficking)
  - In the latter context identify the high threshold for deviation from country guidance ie *strong grounds supported by cogent evidence - SG (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 940 [47]
  - Adduce evidence of grants by the Home Office and allowed appeals on comparable facts

- A similar strategy for preparation of **exceptional circumstance** and **serious irreversible harm** applications, and subsequent challenges, can be adopted

Detention provisions in the Illegal Migration Bill

Greg Ó Ceallaigh

21 March 2023

Introduction

- The aim of this training is to give an overview of the new provisions in the Illegal Migration Bill:

  - Set out the new provisions

  - Set out some of the issues they raise

New provisions in summary

- **Clause 11:**
  - Creates new powers of detention for those being removed or considered for removal under Clause 2
  - Explicitly removes some protections for vulnerable groups, e.g. families, unaccompanied minors, pregnant women

- **Clause 12:**
  - Removes the power of the Court to examine for itself whether detention has endured beyond a reasonable period
  - Expressly permits detention when there is an obstacle to removal
  - Permits further detention for a potentially lengthy 'grace period'

- **Clause 13**
  - Completely prevents detention being challenged by judicial review or bail application in the first 28 days of detention under the new powers

Clause 11

Clause 11: The new detention powers

- This clause creates new powers of detention:
  - For an Immigration Officer in a new para 16(2C) and (2D) of Schedule 2 to the Immigration Act 1971
  - For the Secretary of State in an equivalent s62(2A) and (2b) of the Nationality, Immigration and Asylum Act 2002

- The power is to detain: a person who may be removable under Clause 2; pending consideration of whether they are removable/the duty applies, pending removal/release

- Creates an equivalent power to detain their family members

- Excludes, where detention is under the new powers, the protections:
  - For unaccompanied minors in paragraph 18B of Schedule 2 to the 1971 Act
  - For detained families in s147 of the Immigration and Asylum Act 1999
  - For pregnant women in s60(8) of the Immigration Act 2016

- Removes the power to detain under paragraph 16(2) where the new powers are available

Clause 11: Issues with the new powers

- This power applies to people in respect of who there was already a power to detain under paragraph 16(2)
- The purpose of these new powers appears to be:
  - To remove the protections as to place of detention
  - To remove the protections for kids/families/pregnant women
- This is the first piece of immigration detention legislation I have seen intended to *increase* the powers to detain groups identified as at risk of harm in detention
- There is a real likelihood of detention of children and families raising issues under Article 5 ECHR as well as potentially Article 8 ECHR (and conceivably Article 3 ECHR)

Clause 12

Clause 12: Removal of limitations on length of detention

- This clause applies to all immigration detention
- Allows (by amendments to all extant immigration detention powers) detention to endure for a period that is reasonably necessary "*in the opinion of the Secretary of State*"
- Allows detention to endure even where removal cannot be achieved "*for the time being*"
- Introduces a new power to detain while the SSHD makes arrangements for release – again while necessary "*in the opinion of the Secretary of State*"
- Those changes are subject to the protections for pregnant women

Clause 12: Issues with the new powers

- This will:
  - Place some of the *Hardial Singh* provisions on a statutory footing
  - Remove the requirement that detention be for the purpose of removal
  - Remove (possibly) the requirement for diligence in pursuing removal
  - Remove the Court's ability to examine for itself if a reasonable period has been exceeded, reversing *R(A) v SSHD* [2007] EWCA Civ 704
- Unclear if this will work – can the SSHD rationally detain for a period that is not objectively reasonable? Can the SSHD maintain detention on a belief that is not rational? Can the Court decide whether the SSHD's belief is rational without examining the facts?

Clause 12: Issues with the new powers

- Likely to be contrary to Article 5 ECHR:
  - *R (Lumba) v SSHD* [2011] UKSC 12 at §30: "*the Hardial Singh provisions only do what article 5 requires*")
  - *SSHD v Fardous* [2015] EWCA Civ 931"*[i]t is this objective approach of the court which reviews the evidence available at the time that removes any question that the period of detention can be viewed as arbitrary in terms of article 5*".
- Places the 'grace period' from e.g. *AC(Algeria) v SSHD* [2020] 1 WLR 2893 on a statutory footing:
  - expanded so that detention will be lawful until a release that "*the Secretary of State considers to be appropriate*"
  - and without judicial scrutiny – that can take as long as is necessary "*in the opinion of the Secretary of State*"

Clause 13

Clause 13: Limitation on bail and judicial review

- This Clause introduces a power to grant bail to those detained under the new detention powers both to the SSHD and the FTT
- Makes the fact that removal under the new power is under consideration a relevant factor in a decision of the FTT as to whether to grant bail
- Provides that a person detained under the new powers:
  - Cannot be granted bail at all by the FTT until after the end of 28 days of detention
  - Cannot challenge the decision to detain or refuse bail "*in any court*" unless she acted in "*bad faith*" or a "*procedurally defective way*" that amounts to a "*fundamental breach of the principles of justice*"
  - Public law errors would not render detention unlawful
- *Habeas corpus* remains available

Clause 13: Issues with the new powers

- Difficult to see how *habeas corpus* provides any comfort

- The Explanatory Memorandum claims hat damages claims will still be possible, but it is difficult to see how if the decision is "*…not liable to be questioned or set aside in any court.* "

- Seriously doubtful whether these powers comply with Article 5(4) ECHR:

  "*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*"

- Or Article 37(d) UNCRC:

  "Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

Thank you

020 7993 7600 | info@gclaw.co.uk | @gardencourtlaw