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Immigration Legal Bulletin. September Bulletin

Introduction

Welcome to the February 2008 edition of the Immigration and Asylum Law Bulletin which we hope you will find informative.

In this months bulletin it includes case summaries upon the following issues:-,

AB Jamaica (CA) considered. Marriage policy and article 8.

KG Sri Lanka (CA). AIT's approach to EEA issues upheld, extended family members the directive and the EEA Regs considered.

MW Liberia (CA). AIT's approach to third party support upheld but Court urges Home Office to change rules. Considers that this issue is very relevant to consideration of Article 8.

AB (DRC) (CA). Approach to insurmountable obstacles and grant of refugee status to family member or dependant. SS (Sri Lanka) approach of AIT approved of.

AIT reported decisions include: paragraph 320 and substantive rule approach, "own or occupy exclusively"; Rule 23(5) respondent's duty, and a number of CG cases including Zimbabwe, DRC, Afghanistan.

The Immigration newsletter is produced by Iain Burnett a member of 4 King's Bench Walk (4KBW). The summaries and opinions reflect the author's views and not the opinions or views of any other member of 4 KBW. (Unless otherwise stated)

This February Bulletin provides a round up of recently reported and completed cases. The full text of the judgments and reports can be found on websites such as EIN, CASE-TRACK, BAILII, and the AIT.

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News of forthcoming cases.

The Court of Appeal is going to tackle the issues surrounding students and satisfactory progress, which course of study is appropriate to consider and other issues surrounding students.

The Court has listed a number of cases to be heard together in April to resolve these matters. Iain Burnett is instructed by the IAS in one of the six listed test cases.

Comment: It will be interesting to see the approach and position of the Home Office to these issues and whether it agrees with the current interpretation of the Rules by the AIT.

Iraqi Cases

The AIT has heard a number of cases together over several days earlier last month to consider the issues under the qualification directive. Previously it is understood that the SSHD withdrew a number of decisions to prevent the AIT dealing with the issue. The issue to be considered is whether Iraq falls within Article 15 of the Council directive when considered as against preamble 26 and the correct approach for the AIT to consider such issues. IE whether there is a “*serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict*” (See further paragraph 339C Immigration rules)

Article 8 and the Marriage Policy

AB (Jamaica) V SSHD [2007] EWCA Civ 1302

The Court of Appeal considered the marriage policy and article 8 and the tension between the two aspects. At paragraph 19 and 20 the Court considered that the AIT and the Home Office had paid scant regard for the position of the settled spouse (a British Citizen). In paragraphs 23-29 the Court considered the approach to the marriage policy and its relevance to the appeal on article 8 grounds. After considering the differing view points of the policy and article 8 the Court concluded that the determination was further flawed by a failure to properly bring into the assessment that the executive through its policy did not regard overstaying which was relatively brief as particularly significant and if in a qualifying marriage the policy did not require removal of the over stayer when it would be unreasonable to expect the settled spouse to accompany the person.



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In paragraphs 30-34 the Court made some strong remarks about the conduct of the Home office, its initial inertia and also that the Home Office had provided no evidence to show that the settled spouse could go to Jamaica and get a job and adequate accommodation. It appears in paragraphs 31-2 that the Court of Appeal takes the view that the burden of showing that it was reasonable to expect the settled spouse to go to Jamaica was on the Home Office. In the circumstances the Court entered judgment for the appellant and did not remit it to the AIT for further consideration.

Comment: The Court of Appeal took a robust approach to this case and the failings of the home office. The case is helpful in its approach to the question of whether it is reasonable for a settled person to accompany their partner. Often the Home Office produces no evidence to support their assertions and often there is inertia and delay. It is understood that the Home Office is unhappy with this judgment and it is considering a possible appeal to the House of Lords.

EEA Extended Family Members

KG and AK (Sri Lanka) [2008] EWCA civ 13

The Court of Appeal considered the position of extended family members (referred to in the judgment as OFM's). The Court of Appeal's approach seems to largely support the views of the AIT which has stated in a number of decisions that the treaty rights are founded upon movement within the community and nothing in **MRAX** or **Commission v Spain** contradicts this. The Court of Appeal left open the question of whether if an EEA national moves straight from a country outside the EU to another member state with their spouse whether this is precluded under community law. It appears to be precluded under the interpretation given at the moment in respect of movement within the community. (See paragraph 29-31, 68 and 82). The leading judgment was given by Buxton LJ with whom the other LJ's agreed.

The Court of Appeal considered that the recognition of family life was as a support to, and encouragement of, the exercise of rights by the Union citizen and not as an end in itself. In paragraphs 57-69 the Court set out a number of propositions from community law which assisted the proper construction of article 3(2)(a) of the Directive.

In paragraph 65 the Court considered that the whole basis of the position of the OFM is dependent upon the tight relationship between the exercise of the rights by the Union Citizen and the requirement that the OFM accompanying him or joining him should have been his dependents or members of his household in the country from which they have come. The OFM should have been so dependent upon the Union Citizen in the member state from which the Union Citizen had come and the relationship to have existed immediately before the Union Citizen was accompanied or joined by the OFM.



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In paragraphs 72-4 the Court of Appeal considered that the question of “accompanying and joining”. In the cases before the Court the Court of Appeal considered that as the appellants’ had been in the UK long before the Union citizen they could not be said to be joining or accompanying them. Even applying as the point in time, the application of the residence card, the Court considered that it could not be said that they either accompanied or joined the Union Citizen on the facts. The Court held that the Union Citizen joined them.

In paragraphs 75-76 the Court considered the question of dependency and that the Union Citizen needed to provide the “essential needs” of the dependent.

In paragraphs 77-78 The Court considered that “*under the same roof*” was not “*membership of the household*” of the Union citizen. (ie that the Union Citizen be head of the Household).

Comment: In this case the Court of Appeal have laid to rest a number of propositions that are often put forward for OFM’s (extended family members). The question of which country is to be treated as the country from which they have come, accompanying and joining, deterrence of community rights, and dependency. The Court also considered arguments as to the correct interpretation of article 3(2) of the directive. The interpretation adopted by the Court largely reflects the EEA regulations and the requirements for extended family members set out in regulation 8.

Third party Support revisited

MW (Liberia) v SSHD [2007] EWCA Civ 1376

The Court of Appeal considered the arguments as to third party support in respect of a child under rule 297. However in looking at the interpretation of the Rule the Court of Appeal also considered other decision in respect of requirements under other Immigration Rules. The Court endorsed the approach of the AIT. (See paragraphs 13-5) (IE no third party support)

It should be noted though that the issue under article 8 was remitted to the AIT for further consideration. Lord Justice Lawrence Collins also requested that the Home Office perhaps look to a Rule change with the policy of family reunification in mind to allow third party support in some cases. (See paragraph 20)

Comment: Unfortunately the Court of Appeal upheld the AIT determinations in respect of third party support. It seems now that these cases can only succeed under article 8 with verifiable third party support. A worrying development, but lets hope the Home Office take on board the request from the Court of Appeal.

PS. In respect of cases where the sponsor is living on disability living allowance (DLA), the case of **MK (Somalia)** was successful in the Court of Appeal in late November. However a judgment is still awaited.



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Previous grant of refugee status to a family member and insurmountable obstacles.

AB (DRC) v SSHD [2007] EWCA civ 1422.

The Court of Appeal considered the approach of the AIT to questions of insurmountable obstacles and the previous grant of refugee status to a family member. The Court endorsed the approach of the AIT in the well cited case of SS(Sri Lanka) (Unfortunately a case in which the author appeared!) which held that a previous grant of refugee status was only a starting point and did not amount to insurmountable obstacles necessarily. The Court went on to state that there was a burden on the Home Office but not a legal one. This could be discharged by objective evidence or from the AIT's own experience of Country issues like in the case of SS. (See paragraph 21). However in the present case the AIT had fallen into error in their approach and treatment of the status of the other family members. The Court concluded that the question was relevant and the AIT had acted in an impermissible manner. Without evidence before them as to the status of the family member the AIT concluded that there were no insurmountable obstacles to the return of the family member. However, the Court held that the Home Office should discharge their burden (Not a legal one) and that there are reasons of fairness and practicality for taking this approach. As Sedley LJ observed in granting leave to appeal, the Home Office will hold the record showing the details why a person was granted refugee status. If there has been a change in conditions in the relevant country in the interim, that is a matter which either the tribunal will know about or the respondent will be able to raise. The Court did not see justice or a practical benefit in adopting an approach which would make it incumbent on an appellant in every case to re-prove the third party's original entitlement to refugee status, or to prove its basis or to adduce positive evidence that there had been no subsequent material change. (see paragraph 22)

Comment: It is my view that this Judgment maybe misunderstood and this is perhaps unfortunate in that it does not clearly express the interference question and the hurdle to be surpassed by the applicant. (Although successful on the facts). Once again looking narrowly at the issues in this case, the focus on whether there is interference to family life, centered on the question of the refugee status and whether there were insurmountable obstacles. However of course in AG Eritrea the Court of Appeal commented that the AIT often confused the issue of interference with the question of proportionately, and stated that the requirement was not a particularly high one. With the focus upon the status of the family member and whether that status had changed it is my view that the interference question will potentially lose its proper focus once again and often be equated by the AIT to circumstances equivalent to article 3, HP, or asylum!. It is positive in finally reinforcing the position that the refugee status of a family member is the start point and if the Home Office state the family member can go back they must give reasons why.



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Additional grounds of Refusal and the Substantive Rule.

JF (Para 320 refusal substantive Rule) Bangladesh [2008] UKAIT 00008

The AIT considered a case where the IJ had exercised discretion in the appellant's favour and then went on to allow the substantive Rule appeal. The AIT looked at this situation and stated that where the additional grounds had gone in the appellant's favour then consideration should be given to the substantive rule under which the appellant had applied. The IJ must consider all the aspects of the Rule (even if the ECO did not) and consider the evidence going to each aspect if not conceded by the ECO as satisfied. In this case the refusal had only been on the additional grounds. The AIT considered the evidence that was before the IJ and found that there was not sufficient evidence to be satisfied that the substantive Rule was met. The AIT found a material error and dismissed the appeal.

Comment: This is perhaps a warning in cases where the ECO has only refused the application on the basis of the additional grounds. If an appellant is to succeed then the evidence submitted with the application and any further evidence to show that at the date of decision (if entry clearance) the Rules were satisfied should be submitted on appeal.

"owns or Occupies exclusively"

KJ ("owns or occupies exclusively") Jamaica [2008] UKAIT 00006

The AIT gave a common sense approach to this question and an approach that is generally understood and applied in practice. If there were any doubts the approach permits sharing a room (as long as not statutorily overcrowded) and allows for additional sharing of other rooms so the family unit do not have exclusivity of the whole premises.

Comment: The question in my view was in essence:- "Is there enough room but not overcrowded?".

Respondent's Duty in allowed appeals.

RN (Rule 23(5) Respondent's duty) Zimbabwe [2008] UKAIT 00001

The AIT considered the duty of the respondent in applying for review of a determination in which asylum issues are raised. There is a duty on the respondent to send or deliver the determination not later than the day on which the application is made. Where the appellant adduces evidence that suggests that the respondent has not complied with Rule 23 it is for the respondent to show otherwise.



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Comment: It will be useful in any case where asylum (HP) issues are raised that the envelope (with an indication) of when the determination was sent is saved in case the Home Office apply for a review. In any case where the determination is received after two days after an application has been made this may be (with a signed statement of when the determination was received) enough to place the burden on the Home Office to show that they have complied with Rule 23. It should be noted that despite being aware of this problem and the former case of **HH**, the Home Office do not appear to have systems in place to properly record and prove that a determination was sent out on the appropriate day.

Country Guidance Cases

There have been a number of country guidance cases recently.

BK (Failed Asylum seekers) DRC CG [2007] UKAIT00098;

HS (Returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094

PM and others (Kabul- Hizb-i-Islami) Afghanistan CG [2007] UKAIT 00089

It is not surprising that in none of the above cases was there a risk to the identified group in the heading (Ie asylum seekers, or members of Hizb-i-Islami) !!

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Note- the above provides only a summary of the judgments and cases and it is important that reliance is not placed upon it as setting out the law. Individuals are advised to consult the report for themselves to determine its scope and application.