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IMMIGRATION AND ASYLUM LAW UPDATE

July 2007 Bulletin

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IMMIGRATION AND ASYLUM LAW UPDATE

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Introduction

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

In this month's bulletin it includes case summaries upon the following issues:-

Delay (the Court of Appeal look again at the "*Rashid*" principles),

Article 3(2) of the Council Directive and extended family members (AIT),

The burden of showing the precedent fact under section 10(1) of the 1999 Act, (Removal of persons unlawfully in the UK) (Admin Court),

The failure to take account of a country guidance case is a material error of law if the Adjudicator (IJ) *might* have come to a different conclusion (Court of Appeal)

and interpretations of the Immigration Rules in various cases including "*regular attendance*", "*Family unit*"; 3rd party support for spouses, and "*independent family unit*".

Country Guidance cases for Eritrea, Sudan and Cameroon

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.

This July 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, CASETRACK, BAILII, and the AIT.

Please feel free to forward it to colleagues and if they wish to be added to our mailing list they just need to send an email to clerks@4kbw.co.uk.

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Delay ("Rashid principles")

SSHD v R (S) [2007] EWCA civ 546

The SSHD appealed the decision of Mr Justice Collins applying the "*Rashid principles*" to this case. The Court of Appeal looked again at the principles and the application of "*conspicuous unfairness*" in delay cases. The Court found difficulty with the suggestion that in an application for judicial review, the Court had power to intervene with a later potentially lawful decision taken after a previous unlawful decision which was not the subject of challenge before the court. However the court considered that the previous unlawful decision was a material factor in the later made decision. Failure to take it into account would lead to the usual *wednesbury* grounds of review. In establishing the earlier unlawful decision, consideration was given to the question of whether the earlier decision was unlawful by virtue of abuse of power (conspicuous unfairness).

If the court found that the later decision was unlawful (failure to take account of the earlier unlawful decision and the injustice to the applicant) the correct approach is to return the decision to the Administrative body so that it can retake the decision on lawful grounds. However the relief granted in the Rashid case could be best understood as a case where the unfairness was so obvious and the remedy so plain that the SSHD in that case could only exercise his discretion in one way.

Applying the above to the current case before the court, the Court of Appeal upheld Collins J's decision.

3C leave

EL (Jamaica) v SSHD [2007] EWCA civ 591

The Court of Appeal considered that it was arguable that because leave was extended under 3C of the Immigration Act 1971, the AIT's interpretation of the Immigration Rules 284(i) was arguably wrong. However, it should be noted that this was only a permission application and the Court expressed that its view was that there was some difficulty with the provisions of 3C.

Comment: Please note the summary provided in the last legal bulletin in June of the AIT's interpretation of 3C in the case of DA.

Country Guidance Cases, Material errors of law

IA (Somalia) [2007] EWCA civ 323

In this case the argument centred on the issue of whether the failure to consider and provide any reasons in respect of a country guidance case was a "material error of law". Counsel, although invited to, did not argue that a failure to have regard to a country guidance case was *not* an error of law. The question posed for the court was whether it was a *material* error of law. The Court held that an error of law is established as a material error of law if the Adjudicator (immigration Judge) *might* have come to a different conclusion if it had been taken into account (See paragraph 15 of the judgment)

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Administrative Court

R (yeeKiong LIM and Yet Kiow SEW0 v SSHD [2006] EWHC 3004 (Admin) (case completed 14th June 2007)

The Administrative Court considered where the burden of proof lay in deciding whether a person was subject to section 10(1) of the 1999 Act, that the person was unlawfully in the United Kingdom. Mr Justice Lloyd Jones concluded that the burden of showing the precedent fact, that the person had breached their conditions of leave to remain lay upon the SSHD. The burden of proof applicable was on the balance of probabilities, the degree being proportionate to the nature and gravity of the issue. Given that the case concerned issues of personal liberty the degree of probability will be high. (See paragraph 19 and 20 of the Judgment). The Administrative Court went on then to consider whether in order to show that the precedent fact was established in judicial review proceedings the review was on the basis of the *Wednesbury* test or whether the review extends to considering whether the decision was justified and in accordance with the evidence. The Court concluded that the later was applicable (See paragraphs 20 and 22).

Finally the Court was asked to consider whether judicial review was an appropriate remedy given that the applicant had an out of country right of appeal. After considering the authorities the Court concluded that there were exceptional circumstances in the case which required judicial review to be available to the applicant. The Court considered that the out of country right of appeal would not afford a satisfactory or effective remedy. (See paragraphs 44 and 50)

Comment.

This judgment seems to coincide with the decisions and view of the AIT in respect of the extra statutory grounds of refusal. (See **JC** and **RM**)

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Asylum and Immigration Tribunal

APand FP (Citizens Directive Article 3(2); discretion; dependence)
India [2007] UKAIT 00048.

This is an interesting case concerning the question of whether the Council directive provides substantive rights of residence and free movement to extended family members. The AIT concluded that the 2006 Regulations were not incomplete as the Council directive did not provide substantive rights of residence or free movement to extended family members. The AIT concluded that the directive only afforded procedural rights to members of the family who had substantive rights of entry and residence under domestic (National) legislation (i.e. the Immigration rules). Further that the test of dependency was as set out in the European Courts Judgment in **JIA**, "*dependence arising from a need for support of the national of a Member State.*" (See paragraphs 26-30)

The case is also of interest as arguments as to discrimination and article 8 were also raised. The facts of the case were that the appellant's were the wives of sons, whose father was an EU citizen exercising treaty rights in the United Kingdom. They applied to join their husbands who were lawfully in the UK. The AIT rejected arguments as to discrimination and article 8 on the basis firstly that the sons did not have rights under the directive as the national rules were more generous than the directive, and article 8 was not applicable as the marriage was a transnational marriage and the parties to such a marriage were not in general entitled to choose the place of their residence without being subject to National Law.

Comment. This case seeks to "put to bed" arguments based upon article 3(2) of the Council directive. It is also interesting to note that the AIT found that arguments based upon discrimination failed, even though the sons were lawfully in the United Kingdom, and because they were not settled, they could not apply for their wives to join them.

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IMMIGRATION CASES

JJ & SS (regular attendance) [2007] UKAIT 00050

In this case the AIT adopted a similar approach to regular attendance as adopted in *TY Burma [2007] UKAIT000007* to the question of whether a student had made satisfactory progress. Regular attendance had to be established in respect of the course for which the student, had last been granted leave to remain or, the SSHD had granted permission to transfer to. Regular attendance could be established despite some absences for say illness, or because of family or personal circumstances.

Comment. It should be noted in this case that the “*satisfactory progress*” analysis in **SW & others [2006] UKAIT 00054** was adopted. **SW** is a case which is very harsh in its application and has been challenged numerous times recently. It is hoped that the Court of Appeal will soon be invited to consider the legal interpretation of paragraph 60(v) of the Immigration rules. *The author of this bulletin is aware of an unreported case which was heard by the Deputy President (and an SIJ), in which **SW** was read down to state that the word “relevant” in paragraph 60(v), meant that the taking and passing had to relate to the progress.*

BM & AI 352D (iv) “family unit” [2007] UKAIT00055

The consideration of whether a child was a member of the family unit was a question of fact to be determined in each case. It was not necessarily limited to children living in the same household.

AM (3rd party support Rule 281(v)) [2007] UKAIT 00058

The AIT held that third party support was not permitted under Rule 281(v) maintenance. The AIT further upheld previous decisions of the AIT as to the correct approach to consideration of maintenance for someone on disability payments. The AIT held that the appellant in this case could not succeed under the Immigration Rules. The AIT then invited the parties to consider and argue the application of article 8 in the case. However the AIT held that the appellant could not succeed under article 8.

Comment: This case is yet another recent harsh decision by the AIT. The sponsor was disabled, the spouse (applicant) had various health issues and they had a wealthy daughter who could assist with support and maintenance (and offered to). Despite all this the case was dismissed!

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NM ("independent family unit") [2007] UKAIT 00051

This phrase is used in various provisions of the Immigration rules and is to promote family unity. The AIT so held in finding a material error of law, and applying the phrase as they understood it, allowed this appeal. The AIT held that the Immigration Judge had erred in law in finding that capacity was a necessary part of whether some one was independent. The AIT stated that the consideration of capacity was not appropriate, it was whether in fact the person was independent. Relevant factors were where the child was living and financial and emotional support. However these were not the antithesis of independence and it depended upon the circumstances of the individual case.

COUNTRY GUIDANCE

FM (FGM) Sudan CG [2007] UKAIT 00060

The AIT found that *"There is in general no real risk of a woman being subjected to FGM at the instigation of persons who are not family members. As a general matter, the risk of FGM being inflicted on an unmarried woman will depend on the attitude of her family, most particularly her parents but including her extended family. A woman who comes from an educated family and/or a family of high social status is as such less likely to experience family pressure to submit to FGM. It is, however, not possible to say that such a background will automatically lead to a finding that she is not at real risk."*

The risk of FGM from extended family members will depend on a variety of factors, including the age and vulnerability of the woman concerned, the attitude and whereabouts of her parents and the location and "reach" of the extended family.

If a woman's parents are opposed to FGM, they will normally be in a position to ensure that she does not marry a man who (or whose family) is in favour of it, regardless of the attitude of other relatives of the woman concerned."

MA (Draft Evaders –Illegal Departures) Eritrea [2007] UKAIT00059

The AIT found that *" A person who is reasonably likely to have left Eritrea illegally will in general be at real risk on return if he or she is of draft age, even if the evidence shows that he or she has completed Active National Service, (consisting of 6 months in a training centre and 12 months military service). By leaving illegally while still subject to National Service, (which liability in general continues until the person ceases to be of draft age), that person is reasonably likely to be regarded by the authorities of Eritrea as a deserter and subjected to punishment which is persecutory and amounts to serious harm and ill-treatment."*

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Illegal exit continues to be a key factor in assessing risk on return. A person who fails to show that he or she left Eritrea illegally will not in general be at real risk, even if of draft age and whether or not the authorities are aware that he or she has unsuccessfully claimed asylum in the United Kingdom."

FK (SDF Member/ activist risk) Cameroon [2007] UKAIT 00047

The AIT found that "In the light of the evidence currently available, membership of or actual or perceived involvement with the SDF at any level is unlikely by itself to give rise to a real risk of persecution but some prominent and active opponents of the government in Cameroon may depending on their particular profile and circumstances continue to be at risk"

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. These summaries provide an overview of the case and should not be relied upon to set out the law. Readers are advised to consult the full text judgments and reports.

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.