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IMMIGRATION AND ASYLUM LAW UPDATE

June 2007 Bulletin

Introduction

Welcome to our June edition of the Immigration and Asylum Law updates which we hope that you will find informative. 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.

Our next edition will be circulated in **July 2007**.

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Full List of Members of Immigration and Public Law Team

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IMMIGRATION CASE LAW UPDATE

June 2007 Bulletin

Intro:-

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 June 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.

Article 8 ("Exceptionality")

Early indications of the Court of Appeal gave hope as to appeals being remitted and reconsidered if the Asylum and Immigration Tribunal (AIT) used the exceptionality test in Article 8 cases. However several cases have now indicated the view and approach of the Court of Appeal to appeals based upon the Asylum and Immigration Tribunal (AIT) using "exceptionality" as a legal test in respect of article 8 and proportionality.

It appears that the Court has indicated that although "exceptionality" is not the legal test, where the AIT has applied it in its analysis of proportionality, and because it is still an expectation and the AIT is the specialist Tribunal considering such matters, it is very unlikely to lead to a different result. (CF **KR (IRAQ) [2007] EWCA civ 514 (at para6); AG (ERITREA) [2007] EWCA civ 407; IP(INDIA) [2007] EWCA civ 435.**)

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Fresh Claims.

AK (Afghanistan) [2007] EWCA civ 535 . In this case the Court of Appeal were considering fresh claims and the approach of the SSHD and the Courts to such claims. The Court of Appeal emphasized that **WM (DRC)** did not alter the law (See **ONIBIYO and CAKABAY**) but it did help clarify its structure. The Court went on to restate again as set out in **WM** that the SSHD must ask the correct question and look as to how the independent Tribunal (AIT) might assess the claim. Only if the SSHD could exclude as a realistic possibility that the Tribunal might come down in favour of the applicant's claim, was there no mischief. In the case in question the official of the SSHD in responding to the applicant's fresh claim, had not properly asked the correct question and hence the decision was quashed and returned to the SSHD to reconsider on the correct legal basis.

RECONSIDERATION (CREDIBILITY FINDINGS)

HF (Algeria) [2007] EWCA civ 445.

In this case the Court of Appeal confirmed again the approach in **DK (Serbia)** . The Court re-stated that credibility findings not "infected" by the identified errors of law should not be reconsidered and found that it was an error of law in this case to have reconsidered the positive credibility findings.

Comment. This case once again emphasizes that positive credibility findings not affected by the identified errors of law should not be reconsidered. The Court considered that the anxiety and stress for an asylum seeker having to go over evidence time and again especially when the identified error of law did not touch upon the factual findings was a wrong approach. It is anticipated that the AIT will try to ensure that directions are given after the errors of law are identified as to the approach to the second stage in reconsideration hearings. However, in other cases, the Court of Appeal has held that where an error of law has been identified it is incorrect for the Tribunal to revisit the error of law question but to apply what the AIT found at the first stage. Only in exceptional situations should the AIT look at the error of law at the second stage, the correct approach should be to appeal to the Court of Appeal upon completion of the second stage.

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DOMESTIC VIOLENCE (Prescriptive Rules.)

ISHTIAQ [2007] EWCA civ 386. In this case the Court of Appeal assessed the Domestic violence immigration Rules, Rule 289A (iv) as amended.

The Court of Appeal also considered the case of **JL (INDIA) [2006] UKAIT000058** and the approach of the AIT to such cases. The first issue the Court addressed was the proper construction of part (iv) of Rule 289A. The issue was whether when looking at the Rule and the IDI's (Chapter 8 section 4), the IDI's provided the only way in which an applicant could establish the necessary facts (i.e domestic violence). The Court held that paragraph 289A (iv) gives a caseworker a discretion to decide what evidence to require the applicant to produce in the individual case. In exercising that discretion, it was expected that the caseworker would usually start by applying the IDI's. If an applicant was unable to produce the evidence in accordance with the guidance, the caseworker should seek an explanation for their inability to do so. If the applicant provides a reasonable explanation, the caseworker should give the applicant the opportunity to produce such other relevant evidence as she wishes to produce. (See paragraph 38). The Court concluded that the IDI was not inflexibly prescriptive as the AIT had found. This was sufficient to dispose of the appeal.

The Court then went on to consider **JL (INDIA)** and the approach of the AIT to para 289A in that case as **JL** was being followed as the correct approach to domestic violence cases. The Court held that the reasons given by the AIT in **JL** were wrong. The Court considered that section 85(4) was not of assistance, as it could not allow an appellant to produce evidence on appeal that could not be produced to the decision maker. As to the reasoning regarding the 2003 Regulations and the Immigration Act 1971 (i.e whether ultra vires), the Court concluded that Rule 289A (iv) was concerned with substantive evidential requirements. The 2003 Regs and the 1971 Act were concerned with the separate consideration as to the procedural requirements for a valid application not its merits. The Court hence concluded that the approach of the AIT was wrong.

Comment. It should be noted from this Judgment that the Court of Appeal considered that the Immigration Rules can be prescriptive of the evidence that is required in a given application or situation. However in this case they were not and that if the SSHD wanted to achieve this it should (the Rules) have clearly said so, and in this way it could have been debated in Parliament. (see *paras 32 and 33*). The Court also stated when considering **JL** that the AIT had no power to declare the Rules ultra vires. (See *para 58*)

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Asylum and Immigration Tribunal

VW (Extension) [2007] UKAIT 00042. This is an interesting case concerning the extension of Discretionary leave in applying under the Domestic violence concession for indefinite leave to remain. The case considered the construction of Rules 289A and 323 (ii). The AIT held that the appellant could not satisfy the Immigration Rules 289A as the appellant did not have leave granted within the Rules and so could not apply for indefinite leave to remain under Rule 289. However, given this conclusion the SSHD had applied the wrong Rule in considering curtailing the appellant's leave. Rule 323 did not apply to DL and hence the curtailment was not lawful. This meant that the Appellant had lawful extant leave until 2008 and hence therefore had no right of appeal. (*See para 10*)

KL (article 8- Letstaka- Delay-near misses) [2007] UKAIT00044. In this case by the time of reconsideration there had been a number of developments in consideration of article 8 cases. The AIT reviewed a number of them **Letstaka [2005] EWHC 745; SB (Bangladesh) [2007] EWCA civ 28; AA(Afghanistan) [2007] EWCA civ 12; HB (Ethiopia) [2006] EWCA civ 1713.** These cases are concerned with delay, the success of an application from abroad, near misses (ie just outside a policy or Rule, ie nephew with regard to Rule 317 etc). The AIT reviewed the caselaw and its interpretation of the caselaw and applied them to the facts of the particular case. They held that in considering the case and the various aspects, that the case was unusual and that there would be a disproportionate interference with the appellant's article 8 rights. The case provides perhaps a useful insight into the interplay between a number of factors and how the AIT might approach them.

DA (Section 3C meaning and effect) Ghana[2007] UKAIT 00043 This case concerned the application of section 3C Immigration Act 1971 as amended. (Please note that the case notes that the 2006 Act has made a further amendment. See para 7) The case considered whether there could be an application or variation made to an application made to the SSHD during the currency of section 3C leave.

The appellant applied to vary his existing leave to the SSHD, the SSHD delayed in considering the application until the original leave had expired. Leave was extended by virtue of section 3C. The questions considered by the AIT were:- A) "Can an appellant make a new application during the currency of this leave? B) Can an appellant make a variation to his application during the section 3C leave?"

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The AIT concluded that there was a difference between a variation and a new application. The AIT further concluded that there was a difference depending upon the stage the case had reached. Before the SSHD had made a decision, then the appellant could apply to vary his application but after this any variation should be included in grounds of appeal and considered in the appellant's appeal. The appellant could not make a new application at any anytime after the initial leave had expired.

Comment. This is a difficult case to digest. It is considered that the AIT unnecessarily tried to make differences in respect of variation and applications that do not exist within section 3C as it was (before the current amendment). The section provides for the continuation of lawful leave whilst a number of specified events occur, ie consideration by the SSHD of applications for the variation of existing leave. Leave is then extended in various situations (See subsection 2). Subsection 4 provides that an application *for variation* may not be made during the period in which leave is extended by virtue of the section. Subsection 5 provides that the section does not prevent the variation of the application mentioned in subsection (1) (a). This subsection provides " *a person has limited leave to enter or remain in the UK applies to the SSHD for variation of the leave*". If the subsection is read as only allowing a further application for variation to be made during the currency of the initial grant of leave then the difficulties explained by the AIT do not arise. However this suggested restrictive approach to this section will not assist situations where the SSHD delays in the consideration of cases to such an extent that the purpose for which the variation was made has been completed (Ie a student on a course and extensions). It maybe in such situations that a wider approach is taken and argued to subsection (1)(a).

It should also be noted that in this case that the IDI's given to caseworkers did not reflect the current law in force at the time!!

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.