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IMMIGRATION AND ASYLUM LAW UPDATE

MARCH 2007

Introduction

Welcome to the First of our 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 **APRIL 2007**.

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IMMIGRATION AND ASYLUM LAW UPDATE

MARCH 2007

Chambers News

The Immigration and Public Law team is pleased to welcome back Susan Monaghan from her secondment to the ACCA. Before Susan took up her post, she was counsel instructed in the Limbuela case and argued successfully in both the Administrative Court and Court of Appeal (see R (Limbuela) [2004] EWCA civ 540). (see now House of Lords Judgment in the case R(Limbuela) [2006] 1 AC 396). Susan has extensive Immigration and Public law experience.

We are also please to announce that Sanjay Lal, is now also an Asylum support adjudicator, which adds to his list of recent appointments.

Chambers is also pleased to welcome David Bennett and David Sawtell who have both joined the Public Law team after completion of their pupillage.

Full List of Members of Immigration and Public Law Team

| | |
|---------------------|------|
| Iain Burnett | 1993 |
| Reginald Arkhurst | 1984 |
| Sanjay Lal | 1993 |
| Brendan Davis | 1994 |
| Jackie Bond | 1994 |
| Kemi Ojutiku | 1994 |
| Susan Monaghan | 1995 |
| Sabina Khan | 1999 |
| Claire van Overdijk | 2003 |
| David Bennett | 2005 |
| David Sawtell | 2005 |

The Clerks

Sandie Smith - 020 7822 7003

Tom Priest - 020 7822 7006

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CASE LAW UPDATE

PROCEDURAL RULES AND PROCEDURE

FP (Iran) v Secretary of State for the Home Department: MB (Libya) v Secretary of State for the Home Department [2007] EWCA Civ 13 (decision dated 23/01/2007) (see paragraphs 48-50)

The Court held that rule 19(1) and rule 56 of the Asylum and Immigration Tribunal (Procedure) Rules 2005, which do not permit the AIT to reopen appeals in light of the reasons for non-appearance, were unlawful in that they denied a party the opportunity to be heard where through the fault of their representatives they had not been aware of the hearings that had taken place during which their cases were determined against them in their absence. The rules arbitrarily denied what Strasbourg jurisprudence deemed to be the "very essence" of the right to be heard under Article 6 of the ECHR.

AM(Serbia); MA (Pakistan) MA (Sudan) [2007] EWCA Civ 16

The Court held that when the Lord Chancellor promulgated Rule 62(7) he fell into legal error and the rule did not survive a wednesbury challenge. The Court accepted an argument that no reasonable Lord Chancellor could promulgate a Rule which has the effect of preventing an appellant to the AIT from raising by way of amendment or renewal an arguable and potentially meritorious point, provided that it can be considered without injustice to the other side, especially if it relates to an arguable breach of a right protected by the Refugee Convention or the ECHR.

DK (Serbia) & Others v Secretary of State for the Home Department [2006] EWCA Civ 1747 (decision dated 20/12/2006) (see paragraphs 21, 25, 27, 30 and 31)

The Court set down guidance on the scope and procedure of reconsiderations by the AIT. Reconsideration should determine, firstly, if there were any errors of law and, secondly, the effect of any such errors on the decision. If the Tribunal's findings were not infected by errors of law, they should only be revisited if new evidence could affect them or where other exceptional circumstances exist. Reconsiderations should be dealt with in one hearing, unless there is good reason to the contrary, i.e. it fails to give either party a fair opportunity to address the substance of the reconsideration. Further, written reasons should be given where a second hearing is necessary. The Court endorsed to an extent the Amended Practice directions and the Asylum and Immigration Tribunals' determination in **AH (Sudan) [2006]UKAIT00038**. The Court stated that there was nothing in either the 2004 Act or rules which expressly precluded an applicant from raising points of law in respect of which he was not successful at the application stage itself. Nor was there any appellate machinery which would enable an applicant who is successful in obtaining an order for reconsideration to challenge the grounds upon which the Immigration Judge ordered such reconsideration. However it must be the exception rather than the rule that a Tribunal will permit other grounds to be argued, although clearly the Tribunal needs to be alert to the possibility of an error of law other than that identified by the Immigration Judge, otherwise its own decision may be unlawful.

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CASE LAW UPDATE

POLICY

There have been a number of cases considered recently by the Courts regarding the policies of the Home Office, including the Unaccompanied minors policy **AA (Afghanistan) v SSHD [2007] EWCA civ 12**; the family reunion policy **AL(Serbia) v SSHD [2006] EWCA civ 1619**; **R on the application of Rudi and others v SSHD [2007] EWHC 60 (admin)** (and the discrimination to unaccompanied minors), leave to remain policy for refugees, **R on the application of Rechachi, Kalobo, Fodil, Yusuf v SSHD [2006] EWHC 3513 (Admin)** (delay in the grant of leave to a refugee which resulted in HP being given but when their appeals were originally allowed the policy was to grant ILR.)

Policies have increasingly become a focus in appeals and claims under article 8 and the above judgments are important considerations of these areas.

DELAY

HB (Ethiopia), FI (Nigeria), EB (Kosovo), JL (Sierra Leone) v Secretary of State for the Home Department [2006] EWCA Civ 1713 (decision dated 14/12/2006) (see *paragraph 24*)

The Appellants submitted that, although they had no right to remain in the UK, removal would be an interference with Article 8(1) ECHR, and delay deprived Secretary of State of ability to justify removal under Article 8(2). It was held as follows: (i) the claimant/applicant must establish private/family life in the UK under Article 8(1), delay may increase a claimant's ability to demonstrate private or family life but this is a question of fact; (ii) decisions under immigration policy would be proportionate under Article 8(2) unless the demand of policy is not conclusive in which case it will be truly exceptional (*Razgar* and *Huang* applied); (iii) when immigration policy is not applied because of delay, a distinction should be made between those that have a potential right to be in the UK and those who do not: re the former, it may be inequitable to enforce procedural rules in an extreme case of national disgrace, or where the system has broken down, and, re the latter, delay must have substantial effects to be relevant to an Article 8 application; (iv) arguments re breakdown of immigration system are only relevant where the SSHD seeks to rely on the same system in current proceedings; and lastly (v) the mere fact of delay which has caused an applicant to miss a benefit of a hypothetical hearing of an asylum claim that would have resulted in his obtaining ELR does not of itself affect the determination of a subsequent article 8 claim, vi) FI, EB and JL dismissed as Article 8(1) was not deemed to be satisfied. HB was dismissed, as without delay, she would have no right to be in the UK.

(See further the application of policy and delay principles in **R on the application of S v SSHD [2007] EWHC 51 (admin)**)

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CASE LAW UPDATE

IMMIGRATION RULES DOCTORS AND DENTISTS

R On the application of Bapio Action Ltd and Dr Imran Yousaf v SSHD [2007] EWHC 199

The Court did not accept the challenge to the Immigration Rule changes announced on 7th March 2006 (which came into force on 3rd April 2006) which made it more difficult for postgraduate doctors and dentists (non-UK or EEA) to obtain leave to enter or remain for the purposes of postgraduate training, or the challenge to the guidance given by the DH. There is in this judgment a useful appendix of the changes to the Rules.

COUNTRY CASES

MA (Palestinian Arabs – Occupied Territories – Risk) Palestinian Territories CG [2007] UKAIT 00017 (determination promulgated on 20/02/2007) (see paragraphs 121-131)

The Tribunal held that merely being a Palestinian Arab in the Occupied Territories, even if male aged between 16-35 from the northern part of the West Bank, does not mean that a person would face on return a real risk of persecution, serious harm under paragraph 339C of the amended Immigration Rules or ill-treatment contrary to Article 3 of the ECHR. This Determination, made with the benefit of up-to-date and detailed background evidence, updates and replaces *AB & others* as country guidance.

MK (Accession- effect on asylum related appeals) Bulgaria CG [2007] UKAIT 00004 (determination promulgated on 17/01/2007) (see paragraphs 16-21)

This case offers guidance on pending asylum relates appeals by nationals of Bulgaria and Romania since they became EEA nationals on 1 January 2007. Any such appeals relating to an immigration decision made before 1 January 2007 that have not been withdrawn must be allowed as removal of EEA nationals is unlawful except where there are public policy, health or security grounds to do so. The only exception to this would be in respect of deportation decisions governed by regulation 8(2) of the Accession (Immigration and Worker Authorisation) Regulations 2006. Further, reported Country Guideline cases relating to countries that have since acceded to the EU no longer afford country guidance and such authorities should be removed. Only in unusual cases raising issues for example of chain refoulement would there still be a role for country guidance cases dealing with member States of the EU.

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CASE LAW UPDATE

SK (Liberia CG) v Secretary of State for the Home Department [2007] UKAIT 00001 (determination promulgated on 08/01/2007) (*see paragraph 69*)

Women in Liberia belonging to ethnic groups or sub-groups where FGM is practised are a particular social group under the 1951 Geneva Convention. A woman will be at real risk if she is from such a group and the evidence shows she is reasonably likely to be required by her family/group to undergo FGM. Internal relocation is available: (i) if she is unlikely to encounter a person of power and influence over her in that location who would require her to undergo FGM; (ii) she can reasonably be expected to live in that place. Individual credibility and country information are important in determining real risk of FGM.

SK (illegal entrant: leave to enter) Nigeria [2007] UKAIT 00003
(determination promulgated on 22/12/2006) (*see paragraphs 25, 26, 29-35*)

In accordance with *Akhtar v Governor of Pentonville Prison* [1993] Imm AR 424 and *Afunyah v SSHD* [1998] Imm AR 201, a person who seeks leave to enter but then breached the terms of his temporary admission may be treated as an illegal entrant but is not entitled to demand treatment as an illegal entrant. He can still be refused or given leave to enter (to be distinguished from leave to remain) and cannot demand to be considered as an illegal entrant for the purposes of deportation policies.