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Immigration Legal Bulletin. September Bulletin

Introduction

Welcome to the September 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:-,

- Sri Lanka Country Guidance A return to scarring?
- The new deportation Rules para 364 considered,
- Article 8 and near misses and policies and article 8 the approach considered by the AIT to be correct,
- Service of determinations and the computation of time some salient lessons.
- Iraq CG-Entry clearance from Jordan not disproportionate.
- Immigration cases including dependency and third party support 317 considered; WHM's and 12 months employment; students "satisfactory progress" revisited.

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 September 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.

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Country Guidance Sri Lanka

LP (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG [2007] UKAIT 00076

The AIT found that Tamils are not per se at risk of serious harm from the Sri Lankan authorities in Colombo. A number of factors may increase the risk, including but not limited to: *a previous record as a suspected or actual LTTE member; a previous criminal record and/or outstanding arrest warrant; bail jumping and/or escaping from custody; having signed a confession or similar document; having been asked by the security forces to become an informer; the presence of scarring; return from London or other centre of LTTE fundraising; illegal departure from Sri Lanka; lack of an ID card or other documentation; having made an asylum claim abroad; having relatives in the LTTE.* In every case, those factors and the weight to be ascribed to them, individually and cumulatively, must be considered in the light of the facts of each case but they are not intended to be a check list.

The AIT went on to state that if a person is actively wanted by the police and/or named on a Watched or Wanted list held at Colombo airport, they may be at risk of detention at the airport. Otherwise, the majority of returning failed asylum seekers are processed relatively quickly and with no difficulty beyond some possible harassment. Tamils in Colombo are at increased risk of being stopped at checkpoints, in a cordon and search operation, or of being the subject of a raid on a Lodge where they are staying. In general, the risk again is no more than harassment and should not cause any lasting difficulty, but Tamils who have recently returned to Sri Lanka and have not yet renewed their Sri Lankan identity documents will be subject to more investigation and the factors listed above may then come into play.

Returning Tamils should be able to establish the fact of their recent return during the short period necessary for new identity documents to be procured. A person who cannot establish that he is at real risk of persecution in his home area is not a refugee; but his appeal may succeed under article 3 of the ECHR, or he may be entitled to humanitarian protection if he can establish he would be at risk in the part of the country to which he will be returned.

The AIT also stated that the weight to be given to expert evidence (individual or country) and country background evidence is dependent upon the quality of the raw data from which it is drawn and the quality of the filtering process to which that data has been subjected. Sources should be given whenever possible. The AIT further added that the determinations about Sri Lanka listed in para 229 are replaced as country guidance by this determination. They continue to be reported cases.

Comment: Those who can remember the times before *Jeyachandran* will remember the factors and the issue of scarring.



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Deportation: The new para 364

EO (Deportation appeals: scope and process) Turkey [2007] UKAIT 00062

Despite the surprising argument from the Home Office that the amendment did not make a substantive change the AIT held that HC 1337 introduced a substantive change, not merely a change of emphasis or clarity, into paragraph 364 of the Immigration Rules.

The AIT went on to consider the "old" and the "new". Deportation decisions made before 20 July 2006 are made under, and on appeal are to be reviewed in accordance with, the 'old' version of paragraph 364; deportation decisions made on or after 20 July 2006 are made under, and are to be reviewed in accordance with, the 'new' version.

The AIT further stated that decisions to make deportation orders and decisions to issue removal directions under s10 now need to be carefully distinguished. **In determining an appeal against a deportation decision made on 'conductive' grounds on or after 20 July 2006** the Tribunal should first confirm that the appellant is liable to deportation (either because the sentencing judge recommended deportation or because the Secretary of State has deemed deportation to be conducive to the public good); if so, secondly consider whether deportation would breach the appellant's rights under the Refugee Convention or the ECHR; if not, thirdly consider paragraph 364.

Paragraph 364 is only in issue if the appellant fails to establish a claim under either Convention; and if an appeal is to be allowed under paragraph 364 the Tribunal must identify the reasons, state why they amount to "exceptional circumstances", and state why they are so strong that the appellant is able to establish that his own circumstances displace the public interest.

Removal decisions under s 10 (as distinct from deportation decisions) carry a wider right of appeal on the ground that the discretion should have been exercised differently, but, given the terms of s 92, that right can by no means always be exercised from within the UK.

In determining an appeal against a decision (whether before or after 20 July 2006) to give directions under s 10 (as distinct from directions for removal of an illegal entrant) the Tribunal should first consider whether the decision shows, by its terms, that the decision-maker took into account the factors set out in paragraph 395C and exercised a discretion on the basis of them. If it does not, the appeal should be allowed on the basis that it was not in accordance with the law and that the appellant awaits a lawful decision by the Secretary of State. If the decision was made properly, the Tribunal should secondly consider whether the removal of the appellant would breach his rights under the Refugee Convention or the ECHR, and, if not, thirdly whether the discretion under paragraph 395C should be exercised differently, bearing in mind that paragraph 395C does not have the restrictions contained in the 'new' paragraph 364. The process is somewhat similar to that under the 'old' paragraph 364.



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Comment: It will be interesting to see in what circumstances the AIT will find exceptional circumstances where it is held that there will be no breach of any Convention rights (IE Article 8)

Article 8 (The near miss argument in respect of policies.)

JS (Family ILR Exercise –near-miss argument) Albania [2007] UKAIT 00080

The AIT in this case looked at the arguments about the family amnesty exercise and those who were a near miss. In this case this family claimed asylum after 2nd October 2000. The AIT stated that individuals who lodged their asylum claims after 2 October 2000 were subject to one-stop appeals under the Immigration and Asylum Act, 1999 which did not apply to individuals who lodge their claims before that date. Given the rationale for this cut-off date, it has an “all or nothing” significance in that where an individual lodged a claim for asylum on or after 2 October 2000 the Family ILR Exercise does not apply to him or her and the fact that he or she “only just missed” being eligible, even if only by one day, is irrelevant.

The Court of Appeal in Jovan Shkempi v Secretary of State for the Home Department [2005] EWCA Civ 1592 did not decide that the Family ILR Exercise had any significance or relevance to the Article 8 claim of an individual who lodged his claim on or after 2 October 2002. The court in that case was concerned with procedural unfairness.

Comment: In this case the AIT considered that the near miss argument in respect of the family amnesty exercise was not a relevant consideration to the article 8 claim. It endorsed the approach of the Tribunal in the case of KL. (KL (Article 8-Lekstaka-delay-near-misses) Serbia & Montenegro [2007] UKAIT 00044). The AIT looked at the authorities of Rudi and Shkempi and Mongoto. The AIT considered that these were not in conflict and in this case drew particular assistance from the case of RUDI.

Article 8 : The approach to policies

AG and others (Policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082

The AIT heard argument about the relationship between article 8 and policies and the jurisdiction of the AIT. The AIT stated that if human rights are argued, they should be determined in advance of any argument based on discretion: if the claimant's human rights entitle him to enter or remain in the United Kingdom any discretionary power to allow him to do so is otiose.

A policy that in all the circumstances of the case would apparently be exercised in the claimant's favour and contains no elements that genuinely would leave the decision open is relevant in the assessment of proportionality because it goes to the issue of the importance of maintaining immigration control in similar cases. If the claimant fails to establish that his human rights compel the remedy he seeks, but is able to show that there was at the date of the decision a policy in force that governed his case but was not taken into account, he may win an appeal on the ground that the decision, having been made not in accordance with published policy, was ‘otherwise not in accordance with the law’ within the meaning of s 84(1)(e).

If the policy was taken into account and the claimant can show that the terms of the policy and the facts of his case are such that there was no option open to the decision-maker other than to grant him the remedy he seeks, his appeal should be allowed with a direction. But where within the terms of the policy the benefit to the appellant depends on the exercise of a discretion outside the Immigration Rules, the Tribunal has no power to substitute its own decision for that of the decision-maker.



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Comment: The argument as to the correct approach of the AIT in respect of policies continues and no doubt the Court of Appeal will be asked to Rule definitely on the issue of jurisdiction and the correct approach of the AIT to policies. There are two schools of thought, (1) those that believe a policy can be applied by the AIT, and (2) those that believe that only the SSHD can apply a policy the most one achieves in such an appeal is allowed as "not in accordance with the law" and for the application to be returned to the SSHD for a lawful decision.

Service of Determination (a warning from the AIT!!)

FS (Service of determination) Eritrea [2007] UKAIT 00084 AIT Reported

The AIT stated that the calculation of the time when a determination of the Tribunal is served on a party is governed by the Procedure Rules of the Tribunal and not by the CPR; although decisions on the meaning of phrases in the CPR may be of assistance in the interpretation of the same phrases in the Procedure Rules. Proof that a determination was not received on the second day after posting may be by any of the usual means, including judicial notice and a statement of truth; but (save when rule 55(4) causes time to start to run) evidence of service on the representative is no evidence of the date of service on the party himself. Where the evidence merely negates the deemed date of service, service is deemed to have taken place on the next day that the evidence does not negate.

Comment: This may be considered by some to be an alarming decision in which in-country appeals have to be lodged within 5 days. Applying the time limits in this case, the AIT held that deemed service included Saturdays and Sundays! Given that there is no post on a Sunday the deemed date of receipt was held to be on the Monday. Time ran from this date and ended the following Monday at 4pm!! (See CPR Rules) The grounds were faxed at 6.25 pm but by the procedure Rules these were deemed to be received on the next working day i.e. a day out of time. There was no application for an extension and the AIT refused to extend time and hence there was no reconsideration application before them!! It should be also noted that the AIT did not consider that it made any difference that the solicitor had sent a sworn affidavit that stated that the determination had been received on the Tuesday! In the current climate of postal strikes it maybe worth keeping a note of these just in case!!

Rule 51(4) Apply to oral evidence?

MA (rule 51(4) – not oral evidence) Somalia [2007] UKAIT 00079

The AIT found that Rule 51(4) is confined to written evidence and cannot be used to prevent a person from giving oral evidence to the Tribunal. There will rarely be any point in relying on rule 51(4) to exclude a witness statement of a person who is to give oral evidence. The AIT stated "*The fact that rule 51(4) is confined to written evidence in practice means **that there will rarely be any point in the Tribunal excluding a witness statement of a person who is to give oral evidence.** Such a course of action would merely serve to extend the proceedings, by requiring a representative to ask questions in examination-in-chief, which might otherwise have been dealt with by asking the witness to adopt his or her statement.*"



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[A refusal to vary leave Section 82\(2\)\(d\) Considered](#)

[SA \(Section 82\(2\)\(d\): interpretation and effect\) Pakistan \[2007\] UKAIT 00083](#)

The AIT stated that in order to give s82(2)(d) of the 2002 Act any meaning at all, it has to be read in such a way as entirely to exclude the effect of s3C of the 1971 Act. Subject to that, s82(2)(d) means what it says, and a person whose existing leave continues beyond the date when a variation is refused has no right of appeal against the refusal.

[Iraq and article 8; Entry clearance in Jordan CG](#)

[SM \(Entry clearance application in Jordan – proportionality\) Iraq CG \[2007\] UKAIT 00077](#)

Having considered the arguments again about applying in Jordan the AIT stated that further evidence since the Tribunal's decision in **SA (Entry clearance application in Jordan – proportionality) Iraq CG [2006] UKAIT 00011** concerning the procedures and general difficulties facing an Iraqi in returning to Iraq and travelling to Jordan to make an application for entry clearance does not lead to a conclusion different from that in **SA** that generally it is not disproportionate to a legitimate aim within Article 8(2) to require an Iraqi to return and apply in that way.

[Third Party Support and Dependency \(para 317 Immigration rules\)](#)

[VS \(Para 317\(iii\) – no 3rd party support\) Sri Lanka \[2007\] UKAIT 00069](#)

In this appeal heard by the President the AIT once again looked at third party support and this time with the issue as to dependency under Rule 317. The AIT found that third party support is not permitted under paragraph 317(iii) of the Immigration Rules. Where a sponsor is wholly dependent upon public funds and sends to the relative outside the UK money he has received from a third party he is a mere conduit for that money. That does not create a dependency on the sponsor within the Rules.

[EEA Regs : 5 Years residence](#)

[GN \(EEA Regulations: Five years' residence\) Hungary \[2007\] UKAIT 00073](#)

The AIT found that the word "legally" in Article 16 of the Citizens Directive is to be construed as a reference to requirements of European law: it does not mean "in accordance with national law". The requirement in reg 15(1)(a) of five years' residence in the UK "in accordance with these Regulations" is not contrary to any rights given by the Directive and means what it says (as supplemented by the Transitional Provisions in Schedule 4). Thus, a period of residence by a person not exercising a right under the 2000 or 2006 Regulations at that time cannot count towards the five years.

Immigration Cases. Working holiday maker, Students-

[MG South Africa \(degree level study\) \[2007\] UKIAT 00067](#)

The AIT held that the requirement of 'a course of study at degree level or above' in paragraph 60(i)(c) of HC 395 has to be interpreted in accordance with paragraph 6 of the Rules. Further the AIT held that the constituent part of the course must be at degree level. Also see **YS and SJ ('Degree level' study) Mauritius [2006] UKAIT 00094**.



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AK Bangladesh (WHM - maximum 12 months work) [2007] UKIAT 00064

The AIT held that the restriction in paragraph 95(vi) to a maximum of twelve months' work applies whether the work is full time or part time. At para 12 the AIT held that decision-makers are not required to add up each day to be worked to see if the total is likely to reach 12 months' work during the visit as a whole: they cannot have been expected to form their own rules, without any further guidance, as to what a working month, or even week was to be. All they need to do is to decide whether a would-be working holidaymaker will need to work for any part of a period (or periods, in line with Mr Khan's concession) exceeding 12 calendar months during his whole stay. If the employment exceeds 12 months, then following AG, employment cannot be regarded as "incidental to the holiday", and the application must fail under the rule. Further at para 23 the AIT held that the correct interpretation is that an applicant is not entitled to entry clearance unless he is "intending only to take employment incidental to a holiday" and the reference "12 months" at the end of the sub-paragraph is significantly in our view preceded by the words "in any event".

Comment: This is interesting and although perhaps not clear what the AIT are stating is that a WHM cannot work outside a 12month period during the 24months. If the person works across more than a 12month calendar period (or intends to) he is in breach of the Rules.

GB Ethiopia (Family visitor half brother included) [2007] UKIAT 00063

The AIT held that where the Regulations refer to brother or sister they should include half brothers and half sisters and hence have a right of appeal.

ML (student; "satisfactory progress"; Zhou explained) Mauritius [2007] UKAIT 0061

The AIT reaffirmed the findings of TY(Student; "satisfactory progress2; course of study)Burma [2007]UKIAT 00007 in respect of the meaning of "his course of study" in para 60(v). The AIT also considered the Court of Appeal in Zhou v SSHD [2003] EWCA Civ 51. On applying Zhou to the particular facts of this case the AIT held that "satisfactory progress" has to be established in the "course of study for which leave as a student was last granted leave because there is no mechanism for the SSHD to approve transfer to another course of study during the period of that leave.

Comment: This is yet another case concerning students and justifications put forward for failing exams. It will be interesting to see whether the AIT would be willing to allow an appeal, which will fall foul of the "satisfactory progress" test, on the basis of the re-sit provisions.

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.