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Immigration Bulletin. November 2008

Introduction

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

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

Tiers 2 and 5 of the points based system rolls out on 27th November.

Tier 4 Students is to roll out in March 2009 and the intention and guidance has been issued by the UK Borders Agency.

Marriage age for entry clearance is to rise from 18 to 21 as from 27th November.

TG Eritrea (CA) considered. Looks at the recent House of Lords judgments in Chikwamba, and Beoku Betts in respect of article 8.

SK Zimbabwe (CA). considered. Looks at the question of whether non-compliance with the detention centre rules and the Home Office Manual on detention makes a detention unlawful.

Am & Others (CA). Third party support for rules 281, 297 and 317 considered. Also MK Somalia approved in regards DLA. Observations made about requirements of 1 or 2 sponsors for paragraph 317.

Sri Lankan cases. The UK government has agreed an undertaking with the European Court of Human Rights.

AIT reported decisions include: permanent residence for EEA nationals and their family members, and proxy marriages.

This November 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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News

Tiers 2 and 5 of the points based system will roll out on 27th November 2008. All applications made after this time will be considered under this new structure. There are transitional provisions for those already in the UK under the former rules and for those who apply before 27th November. Please see the UK Borders Agency website for further details.

Tier 4 (students) will roll out next year and the UK Borders Agency has published its intentions and plans on the website. Colleges and institutions who wish to recruit foreign students outside the EEA will need a sponsorship licence. In order to be ready for the introduction of the new system colleges and institutions will need to apply before February 2009.

Marriage age to increase. The UK Borders Agency intends to raise the age of marriage for entry clearance purposes from 18 to 21 from 27th November 2008. This they say is to try to help combat forced marriages.

Comments. The new systems appear to be trying to remove as many appeals from the appeals system as possible and streamline immigration in a fashion similar to the Australian system. Although there is the amendment to section 85 (See section 19 of UK Borders Act 2007) this has not as yet been brought into force. When it is brought into force this will further limit the use of further evidence on appeal not submitted before the SSHD. In Entry clearance cases under the points based system, this is subject to a stricter regime for a review first and then a very limited appeal basis.

Sri Lankan Cases. The UK Government has agreed an undertaking with the European Court of Human Rights in respect of Sri Lankan cases. In letters to the European Court the UK agreed to reconsider all Sri Lankan Tamil cases where Rule 39 had been applied and where the applicant relied upon more than just Tamil ethnicity. The UK agreed that they would apply the principles derived from the case of NA and consider whether leave should be granted, a fresh claim should be accepted or the matter be further refused allowing the applicant to judicially review the SSHD's decision. Until this further process has been accomplished the European Court indicated that it would not apply Rule 39 to Sri Lankan cases.

Comment. This almost seems hollow as the SSHD has a very restrictive view of NA applying it seems in a lot of cases a test of "**wanted in a relatively serious fashion**" The old **Jeyachandran** test. It is my view that this is not what the ECHR applied in NA. The other area of dispute revolves around whether there will be a record, and whether that record will be available at the airport. Once again the SSHD applies a narrow view of this and this approach has received some support already in the Country Guidance case of **AN and SS**. Although this case was heard in February 2008 it was not promulgated until after NA. There is a "throw away" line about NA but NA is not considered or applied in any detail and it is my view the AIT applied a more restrictive view of the objective evidence than did the European Court.



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[Article 8](#)

TG v SSHD [2008] EWCA civ 997;

Argument was made as to whether following the recent House of Lords opinions in **Chikwamba** the case should be allowed or remitted back to the AIT to reconsider. Looking at the case itself the Court of Appeal stressed that following Chikwamba did not mean that the Court of Appeal would decide issues of proportionality and each case had to be decided upon its own facts. In the case before the Court, the Court was of the view that there were issues in the appellant's immigration history which needed to be weighed properly together with the reasons why the appellant should not be made to return to the country of origin and apply for entry clearance to return.

Comment. The SSHD has been trying to limit (what by some seems) the scope of Chikwamba and arguing that the case was very exceptional upon its facts. It seems as though this approach has received some support in the Court of Appeal following this judgment. Each case will very much depend upon its own facts and the immigration history of the appellant in the UK. This largely reflects the ECHR in many cases in which it stresses that each case depends upon its own factual matrix.

I should just comment that their Lordships have delivered their opinions in the case of **EM Lebanon v SSHD [2008] UKHL 64.**

The Court of Appeal found that there would not be a flagrant denial of this mother's article 8 rights. However their Lordships considered that the Court of Appeal had applied the wrong legal test and taken the comments of their Lordships in other cases to provide that legal test (Nullification of the right etc see in particular opinions at paragraphs 33, 35 and 38 and the application of the test at paragraphs 40-1). In this case their Lordships considered on the facts that there would be a flagrant denial of the mother's rights to a family life with her child and hence allowed the appeal. The facts of this case are interesting and it is in my view a little difficult to see how the Court of Appeal applied the wrong legal test.

Final thought, I remember comments made by Sedley LJ in one case that applying article 8 was not a reward for good behaviour and punishment for bad. It now seems that there is a punishment for a bad immigration history. Your article 8 rights will be ignored (interfered with)!

[Detention Unlawful?](#)

SK Zimbabwe V SSHD[2008] EWCA Civ 1204

In this case the SSHD appealed against a judgment of the Administrative Court finding that the applicant had been unlawfully detained. The arguments advanced by the SSHD criticised the findings and arguing that although there may have been a failure to follow the detention centre rules and the Home Office's own manual on detention this did not make the detention unlawful. The Court of Appeal agreed and allowed the appeal of the SSHD.

The issue in this case is set out at paragraph 21. The Court provides its conclusions in paragraph 25. In paragraphs 32 onwards the Court considers the scope of the detention under paragraph 2(2) as against article 5. The conclusions on all issues are set out in paragraph 35.



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Comment-

However there is a postscript about the instructions given to caseworkers that foreign criminals should be detained following the end of their sentence. There are a number of challenges to this instruction in the Administrative Court and this case was remitted to the High Court to resolve this issue.

Third party Support

AM and Others v SSHD[2008] EWCA Civ 1082

In this case the Court of Appeal, by a majority, agreed with the views of the AIT that there could be no reliance upon third party support in cases under 281, 297 and 317. In interpreting the Immigration Rules the approach adopted by the Court was applying its natural meaning (See paragraph 54-55 of the judgment). There was a dissenting judgment in respect of paragraph 317. Also the Court made some observations about whether there could be more than one sponsor under paragraph 317. The Court considered that there could be more than one sponsor, however this was not part of the judgment and the SSHD's policy is that there cannot be more than one sponsor.

Comment. In these cases the Immigration rules is to provide a proportionate response to an applicants rights to family life. If the applicant meets all the other requirements apart from the maintenance requirements but there is an offer for the appellant to be maintained by some one else what legitimate purpose does this offend or is proportionate to? There is no economic detriment and the person has applied outside the country and so immigration control is not breached. Under Immigration rules the SSHD can obtain an undertaking from a sponsor and it can result in sanctions if breached. In these circumstances what legitimate purpose is served and how is it proportionate not allowing the family to be together?

AIT reported cases

Permanent Right of Residence

OP [2008] UKAIT 00074 Permanent right of residence

The AIT held the following :-

(1) *Where a person relies (wholly or in part) on a period of residence under the earlier 2000 EEA Regulations in order to establish a permanent right of residence under regulation 15 of the 2006 EEA Regulations, the period of 5 years continuous residence in the UK must end on, or after, 30 April 2006 when the 2006 EEA Regulations came into force.* (2) *Whilst residence in accordance with the 2000 Regulations (but not the 1994 Order) counts as residence "in accordance with" the 2006 Regulations for the purposes of regulation 15(1)(b), a family member must also show by evidence that that residence was "with the EEA national".*

Comment

This case has the potential to discriminate against EEA nationals and their family members. The person may have been lawfully resident in the UK for 10 years by 2005 but this period will not end on or after April 30th 2006 and hence the person will not be entitled to permanent residence in the AIT's view. However residence under the regulations is not leave and so cannot be counted under the Immigration rules. This the AIT did not consider in applying their restrictive view of the permanent residence requirements. It should be noted that a similar approach has been followed in a number of cases see GN Hungry[2007] UKAIT 00073 and JT Polish workers [2008] UKAIT 00077.



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PROXY MARRIAGES

CB (Validity of marriage: proxy marriage) Brazil [2008] UKAIT 00080.

The AIT Held:-

*There is no exception in immigration cases to the rule of private international law that the validity of a marriage is governed by the *lex loci celebrationis* and on the authority of Apt v Apt [1948] P 83 there is no reason in public policy to deny recognition to a proxy marriage.*

Comment:-

The SSHD has been trying for a little while to stop the recognition of proxy marriages. Many people tried to find a solution to the problem of the Certificates of Approval and in the circumstances proxy marriages were conducted in other countries. The SSHD did not recognise these as valid marriages and applied the domicile test in Marks v Marks (HL) in such cases. This has now been found by the AIT in this case to be incorrect. It will be interesting to see if the SSHD attempts to appeal this case as it has potential ramifications in many other cases and following the decision of the European Court of Justice in Metock and others implications for the issue of residence cards. By way of final note it is possible to seek a declaration from the family Courts in the UK that the marriage is valid.

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.