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Immigration Law Newsletter

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Asylum and Immigration Tribunal

The purpose of the Immigration Law quarterly is to highlight some of the cases of the last quarter that may be useful aids in future cases. The next issue will be distributed in December 2009.

The long awaited decision of LG was finally promulgated with a referral to the European Courts. KH (Afghanistan) of the Court of Appeal identified difficulties with two different lines of Article 3 jurisprudence.

Interestingly, the SSHD aids any challenges under the point based rules. The SSHD, under the 'point based rules' has split the criteria to be met between the rule and guidance notes. Whilst the status of the Rules and how they are to be interpreted is clear, it is yet to be seen whether the Appendix to the Rule is lawful in its incorporation of further criteria as set out in the Guidance.

Kan -v- SSHD [2009] AIT 00022

The Appellant made an application under Paragraph 245Z of the Immigration Rules but her application was refused because she did not have the relevant qualification at the date of application. She nevertheless claimed the relevant points on the basis that she would soon after be awarded her certificate.

She appealed the refusal on that basis. The Immigration Judge upheld the SSHD's decision. On reconsideration the AIT decided that in order to be awarded the points the Applicant must have been awarded the qualification, it is not sufficient to provide a letter that the qualification will be awarded.

Where the Appellant has obtained the qualification but is yet to be awarded the degree certificate, then in those circumstances a formal letter providing details of the awarding body may be produced. Interestingly, Paragraph 9 of the decision states that there was nothing in the guidance that allows the rule to be interpreted in any other way but to give effect to the ordinary meaning. This would suggest the Tribunal was open to the argument that the guidance could allow for a more generous interpretation of the rule.

CASE LAW

LA -v- SSHD [2009] AIT 00019

The Appellant made an application to remain in the United Kingdom. Her marriage had broken down as a result of domestic violence before her leave expired. The application was refused because she had not provided the requisite evidence. The Immigration Judge, having made a finding of domestic violence, decided that there was no evidence that the marriage broke down because of domestic violence but because of the British spouse's lack of commitment. The Tribunal decided that 'In the light of AG (India) v Secretary of State for the Home Department [2007] EWCA Civ 1534, when considering whether an appellant who is the victim of domestic violence has proved that the "relationship was caused to permanently break down before the end of that period as a result of domestic violence", the Tribunal must be careful to assess the evidence in the round, looking at the totality of the evidence and remembering that a broken marriage may have ended before the parties separate and the marriage may have broken down as a result of domestic violence even if other grounds are given in matrimonial proceedings or raised before the Tribunal'.

SD (Para 320: findings desirable) Pakistan [2009] UKAIT 00021

The Appellant made an application for entry clearance as the spouse of a British person. The Appellant had, although regarding the marriage to be formal, undergone a religious ceremony only. The entry clearance officer refused the application under paragraph 281 and paragraph 320, on the basis of the Appellant's previous entry into the UK, but failed to provide any reasons. The Immigration Judge upheld the appeal. On reconsideration the Tribunal stated that, where there had been a refusal under Paragraph 320, the Immigration Judge had to provide reasons for any decision concerning Paragraph 320, so that the reasons could be relied upon in any future application.

YS (Paragraph 57(iv): "external student") India [2009] UKAIT 00015

The case concerned a college in the UK that awarded US degrees. The issue was whether this came within the ambit of Paragraph 57 (vi) Immigration Rules;

"he has been accepted to study externally for a degree at a private institution, he is also registered as an external student with the UK degree awarding body"

The SSHD argued that the degree had to be awarded by a UK institution and not merely taught here in the UK. The Tribunal disagreed and decided students who otherwise meet the requirements of the rules are allowed to come to this country in order to undertake courses that do not lead to a UK degree and it would be odd if it was more difficult for the same student to undertake the same course, if it led to a degree from an institution outside the United Kingdom.

WW (EEA Regs. – civil partnership)

Thailand [2009] UKAIT 00014

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The Appellant had separated from his EEA national civil partner by the date of the AIT hearing. He had lived with his partner for a year in Thailand in 2001 and then was sponsored by his partner to come to the UK as a student.

The Appellant had lived with his partner until separation in 2008. He had lived as a family member of an EEA national exercising treaty rights. The Appellant's partner left for the far east. The Appellant sought to stay in the UK as a family member of an EEA national. The parties became civil partners in 2004 but sought to dissolve the partnership in 2008. The civil partnership had not been formally dissolved. Finding that the Immigration Judge had made a material error, but dismissing the appeal, the Tribunal referred to Regulation 10 (1) & 10 (5).

which provide that 'family member' includes prior to the initiation of termination of marriage that parties have lived together one year in the host state and three years in total. The Tribunal referred to Article 13 of the 2004 Directive and stated that termination refers to divorce/annulment or termination of marriage/partnership. This would therefore clearly mean formal termination and not de facto. However, the Regulations came into effect on 30th April 2006. Prior to that the Appellant could not come under the 2000 Regulations. Accordingly, the Appellant had not lived together for a period of at least three years as a civil partner prior to initiating proceedings to terminate the relationship. The Appellant was therefore not a family member for the purposes of Regulation 10 (5).

AF (Terrorist Suspects – HS (Algeria) confirmed) Algeria CG [2009] UKAIT 00023

An appellant who can establish that he has a history that suggests he may have connections to international terrorism is at real risk of being detained on arrival in Algeria, and investigated.

- It is reasonably likely that when the suspicion is of international terrorism such a returnee will be passed into the hands of the Department du Renseignement de la Sécurité ("DRS") for further interrogation.

- The historic evidence about the DRS's propensity to use torture as a means of interrogation, together with the continuing absence of any evidence of accountability or monitoring, strongly suggests that, in the absence of evidence to the contrary, the DRS still uses torture and other serious ill-treatment in its places of secret incommunicado detention.

- In the light of the further report from Dr Seddon, and of both Y, BB and U v Secretary of State for the Home Department [2007] UKSIAC 32/2005, and PP v Secretary of State for the Home Department [2007] UKSIAC 54/2006, the Tribunal saw no basis for doing other than confirming that HS (Terrorist suspect – risk) Algeria CG [2008] UKAIT 00048 (heard before the SIAC Cases) was correct and that the risk categories set out therein do not require widening.

CASE LAW

R (on the application of V) KH (Iraq) v SSHD [2009] EWCA 836

The Applicant, who is now in his late twenties, arrived here and sought political asylum in 2002. The claim failed. Consequently, he lost his NASS and began a process of physical decline which ended with his living rough, sleeping in a graveyard and showing several clear signs of mental disturbance. By 2005 he had sought and found professional help through the National Health Service and been found eligible for support under the National Assistance Act 1948.

His solicitors submitted a new application for non-removal, this time on grounds of his mental condition, which remains fragile and prone to self-harm including, it appeared, the possibility of suicide. The diagnosis was recurrent depressive disorder with features of PTSD. Only a supportive support network, it seems, kept the applicant in relative stability. LJ Sedley gave permission to appeal not on the grounds that the treatment here would be better, but because of the inability to cope with destitution by reason of his mental condition. He decided it arguable, and was persuaded by Counsel who submitted, that this point is not dealt with by N v SSHD and the high threshold for Article 3, where removal will lead to cessation of medical treatment but corresponds in turn with the European Court of Human Rights account of degrading treatment in Pretty v United Kingdom 2346/02 [2002] ECHR 427. The passage he particularly relied on is at paragraph 52:

"Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3."

LJ Sedley found the divide in the Jurisprudence of N and Pretty a troubling one.

ZB (Pakistan) v SSHD [2009] EWCA CIV 834

The AIT did not examine the relationship between this 59 year old mother and her daughters upon the correct basis. When considering family life for Article 8 purposes, where a court or tribunal is analysing the relationship of a parent and adult children, something more than normal emotional ties between them has to be shown. Where, as here, the focus is on the parent, the issue must be: how dependent is the older relative on the younger ones in the UK and does that dependency create something more than the normal emotional ties? The court was not finding facts, it was indisputable that the appellant is an insulin dependent diabetic who needed to be cared for and who is either wholly or largely financially dependent on her family in the UK.

R (on the application of V) -v- Asylum and Immigration Tribunal [2009] EWHC 1902

Although the Judicial Review application was dismissed, the Court considered the arguments of whether the AIT powers to strike out the SSHD's case for abuse of process could be implied into the Asylum and Immigration Procedure Rules 2005. The Court also considered the issue of procedural fairness and breach of natural Justice. Judge Hickinbottom concluded:

"I accept that, given that the AIT is enabled to take steps to avoid injustice, if there will be an inevitable breach of the rules of natural justice if the case proceeds to a hearing on its merits, then that is something which the tribunal can, should and arguably must take steps to avoid".

NA (Tier 1 Post-Study) -v- SSHD [2009] AIT 00025

The relevant provisions require applicants to show that they had the requisite amount of £800 during a three-month period of time immediately before their application. It is not possible to apply s.85(4) of the Nationality, Immigration and Asylum Act 2002 so as to enable them to succeed on appeal by proving they had the requisite funds for a period of time (wholly or partly) subsequent to the date of application.

Until s.85A of the 2002 Act is brought into force (subsection 85(4)(a) of which stipulates that, in respect of appeals in Points-Based System cases, the Tribunal may consider evidence adduced by the appellant only if it was submitted at the time of applying), it remains possible for appellants to satisfy the requirements of para 245Z(e) by providing on appeal evidence in specified form showing that they had £800 or over in personal savings for the period of three months immediately prior to the date of application.

LG (Italy) v SSHD [2009] AIT 00024

Time spent in prison does not count towards the acquisition of the level of protection afforded to an EEA national by regulation 21(4) of the Immigration (European Economic Area) Regulations 2006, even for a person who has a right of permanent residence in the United Kingdom.

A clear distinction is required to be drawn between the three levels of protection against removal introduced in the 2006 Regulations, each level being intended to be more stringent and narrower than the immediately lower test.

Court of Appeal Decisions

VH (Malawi) [2009] EWCA 645

It was submitted, in respect of a 2nd stage reconsideration, that the husband's determination in the wife's appeal put on a distinct and separate basis was not admissible in evidence of the appellant's appeal and should not have been taken into account by the panel, who had taken active steps itself to obtain the decision. It was accepted that the tribunal has a limited inquisitorial function (as to which, see Macdonald's *Immigration Law and Practice*, 7th ed. (2008), paragraph 18.134), but in the Appellant's submission the tribunal overstepped the limits of that function and descended impermissibly into the arena. It was submitted that the fundamental rule is that the tribunal must decide the case on the basis of the evidence placed before it by the parties; it may have regard to other evidence as to the objective evidence in a country, but it is not entitled to seek out evidence relating to the personal circumstances of an appellant. The Court of Appeal found that this was the 'most anxious part of the appeal', that is the consideration of evidence that was not relevant to the appeal. It did not find a material error of law because the Tribunal had reached its decision in the round taking all matters into account. It is clear from the decision that irrelevant consideration of evidence is an error of law.

AM (Somalia) [2009] EWCA 634

The Appellant sought entry clearance to join a spouse who was not able to work in the UK by reason of disability. The appeal concerned paragraph 281, 'that is that the parties will be able to maintain themselves without recourse to public funds'. The issue was 'Whether paragraph 281(v) is incompatible with Article 14 of the ECHR taken together with Article 8 (and thereby must be disapplied or read down), given its failure to make provision for people with disabilities by either: (1) excusing them from the maintenance requirement, or at least (2) allowing third party maintenance.' It was common ground that, for the purposes of Article 14, a difference in treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised', (*Abdulaziz, Cabales and Balkandali v United Kingdom* [1985] 7 EHRR 471, at paragraph 72). It was held that there was nothing disproportionate in the general requirement of self sufficiency and nothing discriminatory against the disability. Disability itself led to imponderable variables.

EN (Serbia) [2009] EWCA 630

This appeal concerns Section 72 of the Nationality and Immigration Act 1972 which provides:

(1) This section applies for the purpose of the construction and application of Article 33 (2) of the Refugee Convention (exclusion from protection).

(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is-

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years

(3) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.

Since Section 72 creates a rebuttable presumption of a serious crime, it was not incompatible with the Refugee Convention. If the presumption had been irrefutable then it would have been incompatible. There was nothing objectionable in serious crimes encompassing crimes that were moderate but where a two year sentence had been given, since the presumption of seriousness was rebuttable. If the Tribunal found that a Foreign national had committed a particularly serious crime and that he constituted a danger to the community, he will not be entitled to refugee status even if his Convention rights preclude his removal.

House of Lords

Nasseri v SSHD [2009] HL 23

The case concerned the Council Regulation (EC) No 343/2003 ("the Dublin II Regulation"), which provides in article 10 that if an asylum seeker has crossed the border from a third country into a Member State, that Member State, and only that Member State, shall be responsible for examining his application. Pursuant to the Regulation, the Home Office asked the Greek authorities to accept responsibility for determining Mr Nasseri's application. The Greek authorities agreed to do so and he was notified that he would be removed to Greece.

Mr Nasseri objected on the ground that there was a real risk that, if sent to Greece, he would be returned to Afghanistan to face inhuman or degrading treatment, contrary to article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Secretary of State's response was that by virtue of paragraph 3 of Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, a return to Greece is deemed not to be incompatible with article 3:

(1) This paragraph applies for the purposes of the determination by any person, tribunal or court whether a person who has made an asylum claim or a human rights claim may be removed —

(a) from the United Kingdom, and

(b) to a State of which he is not a national or citizen.

(2) A State to which this Part applies shall be treated, in so far as relevant to the question mentioned in sub-paragraph (1), as a place —

(a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,

(b) from which a person will not be sent to another State in contravention of his Convention rights, and

(c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.

By paragraph 2, Part 2 applies to a list of countries which include Greece. Paragraph 3(2)(b) therefore creates an irrebuttable presumption that Greece is not a place from which Mr Nasseri will be sent to another State in breach of his Convention rights.

The House of Lords decided that the irrebuttable presumption meant that removal on the grounds of how an asylum application would be processed could not be challenged. However that did not stop an Article 3 claim on some other basis.

Odelola -v- SSHD [2009] HL 25

The appeal concerned a question of construction of the Immigration Rules. The House of lords stated in very clear terms that the language of the Rules had to be construed against the relevant background. This involves a consideration of the Immigration Rules as a whole and the function which they serve in the administration of immigration policy. So the most natural reading is that (in the absence of any statement to the contrary) the Immigration Rules will apply to the decisions the SoS makes until such time as the SoS promulgates different Rules, after which she will make decisions according to the new Rules. If new Rules are intended to apply only to applications made after they come into force, they expressly say so, as they did in paragraph 4 of the Immigration Rules 1994 (HC 395).

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