

# Immigration Team Legal Bulletin

Issue 4. July 2005



## Case Law Update

The CA has considered how Article 8 should be applied in deportation cases where the Appellant has a right of residence. In **Machado -v- SSHD [2005] EWCA Civ 597** the Appellant had such a right under the Immigration (European Economic Area) Regulations 2000 as his EEA national wife was working in the UK. Although the SSHD contended that he did not have any corresponding right in EU law as a result of the ECJ's decision in **Akrich**, this argument was rejected on the basis that even if this was the case, the EU jurisprudence such as **Orfanopoulos** reflected how the 2000 regulations should be applied domestically. The IAT had also erred in considering proportionality under EU law and Article 8 separately. In addition, the IAT had erred by failing to properly consider whether the Appellant posed such a present and serious threat to public policy, in order to justify the effective termination of his family life. Despite the Appellant's criminal conduct, in light of the ECHR's decision in **Amrollahi**, a properly conducted examination of proportionality was capable of producing a decision in his favour.

The issue of deportation has also been considered in **Mert -v- SSHD [2005] C4/2004/2087 – 23 June CA**. The Appellant entered the UK in 1989 and claimed asylum. He then met his wife, married and subsequently had four children. The Appellant was then convicted for the supply of controlled drugs and sentenced to nine years imprisonment, following which the SSHD proposed to deport him. An adjudicator held that the deportation decision was disproportionate and in breach of Article 8. An appeal by the SSHD against this decision was allowed by the IAT, but this decision has now been overruled by the CA. In a draft judgment, the CA has held that the Adjudicator's determination was correct as he had given weight to the SSHD's policy and balanced it against the appropriate considerations.

In **SSHD -v- Rashid [2005] EWCA Civ 744** the CA held that the SSHD's conduct amounted to an 'abuse of power' by reason of their persistent failure to apply a policy as regards internal relocation to the KAA, which would have led to the Appellant being granted refugee status. The CA held that the Home Office's failures were 'startling and prolonged' and had resulted in conspicuous unfairness to the Claimant. The abuse was based on a legitimate expectation that a general policy for dealing with asylum applications will be applied uniformly. The CA held that the Claimant was entitled to a declaration of indefinite leave to

remain rather than a grant of status, as the necessary criteria were not satisfied at the time of the decision.

The CA has considered whether a Sierra Leonean Appellant, who would be subjected to female genital mutilation ('FGM') upon her return, constituted a member of a particular social group in **Fornah -v- SSHD [2005] EWCA Civ 680**. The CA majority's surprising conclusion was that she did not, as the majority of the country's population accepted FGM, that it marked an individual becoming an adult and that those who underwent it were not segregated by society and did not remain part of the particular social group. Regular readers may consider that Arden LJ's dissenting judgment is supported by the earlier decision in **Liu [2005] EWCA Civ 249**. There is a strong likelihood that leave will be granted for this matter to be considered by the HL and could be heard with the case of **K -v- SSHD [2004] EWCA Civ 986** for which leave was granted on 4 May 2005.

**R (Khadir) -v- SSHD [2005] UKHL 39** concerned whether the SSHD's inability to safely return an Iraqi Kurd meant that he should no longer be regarded as having been 'temporarily admitted' and instead granted ELR. The Appellant was someone who was 'liable to detention' under paragraph 16 of Schedule 2 to the Immigration Act 1971 as he had unlawfully entered the UK and been temporarily admitted. The HL held that the words 'pending ... removal' within paragraph 16 meant no more than 'until', so that as long as removal remained intended and there was some prospect of achieving this, detention was theoretically authorised. The Appellant's continued temporary admission was therefore lawful.

## Country Guidance

The CG case of **SM and others (Kurds – Protection – Relocation) Iraq CG [2005] UKIAT 00111** finds that (i) KAA authorities provide a sufficiency of protection to their inhabitants, subject to exceptional cases; (ii) relocation from the KDP area to the PUK area is not unduly harsh and vice versa; (iii) a similar conclusion was reached in relation to relocation from an area in which an individual has experienced tribal difficulties; (iv) relocation by a Kurd to the south is not unduly harsh in all but the most exceptional cases.

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