

Immigration Team Legal Bulletin

Issue 14. September 2006



Court of Appeal

S and Others v SSHD [2006] EWCA Civ 1157. This case considered the lawfulness of the actions of the SSHD when amending his discretionary leave policy in August 2005 to enable him to refuse leave to enter to the applicants, a number of Afghan nationals who had hijacked a plane to come to the UK in 2000. It was successfully argued that where such applicants are refused leave to enter, they have a right of appeal. If their appeal succeeds, on asylum or human rights grounds, they are entitled to leave to enter and to remain here, in the latter case, until they can be safely returned without violation of their ECHR rights. This status cannot be taken away from them by the Secretary of State conferring on them a new status which does not in this manifestation form any part of the statutory scheme. The CA stated that nothing in the judgment should be interpreted as meaning that it would not be open to Parliament to confer power on the Secretary of State to introduce a regime similar to the regime he sought to introduce through the August 2005 Discretionary Leave API (so long as the arbitrary elements of it are removed). If it is considered that a person (or a group of persons) has by his conduct disentitled himself to any discretionary leave at all, then it would be open to Parliament, if it thought fit, to create a new statutory category to accommodate him. The present twilight zone occupied by persons entitled to temporary admission was not designed for him. The effect of the judgment is that it was beyond the powers of the Secretary of State to introduce this new category of "persons temporarily admitted" of his own motion without Parliamentary sanction. [judgment](#)

Country guidance

LM (Educated women – Chaldo- Assyrians – risk) Iraq CG [2006] UKAIT 00060. This case returned again to the question of risk of persecution or breach of Article 3 ECHR on the basis of Christianity in Iraq. It was held that female Christians per se were not generally at risk of persecution or breach of Article 3 but that additional factors may increase the risk to a particular female to a level engaging both Conventions. The factors identified by the AIT included - prominent position in companies associated with the Multi National Force, westernised, Women's rights activities or refusal to wear the hijab, lack of KDG connections, no family support, English speaking or non Kurdish speaking. The Tribunal made clear that these factors were not to be treated as a shopping list but that a number of them when considered together could elevate the risk to a particular individual. The questions of family support and/or connections to the KDG were highlighted as important areas to consider when considering the question of internal flight.

In the course of argument, the Tribunal was asked to consider that RA was wrongly decided but declined to do so. However, the AIT noted that

there continued to be a progressive deterioration for all Christians in Iraq and did not close the door on potential arguments that a male Christian from Iraq may be able to demonstrate a real risk on return. Each case will have to be very carefully considered on its own facts and up to date objective evidence provided in support of risk. In the light of this judgment and the recent resumption of involuntary return to Iraq by the British Government, it will be important to take detailed instructions on the above issues from individual applicants. [judgment](#)

Procedure

In **JL (Domestic Violence; evidence and procedure) India [2006] UKAIT 00058** the AIT gave guidance on making applications for ILR arising from domestic violence issues and considered the evidence that should be produced by the Applicant. In relation to procedure, that AIT held that the most important matter to address in the application is that it is made using the appropriate form (SET(O)), otherwise it is not valid and cannot found a successful appeal. Further, the relevant documents identified in SI 2003/1712 should be submitted with the form. However, if the documents are not submitted on time and the Secretary of State does not take any point about the missing documents within the prescribed time, the application will still be treated as valid.

In relation to the evidence to be relied upon, the Secretary of State sought to argue that the Immigration Judge is confined to the evidence required by the Secretary of State in the Regulations or the appeal must fail. The Tribunal rejected this argument, stated their independence from the Home Office and reading down para 289A (iv), reiterated that the question of domestic violence should be determined on the basis of all the evidence before the Immigration Judge. [judgment](#)

It is suggested that applications should be made with a detailed covering letter addressing the requirements of the rules and making reference to human rights arguments, where they are relied upon. This latter point may be particularly important where a representative has a very strong case which cannot fall within the specific immigration rules (i.e. a spouse who suffers violence during the probationary period but leaves after the probationary period). It may also be important to address potential asylum and human rights issues such as risk on return to a country of origin following breakdown of a marriage from family members or community (**Shah and Islam**).

Legal Training Seminar

"Foreign Nationals in the Criminal Justice System : a multi-disciplinary seminar for criminal, immigration and prison law practitioners."

14th September 2006, Manchester, 6 CPD points

[click here for more details](#)