

Immigration Team Legal Bulletin

Issue 15. March 2007



Zimbabwe

AA (Zimbabwe) v SSHD [2007] EWCA Civ 149, (6.3.07) [judgment](#)

On the issue of risk of serious harm to voluntary or involuntary returnees to Zimbabwe, the Court of Appeal has once again remitted the case of AA ([2006] UKAIT 00061 when last heard by the AIT), this time back to the same Tribunal for consideration of specific evidence before it, but found by the Court of Appeal not to have been addressed properly. The Appellant had argued that it was not rationally open to the Tribunal on the evidence as a whole to find that there was a two-stage screening interview process at the airport, and that the first stage was to be regarded as risk-free for those without an adverse political profile, a questionable military history or outstanding criminal matters. The CA held that the evidence did sustain a finding of a two-stage process (para 31), but also held that important evidence had not been taken into account in assessing risk. The evidence of witnesses W5 and W6 had been considered by the AIT; both were formerly involved with airport security, and still had contacts serving there. W5's current contact had told him that all returned asylum seekers were handed over to the CIO who carried out thorough questioning and then decided what should be done. Such thorough questioning, as he understood it, involved the use of crude techniques, which he referred to as coercion. W6 also gave evidence of what happened at the airport in the screening interview; "there was abuse at the airport; kicking, beating, not torture" (paras 33-34). The SSHD accepted before the Court of Appeal that the Tribunal's decision said nothing about hitting and kicking at the airport. The reference to thorough questioning was quoted, but there was no reference to the explanation by the witness of what he understood those words to mean. The Court held that whether or not there was violence at the airport was an important issue, indeed might be seen as pivotal, and determinative of the appeal (para 35), and allowed the appeal on that ground.

It is not only the evidence of W5 and W6 which is to be reconsidered. The Court noted (para 39) that reconsideration of their evidence 'may also require reconsideration, in the light of all the evidence, of the impact which the evidence and information about the 39 individual returnees, taken as a whole and with the other evidence, may have on the appeal.' The Court appears to suggest (paras 40-43) that the evidence of a number of witnesses (R4, R25, R26 and R31) who gave evidence of violence at the airport (rather than elsewhere, having been taken away from the airport) should be reconsidered, which itself draws into question the Court's general approval at para 31 of the AIT's finding of there being a two-stage process. The Court held (para 41) that reconsideration of the evidence of W5 and W6 will require reconsideration also of the relevance of evidence about the risk of violence to voluntary and involuntary returnees, who were not merely failed asylum seekers (emphasis added).

There is therefore no currently applicable CG case on voluntary/involuntary returnees. Appellants may therefore argue the issues at first instance appeals, relying on the evidence of such risk set out in the various earlier judgments in [AA](#) and other sources. Regrettably (for the trees), submission of all four judgments in [AA](#) should therefore be considered in Zimbabwean appeals. Matters in Zimbabwe appear to be deteriorating and a respectable argument might be put forward that the risk to returnees from the UK is likely to be greater now than that suggested by the evidence considered in [AA](#). See: <http://news.bbc.co.uk/1/hi/world/africa/6452451.stm>

As separate but notable issues, the Court held that the AIT's summary of the test to be applied when assessing risk to a person falling within a category of applicant (such as AA), set out at para 14 of the AIT's determination, was a neat and correct synthesis of Law LJ's opinion in [Hariri](#) and Sedley LJ's opinion in [Batayev](#). Further, the Court gave approval to the proposition in [Ribbitsch v Austria](#) (1995) 21 EHHR 573 that in relation to persons in custody, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the rights set forth in Article 3 ECHR. The Court had difficulty understanding why the AIT found Witness 31's experience of being subject to hostile interviewing at the airport, and being struck across the mouth, did not engage Article 3.

Sudan

AA (Sudan) v SSHD [2007] EWCA Civ 95, (31.1.07) [judgment](#)

The Appellant had been attacked and injured by Arab militias in Darfur in 2000. He later tried to lodge a complaint at a police station in Khartoum. He was arrested, accused of making a false statement, and beaten. He escaped from detention. Peter Verney, acknowledged by the Court of Appeal as 'patently an expert on Sudan', had asserted in a report that there would be a record of the Appellant's detention and of his escape. The AIT had dismissed the appeal on the basis that if the authorities really wanted to find the Appellant it was inconceivable that he could have lived on a farm on the outskirts of Khartoum over three years following his escape without detection. The Court of Appeal held that the AIT had simply not dealt with the expert evidence, or alternatively, if they were deemed to have rejected Mr. Verney's evidence, had given no reason for such rejection. The Court of Appeal noted that HGMO [2006] UKAIT 00062 was itself due for hearing before the Court of Appeal in March 2007, but it did not assist the SSHD in any event, as it did not address the position of those who had been detained by the police and escaped from detention. Remitted.

Delay and Article 8

The Court of Appeal in **HB (Ethiopia), FI (Nigeria), EB (Kosovo) and JL (Sierra Leone) v SSHD [2007] EWCA Civ 1713** (14.12.06) [judgment](#), although finding it unnecessary to clarify the law on the effect of delay by the SSHD on claims that rely on Article 8 ECHR to resist removal from the UK, it summarised the jurisprudence on this issue at paragraph 24 of its judgment. The most important distinction to draw from the guidance is that between persons who have some potential right under immigration policy to be in this country (for instance, under marriage policy, as in *Shala* and *Akaeke*); and persons who have no such right. The Court held that "In the former case, where it is sought to apply burdensome procedural rules' (*ie a requirement to return to the country of origin and apply for entry clearance*) 'it may be inequitable in extreme cases, of national disgrace or of the system having broken down [*Akaeke*], to enforce those procedural rules [*Shala; Akaeke*]". However it is notable that *Shala* succeeded in this argument notwithstanding that the courts had not described the delay in deciding his case as a national disgrace. The Court continued: "Where the applicant has no potential rights under specifically immigration law, and therefore has to rely on his rights under article 8(1), delay in dealing with a previous claim for asylum will be a relevant factor under article 8(2), but it must have very substantial effects if it is to influence the outcome [*Strbac* at §25]."

S, R (On the application of) v SSHD [2007] EWHC 51 (Admin) [judgment](#). A useful example of the application of the principles in *HB* (Ethiopia). Mr. Justice Collins considered a judicial review of the SSHD's decision to certify an Afghani applicant's human rights claim under s.96 2002 Act. Collins J was of the view that due to his fear of the Taliban, the applicant was a refugee at the time he arrived in the UK in 1999. However, there had been prolonged delays in dealing with an initial asylum application, and subsequent human rights applications. The applicant had developed a family life complicated by the fact that his British partner was still married to her first husband. Collins J held that policy announcements in the government's July 1998 paper: "Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum" did not provide any legitimate expectation that an application for asylum would be dealt with in any particular time frame (paras 16, 21). He also found at para 23 that there had not been conspicuous unfairness amounting to abuse of power such that the *Ravichandran* principle (objective risk of harm required at date of assessment, not application) should be disapplied (as in *R (Rashid) v SSHD [2005] EWCA Civ 744*). However, the case fell 'fairly and squarely' within the principles in *HB and Others* para 24 (iii) and (viii), and there was the additional complication that there was no entry clearance post in Afghanistan to which the applicant could apply to return to the UK. Certificate quashed, with a strong suggestion that some form of leave to remain ought to be granted.

SB (Bangladesh) [2007] EWCA Civ 28 [judgment](#)

It has been held in previous cases that when determining whether there are truly exceptional circumstances making interference with Article 8 rights disproportionate, the fact that an Appellant would stand a poor prospect of successfully obtaining entry clearance to return to the UK is

not a material factor to be taken into account by the Tribunal (eg *Ekingi v SSHD [2003] EWCA Civ 765*). In *SB* (Bangladesh), the converse was also found to be true. The AIT had dismissed an Article 8 appeal on the basis that the Appellant appeared to have good grounds for applying, after her removal, for entry clearance to re-enter the UK under immigration rule 246 (child contact), and that that was the course of action she should follow. The Court of Appeal rejected the SSHD's submission that the Tribunal had not in fact taken that factor into account in dismissing the appeal. Helpfully, the Court held (para 30) that the Tribunal were right to hold the view, applying the approach of Collins J in *Lekstaka* (2005) EWHC 745 (Admin), that the fact that the appellant "only just failed to qualify for admission" was a fact to be counted in her favour in assessing the Article 8 issue. The Court agreed with the view expressed by Collins J in *Lekstaka* in paragraph 38 that:

"... one is entitled to see, whether in all the circumstances, this case falls within the spirit of the Rules or the policies, even if not within the letter." *

However, the Court held that it was wrong in principle for the Tribunal to have carried out, or taken into account, their own assessment of her prospects of coming back to the United Kingdom on an indefinite basis pursuant to an application which she might make from Bangladesh for entry clearance under the Immigration Rules (para 36). Whilst there remains tension in the judgment between its apparent finding at paragraph 35 that it was still proper for the Tribunal to consider whether an Appellant might be able to apply for entry clearance to return to the UK, and the Court's finding that the Tribunal should not speculate as to what the outcome might be (paras 22, 24), the judgment brings solace to those who may have lost Article 8 appeals due to the apparent ease with which they could obtain E/C to return to the UK.

* **Please note:** The judgment of Collins J in *Lekstaka* and the decision of the CA in *SB* has been revisited more recently in *TK* (Immigration Rules – policy – Article 8) Jamaica [2007] UKAIT 00025 [judgment](#). The Tribunal held that "the issue of whether a person falls within the spirit of the Rules or the rationale of a policy is a matter which is *capable* of affecting the determination of whether, in all the circumstances, the immigration decision, if implemented, would involve a disproportionate interference with Article 8 rights. The essential question remains whether, looked at in the round, the case is a truly exceptional one".

Article 8 and associated family proceedings

In **MS (Ivory Coast) v SSHD [2007] EWCA Civ 133**, (22.2.07), [judgment](#), the Court of Appeal considered the application of *Ciliz v The Netherlands [2000] 2 ELR 496*, a case indicating that it may, depending on the circumstances, be disproportionate to remove a parent from the United Kingdom whilst contact proceedings remain unresolved. The Court considered whether the SSHD undertaking not to remove such a person for the duration of such proceedings was a satisfactory remedy, or whether the Tribunal should determine an Article 8 appeal on the basis of a hypothetical removal at the time of the hearing. The Court held (para 75) it was not open to the AIT to rely on the Secretary of State's assurance or undertaking that the appellant would not be removed until her contact application had been resolved. Nor was it appropriate to speculate upon whether there might be a violation of Article 8 on different facts at some point in the future. Some form of leave to remain ought to be granted if a breach of Article 8 is anticipated, albeit that that might be quite short.