

Immigration Team Legal Bulletin

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2009 has already produced a number of important decisions from the House of Lords and Court of Appeal with far reaching effects.

In this bulletin, [Melanie Plimmer](#) focuses upon those appellate decisions which will impact upon judicial review in light of the Administrative Court opening in Manchester, Leeds, Birmingham and Cardiff from 21 April 2009 [\[more\]](#).

Fresh claims / s 94 certificates – the proper test

ZT (Kosovo) v SSHD [2009] UKHL 6 [judgment](#)

Once a claimant makes further HR and/or asylum representations where a HR or asylum claim has already been refused and 'any appeal relating to that claim [was] no longer pending' it was appropriate to apply paragraph 353 of the Immigration Rules.

The SSHD should apply the paragraph 353 procedure in respect of the cases that have been certified under s 94 of the 2002 Act and should, in all cases, treat a claim as having a realistic prospect of success unless it was clearly unfounded. If there was some reasonable doubt as to whether the claim might succeed, then it was not clearly unfounded.

It therefore follows that a challenge to a decision of the SSHD rejecting fresh claim representations or certifying a claim pursuant to s 94 is a rationality challenge. A court could not consider whether the SSHD's decision was rational without first asking the same questions considered by the SSHD as set out in **WM (DRC) v SSHD [2006] EWCS Civ 1495**.

Revocation of deportation order on human rights grounds – in country right of appeal

BA (Nigeria) and PE (Cameroon) [2009] EWCA Civ 119 [judgment](#)

Where a person, on human rights grounds, appealed against a refusal to revoke a deportation order against him that appeal could be made from the UK pursuant to s 92(4)(a) of the 2002 Act. The statute could be read either way but should not be read to restrict international obligations in relation to human rights.

Minors – correct approach before AIT – extent of right of appeal applying JM -alternative remedy to JR

CL (Vietnam) v SSHD [2008] EWCA 1551 [judgment](#)

At an AIT asylum hearing for a 14 year old unaccompanied minor the SSHD stated that CL would not be returned to Vietnam unless she was satisfied that there were adequate reception arrangements for him and these could be determined after the completion of the appeal relying

upon **BV (Unaccompanied minor-Timing of Decision) Vietnam [2004] UKIAT 00148**.

The IJ disagreed and allowed the appeal on Art 8 grounds on the basis that there was an absence of evidence as to the specific arrangements for CL and he should have been granted ELR pursuant to the SSHD's policy at the relevant time.

The CA agreed with the IJ's approach and stated that in the case of a child, it would be difficult for a decision maker to carry out a proper assessment of the effect of removal on the child's right to family life / private life without considering the circumstances which would await the child on arrival and such an approach was entirely appropriate in light of **JM v SSHD [2006] EWCA Civ 1402**.

An IJ is not entitled to leave this aspect of the appeal for future consideration or to be determined by way of JR. To do so would be to delegate to the SSHD the decision on this aspect of Article 8 and deny the claimant his statutory entitlement to a full appeal process.

Refusal of variation of leave to enter – para 395C - extent of appeal applying JM

TE (Eritrea) v SSHD [2009] EWCA Civ 174 [judgment](#)

When this particular decision for variation of leave was refused, the SSHD should have considered the factors weighing against removal which were listed in paragraph 395C even though no decision to remove had actually been made. This was practical and enabled the AIT to deal with all relevant matters on appeal. It would also prevent the appellant from being forced to become an overstayer.

Sedley LJ considered that **JM v SSHD [2006] EWCA Civ 1402** was an analogous case where the CA found that HR arguments could be heard on a variation appeal, and applied with equal cogency in the present case.

Asylum – PSG – homosexuals

HJ (Iran) and HT (Cameroon) v SSHD [2009] EWCA Civ 172 [judgment](#)

The proper test to be applied by the AIT to the question of whether it was safe for a homosexual to return to their country of origin was whether the person returning could reasonably be expected to tolerate the degree of discretion about their sexuality that would be required to avoid risk to them. The matter was to be judged in the context of the society to which the claimant would return. It would not be enough for an answer to a claim for refugee status that the claimant would be required to, otherwise would conceal his sexual identity in order to avoid harm of sufficient severity to amount to persecution.

Melanie Plimmer, 3rd April 2009