

UK Legal News Analysis

## Significant Negative Country Evidence Required to Challenge "Dublin" Removals

LNB News 30/08/2011 62

### Published Date

30 August 2011

### Jurisdiction

Cyprus; European Union; UK

### Related Legislation

Council Reg 343/2003/EC

### Related Cases

R (on the application of Elayathamby) v Secretary of State for the Home Department [2011] EWHC 2182 (Admin), [2011] All ER (D) 61 (Aug); MSS v Belgium and Greece - 30696/09 [2011] ECHR 108

### Related Digests

Greek Authorities Violate Asylum Seekers' Human Rights, LNB News 04/02/2011 116

### Abstract

**If a claimant is going to challenge a "Dublin" removal destination significant negative country evidence will be required showing substantial failure to comply with its international obligations, says Adam Pipe, Barrister at No 8 Chambers. He explains to Evelyn Reid how a recent judgment has distilled some useful principles in relation to challenging such removals**

### Analysis

A Tamil asylum seeker claimed if he was returned to Cyprus there was a real risk of refoulement to Sri Lanka and his treatment in Cyprus itself would breach art 3 of the European Convention on Human Rights (ECHR). The claimant was a mandate refugee and sought to rely on the UK Border Agency (UKBA) mandate refugee policy to have his case heard in the UK instead of Cyprus. The UKBA defines a mandate refugee as "a person in a third country, who has been recognised as a refugee by, and given protection of, the United National High Commissioner for Refugees".

Adam Pipe says: "In *R (on the application of Elayathamby) v Secretary of State for the Home Department* the claimant's challenge failed on all grounds. However, this case is of interest because of its approach to Council Reg 343/2003/EC (Dublin Convention) challenges post *MSS v Belgium and Greece* and the legitimate expectation argument. In that regard the claimant relied upon the UKBA mandate refugee policy which states that if a mandate refugee makes an application for resettlement after arriving in the UK, then their application must be considered under the Geneva Convention relating to the Status of Refugees 1951 (the 1951 Convention), as opposed to the criteria set out for those applying from abroad."

Sales J, applied the well-known test that in order to found a legitimate expectation the claimant must show that the relevant statement is "clear unambiguous and devoid of relevant qualification" (see para [28] of the judgment). The claimant failed the test.

Pipe argues: "In my view the judge was correct in finding that the relevant section of the policy was merely a reminder to UKBA officials that usual asylum considerations apply to an in-country application by a mandate refugee as opposed to the special criteria for those applying for resettlement from abroad. The main point of the policy document is to explain to UKBA officials how the mandate refugee system operates. The judge did criticise the wording of the policy but that was not enough to found a legitimate expectation. One has to wonder how often a UKBA policy would be adjudged to be sufficiently clear to give rise to a legitimate expectation."

Regarding the argument the claimant would be at substantial risk of refoulement to Sri Lanka in breach of his right to protection under the 1951 Convention and arts 2 and 3 of the ECHR Sales J gives extensive consideration to *MSS*. Pipe says: "The judge distils some useful principles in relation to challenging 'Dublin' removals on the basis of the risk of refoulement or conditions in the receiving state. The starting point is that there is a presumption that contracting states will respect its international obligations in asylum matters. To succeed in any challenge a claimant would need to rebut this policy with considerable evidence from neutral outside sources."

On that score the claimant failed to convince the court. Sales J acknowledged that although there were adverse opinions on Cyprus's asylum procedures from certain local organisations he said "there was no pattern of adverse reporting from respected international organisations". He noted that whilst there were, some criticisms in various reports of the international organisations of the detention conditions in which asylum seekers were held, they were comparatively muted in tone and fell a long way short of the sort of material which supported a claim that the Secretary of State would act in violation of the claimant's rights under art 3 of the Convention if he was sent back to Cyprus.

"It is clear from this judgment," says Pipe, "if a claimant is going to challenge a 'Dublin' removal destination significant negative country evidence will be required showing substantial failure to comply with its international obligations."

"Sales J also placed weight on the ability of the claimant to apply to the ECHR under Rule 39 for interim measures to prevent refoulement. In *MSS* the layer of protection afforded by Rule 39 was considered illusory given the difficulty of claimants accessing the asylum system in Greece. This was not so in Cyprus and the claimant would be able to make a Rule 39 application if the need arises."

"*MSS* may have given practitioners a measure of false hope when challenging Dublin removals. This case is a sobering reminder that the bar is set extremely high and the evidential requirements are rigorous. Whilst Cyprus has its difficulties it is no Greek tragedy."

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UK Legal News Analysis

## **Immigration: Government Migration Proposals "Lacking Family Values"**

LNB News 26/07/2011 64

**Published Date**  
26 July 2011

**Jurisdiction**  
UK

**Related Cases**

R (on the application of Chikwamba) v Secretary of State for the Home Department [2008] UKHL 40, [2009] 1 All ER 363, [2008] All ER (D) 330 (Jun); Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39, [2009] AC 115, [2008] 4 All ER 1146, [2008] All ER (D) 335 (Jun); E B Kosovo (FC) v Secretary of State for the Home Department [2008] UKHL 41, [2008] 4 All ER 28, [2008] All ER (D) 334 (Jun); ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, [2011] 2 All ER 783, [2011] 1 FCR 221, [2011] All ER (D) 02 (Feb)

## Related Digests

Consultation Paper: Family Migration, LNB News 14/07/2011 123

## Abstract

**When it comes to immigration the government lacks the family values that the right wing press are so keen to espouse, says Adam Pipe, Barrister at No 8 Chambers. He talks to Evelyn Reid about the proposals outlined in the consultation on family migration and the likely impact on ethnic minority families**

## Analysis

The government's major overhaul of the immigration system gathers pace with the latest Consultation on Family Migration. Adam Pipe notes: "The Home Office says 'reducing net migration is not its primary goal' however a quick read of the proposals demonstrates that this is exactly its aim. Ironically Oxford University's Migration Observatory questions the impact a change in policy could actually have."

According to the Home Office, family migration needs to be looked at "in the round" including family members of workers and students under the points-based system, refugee family reunion, and family visitors. One area opened up for debate is the European Convention on Human Rights (ECHR) art 8 rights versus the public interest. The consultation document states that although everyone has a right under art 8 to respect for their private and family life "it is not an absolute right". Furthermore it is legitimate to interfere with the exercise of that right "where it is in the public interest to do so" particularly where it is "necessary for public protection or for the economic well-being of the UK, which includes maintaining immigration controls".

Pipe says: "Article 8 always requires a balancing exercise based on the individual circumstances. The suggestion that the circumstances in which the public interest will outweigh an individual's art 8 rights needs further clarity is naive political rhetoric. This is clearly an attempt to row back from recent art 8 jurisprudence from the House of Lords and its emboldened successor the Supreme Court (see inter alia *R (on the application of Chikwamba) v Secretary of State for the Home Department*, *Beoku-Betts v Secretary of State for the Home Department*, *E B Kosovo (FC) v Secretary of State for the Home Department* and *ZH (Tanzania) v Secretary of State for the Home Department*). It is no surprise the government want to look again at art 8 as a significant tightening of the rules for spouses is likely to result in more cases being allowed on art 8 grounds."

A spokesman for the Home Office says the consultation seeks to deliver better migration, which is fair to applicants, local communities and the taxpayer; on the one hand to define more clearly what constitutes a genuine and continuing marriage and on the other to identify sham and forced marriages. One of the key proposals is to explore the case for making "sham" a lawful impediment to marriage and giving authorities the power to delay a marriage where sham is suspected. He points out that in the year to September 2010 family migration still accounted for approximately 17 per cent of all non-European immigration.

Under current policy, family migrants must have access to enough money to support themselves, without their British citizen or UK-resident spouse or partner seeking or needing help from the taxpayer. As part of the consultation the Home Office has asked the Migration Advisory Committee to determine what the minimum income threshold should be.

Pipe questions the motive behind many of the proposals: "In relation to marriage, fiancés and civil partners the proposals panders to the right wing press and ignores the fact that the courts have imposed a sensible approach to maintenance requiring couples to match the income support level. Furthermore the courts have always looked at the reality of a relationship in assessing what constitutes a genuine subsisting relationship."

He notes: "The government also wants to limit the rights of appeal in family visitor visa cases. The rationale given for this is the waste of taxpayers' money in funding appeals where applicants submit new evidence rather than make fresh applications. Practitioners who regularly do visitor visa appeals will know that a quick and easy way to save money would be to improve the quality of decision making. Visitor visa decisions are often sub-standard and based on generalised assertions. When representatives try to get such decisions reviewed rather than having to appeal they often get no response or a rubber stamping of the original decision. A proper functioning review process would again reduce the cost of appeals.

"These proposals will hit ethnic minority families the hardest. Prolonging the time until settlement can be achieved will lead to uncertainty and insecurity and could impede the welfare of children."

He urges practitioners to respond to the consultation which closes on 6 October 2011. "Those who practice day in day out in this field can bring some sensible reality to the government's rhetoric."

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UK Legal News Analysis

## Another One Bites the Dust

LNB News 19/07/2011 29

### Published Date

19 July 2011

### Jurisdiction

UK

### Related Digests

Press Release: Immigration Advisory Service announce their decision to go into administration, LNB News 11/07/2011 58; Coalition Government Plans Biggest Shake Up of Legal Aid in 60 Years, LNB News 22/06/2011 86; Business of Law: Surviving Legal Aid Reform, LNB News 15/07/2011 86; Press Release: Law Society ramps up pressure on Government as legal aid cuts leave immigration clients stranded, LNB News 13/07/2011 63

### Abstract

**Thousands of immigration cases are in legal limbo following the collapse of the Immigration Advisory Service. Evelyn Reid talks to Adam Pipe, Barrister at No 8 Chambers, about the fallout from the closure of the largest provider of publically funded immigration and asylum legal advice**

### Analysis

The Immigration Advisory Service (IAS) which was recently forced into administration has firmly blamed its demise on legal aid cuts. Immigration accounts for around 60 per cent of its income and the government's decision to remove immigration from the scope of legal aid, plus a 10 per cent cut in legal aid fees for refugees seeking asylum within the UK was a double whammy it could not recover from.

Adam Pipe says: "IAS going into administration is a major blow to immigrants and asylum seekers coming only a year after Refugee and Migrant Justice (RMJ) went the same way. This dramatic turn of events leaves some of the most vulnerable members of society without legal representation in the short term. The IAS was the largest provider of publically funded immigration and asylum legal advice employing 300 staff across the country. There are now a large number of dedicated caseworkers looking for new employment.

"The ministerial statement indicated there had been several million pounds worth of misclaimed work however it seems the majority of this was due to a lack of documentation to confirm a client's eligibility for public funding. It appears the trustees of IAS had been in negotiations with the Legal Services Commission (LSC) trying to reach agreement as to how the money would be paid back, but with the government's legal aid cuts looming the trustees came to the conclusion that administration was the only option."

The LSC which administers the legal aid fund claims that it "provides help through 5,400 solicitors' offices and not-for-profit advice agencies". No doubt it will be amending its figures with the closure of the IAS. It is little comfort for the now defunct charity that under the Legal Aid, Sentencing and Punishment of Offenders Bill introduced in the House of Commons on 21 June 2011 the government proposes to abolish the LSC and place the responsibility for legal aid with the Lord Chancellor.

The Explanatory Note to the Bill states "the intention is that an executive agency within the Ministry of Justice will administer the delivery of legal aid services in England and Wales". However, in relation to decision-making in individual cases, the Bill requires the "Lord Chancellor to designate a civil servant to be the Director of Legal Aid Casework" who will "have statutory responsibility for taking decisions on legal aid in individual cases". Pipe says: "There is great concern amongst immigration practitioners about the proposed reforms. Although legal aid will remain for asylum, immigration detention, asylum support and judicial review with some exceptions, funding will not generally be available for immigration cases including family reunion and domestic violence. In addition rates are expected to be slashed by 10 per cent. These proposed cuts are likely to result in injustice for clients and damage access to justice and the rule of law.

"It is clear from the demise of IAS and RMJ, not-for-profit organisations will find it difficult to survive in the new legal aid landscape. Vulnerable clients with complex needs require sympathetic and sensitive expert representation that is publically funded. Such representation cannot be provided in a sausage factory target driven manner.

"It is important that former IAS clients with imminent tribunal hearings secure adjournments in order for them to obtain new representatives. One is always worried that some immigration judges will try and carry on regardless. Hopefully clients will find new representatives without significant difficulties."

He adds: "Society should be judged by how it treats its most vulnerable members. Whilst the public purse must always be stewarded in an ethical manner what do the legal aid cuts say about us and our 'big' society?"

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UK Legal News Analysis

## **Cases Push Judicial Review Door Open**

LNB News 11/07/2011 33

**Published Date**

11 July 2011

**Jurisdiction**

UK

**Related Legislation**

Tribunals, Courts and Enforcement Act 2007

**Related Cases**

R (on the application of Cart) v Upper Tribunal, R (on the application of MR (Pakistan)) v Upper Tribunal (Immigration and Asylum Chamber) [2011] UKSC 28, [2011] NLJR 916, [2011] All ER (D) 149 (Jun); Eba v Advocate General for Scotland [2011] UKSC 29, [2011] NLJR 917, [2011] All ER (D) 150 (Jun)

**Abstract**

**The door to judicial review of the Tribunal has opened says Adam Pipe, Barrister at No 8 Chambers. He talks to Evelyn Reid about the scope of judicial review for excluded decisions within the tribunal system**

**Analysis**

In three linked cases (*R (on the application of Cart) v Upper Tribunal*; *R (on the application of MR (Pakistan)) v Upper Tribunal (Immigration and Asylum Chamber)*; *Eba v Advocate General for Scotland*) the Supreme Court grappled with the question of whether judicial review was available if permission to appeal to the Upper Tribunal had been refused by that court. The Justices said yes it can--but cases must pass an additional test before permission will be granted.

Adam Pipe explains: "The Upper Tribunal along with the First-tier Tribunal was established under the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) which created a unified tribunal structure organised into chambers according to subject matter. The TCEA 2007 provides that the Upper Tier is to be a superior court of record. Given the diversity of jurisdictions covered by the Tribunal system the importance of this decision cannot be understated.

"The Divisional Court and the Court of Appeal had found that judicial review was only available in exceptional circumstances (although they reached the same result by differing routes). The government had previously argued that the excluded decisions were not amenable to judicial review but that argument was demolished by the Divisional Court. When it came before the Supreme Court its position was judicial review should only be available in exceptional circumstances."

Lady Hale settled the debate. Pipe says: "Her judgment approached the question in a utilitarian manner, no doubt conscious of the need for a proportionate response which minimises the scope for error given the limited judicial resources. Three possible alternatives are identified: exceptional circumstances; the status quo (leaving judicial review open with no further restrictions); and the imposition of the second-tier appeal criteria.

"The Supreme Court unanimously answered the question by imposing the second-tier appeal criteria upon judicial review of the Upper Tribunal. This means that permission will only be granted where there is an important point of principle or some other compelling reason to review the case.

"The decision of the Supreme Court is a welcome one and is clearly preferable to the approach of the Divisional Court and Court of Appeal who effectively shut the door on judicial review of excluded decisions.

The point of interest for practitioners is how the Administrative Court will apply the second-tier appeal criteria in particular the second limb of 'some other compelling reason'. The second limb focuses on the extremity of the consequences for the individual; there is clearly scope for debate here, for example, would all cases involving a claim under the Refugee Convention or Art 3 ECHR engage the second limb?"

Lady Hale also said the second judge considering an application for permission to appeal should have more expertise than the judge who first heard the case. Pipe welcomes this comment: "It is important, particularly in the Immigration and Asylum Chamber, that initial permission applications are not decided by less experienced judges leading to a proliferation of poor decisions at the initial permission stage."

The Supreme Court recommended the Civil Procedure Rules Committee consider the scope for a streamlined paper based approach to judicial review in these circumstances--according to Pipe "clearly concerned that the Administrative Court does not get overwhelmed by repeated permission hearings."

He sounds a note of warning for practitioners: "They will need to focus their grounds for judicial review both on identifying the error in the decision of the Upper Tribunal and showing how the matter raises an important point of principle affecting a large number of similar claimants or that there are compelling individual reasons why permission should be granted."

He concludes: "The decision opens the door to judicial review of the Tribunal but as to how wide the door is open remains to be seen."

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UK Legal News Analysis

## **UK Cannot Deport Somali Nationals to War Zone**

LNB News 12/07/2011 1

### **Published Date**

11 July 2011

### **Jurisdiction**

European Union; UK

### **Related Legislation**

Council Dir 2004/83/EC

### **Related Cases**

Sufi v United Kingdom [2011] All ER (D) 234 (Jun); Elgafaji v Staatssecretaris van Justitie: C-465/07 [2009] All ER (EC) 651, [2009] All ER (D) 157 (Feb); QD (Iraq) v Secretary of State for the Home Dept, AH (Iraq) v Secretary of State for the Home Dept [2009] EWCA Civ 620, [2010] 2 All ER 971, [2009] All ER (D) 256 (Jun)

### **Abstract**

**The UK has a duty to protect two Somali nationals from torture or inhumane treatment irrespective of their behaviour the European Court of Human Rights has ruled. Adam Pipe, Barrister at No 8 Chambers, talks to Evelyn Reid about the implications of this leading case**

## Analysis

In *Sufi v United Kingdom* the European Court of Human Rights (ECtHR) said to return the applicants to Mogadishu would be a violation of art 3 of the European Convention on Human Rights (ECHR). It reiterated the prohibition of torture and inhuman or degrading treatment was absolute, "irrespective of the victims' conduct". Consequently, the applicants' behaviour, however "undesirable or dangerous, could not be taken into account".

Adam Pipe notes: "The judgment of the ECtHR is very significant and reads like a comprehensive country guidance of the type one would usually expect from the Upper Tribunal. It establishes the principles which will be applied to similar pending cases of which there are currently 214. Of interest is the fact both applicants had been convicted of serious criminal offences and were subject to deportation orders. Individuals with criminal records such as the applicants' would be excluded from protection under the Refugee Convention or Subsidiary Protection under Council Dir 2004/83/EC and therefore the ECHR would be their only hope.

"Prior to the hearing the Court had granted interim measures preventing removal of the applicants to Mogadishu under Rule 39. It is now becoming more commonplace to see applicants securing interim measures under Rule 39 especially in countries that are in a state of internal armed conflict such as Iraq and Somalia.

"The ECtHR found that the level of violence in Mogadishu was of a level to pose a real risk of treatment in breach of art 3 for anyone in the capital. It did not rule out the possibility that a well-connected individual may be able to obtain protection but only connections at the highest level would be able to assure such protection and it is unlikely someone who had been out of the country for a significant period of time would have such connections.

"Further it ruled out internal relocation unless an individual had close family connections in an area, a Tribunal would therefore have to decide if an individual could reach the area safely. Those who had been out of Somalia for some time would be at risk if he was required to go to or through an area controlled by al-Shabaab. If an individual was forced to live in an internally displaced person's camp this would also be in breach of art 3."

The court also considered the interrelationship between art 3 of ECHR and art 15(c) of Council Dir 2004/83/EC. Article 15(c) is deemed to provide a level of protection over and above the minimum standards imposed by art 3 (see *Elgafaji v Staatssecretaris van Justitie* and *QD (Iraq) v Secretary of State for the Home Dept*). However the court found that art 3 offers comparable protection to that afforded under the Directive. Pipe notes: "It clearly did not want to be outdone by Council Dir 2004/83/EC in the level of protection that art 3 could provide. It will be interesting to see how the jurisprudence develops and whether art 15(c) will have any practical added value to claimants over art 3."

According to Pipe the Secretary of State is going to find it very difficult to defeat Somali protection claims on art 3 grounds. He advises practitioners: "To consider lodging fresh human rights claims for those Somalis who have previously failed in their asylum claims. The judgment of the ECtHR shows the deterioration of the conditions in Mogadishu should be sufficient to pass the fresh claims test (rule 353 of the immigration rules) although the court found in the applicants' cases the fresh claim procedure did not constitute an effective domestic remedy which they had failed to exhaust."

He adds: "Practitioners should also be aware of the current famine blighting the Horn of Africa which makes the situation on the ground even more calamitous and provides another barrier to return. Over recent years the Home Office have phased out their policies granting periods of leave to individuals of certain countries as a matter of course. Surely this judgment cries out for leave to be granted to Somali nationals? Such a course of action would obviate the need for fresh claim litigation and the associated cost however such a course would not go down well in the tabloids and may be a vain hope."

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UK Legal News Analysis

## EU Court to Rule on Asylum and Humanitarian Protection Claims

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### Published Date

3 June 2011

### Jurisdiction

European Union; UK

### Related Legislation

Council Dir 2004/83/EC; Nationality, Immigration and Asylum Act 2002

### Related Cases

FA (Iraq) v Secretary of State for the Home Department [2011] UKSC 22, [2011] All ER (D) 242 (May); Elgafaji v Staatssecretaris van Justitie: Case C-465/07 [2009] All ER (EC) 651; QD (Iraq) v Secretary of State for the Home Dept, AH (Iraq) v Secretary of State for the Home Dept [2009] EWCA Civ 620, [2010] 2 All ER 971, [2009] All ER (D) 256 (Jun)

### Abstract

**It may take the European Court of Justice and the principle of equivalence to ensure humanitarian protection is included in the scope of section 83 of the Nationality, Immigration and Asylum Act 2002. Evelyn Reid talks to Adam Pipe, Barrister at No 8 Chambers, about the right of appeal on humanitarian grounds**

### Analysis

In *FA (Iraq) v Secretary of State for the Home Department* the appellant was granted leave to remain for more than 12 months however his asylum appeal was refused. The question before the Supreme Court was whether the appellant was entitled to also appeal against the refusal to grant humanitarian protection.

The appellant was an Iraqi national who arrived in the UK in 2007 unaccompanied at aged 15. He applied for asylum but the Secretary of State found the evidence in support of his application was not credible and his application was refused. However, the Secretary of State went on to consider whether he qualified for humanitarian protection and/or discretionary leave to remain in the UK.

Adam Pipe explains: "Humanitarian protection is the domestic means of providing 'subsidiary protection' which the Qualification Directive (Council Dir 2004/83/EC) requires to be given to certain third country nationals or stateless persons. The Court of Appeal found that the EU law principle of equivalence required that a right of appeal against the humanitarian protection decision should be recognised. The principle of equivalence requires that claims based upon EU law must not be subject to rules which are less favourable than those based on claims which have national law as their source. The Secretary of State appealed to the Supreme Court. Lord Kerr, delivering the judgment of the panel, referred the issue to the Court of Justice of the European Union (CJEU) for a preliminary ruling under article 267 of the Treaty of the Functioning of the European Union."

Pipe notes the Supreme Court did not clarify the meaning of the Nationality, Immigration and Asylum Act 2002, s 83(2) but explored the principle of equivalence and whether the asylum claim is a legitimate comparator in EU law. He says: "It is a shame the Court of Appeal could not interpret asylum in section 83 as including humanitarian protection. The reference to the CJEU leaves the question of the correct construction open. This will cause practitioners and clients a measure of uncertainty."

How is the Immigration Tribunal likely to respond? Will they proceed on the basis of the Court of Appeal judgment or stay these cases waiting for the preliminary ruling? Pipe says: "Whatever their response the effect may be small given that there are only limited circumstances where, having failed in an asylum claim, a humanitarian protection claim will be successful (see for example, *Elgafaji v Staatssecretaris van Justitie*: Case C-465/07 and *QD (Iraq) v Secretary of State for the Home Dept*). Furthermore as in the instant case there will be a right of appeal on humanitarian protection grounds against any decision to refuse to extend an applicant's discretionary leave.

"That said humanitarian protection is an important additional layer of protection and an area where the jurisprudence is in its early stages and is still evolving. It seems obvious that humanitarian protection should be included within the scope of the Nationality, Immigration and Asylum Act 2002, s 83, if it takes the CJEU and the principle of equivalence to do it then so be it."

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UK Legal News Analysis

## Wife Fails to Regularise Residence of Non-EU Spouse

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### Published Date

16 May 2011

### Jurisdiction

European Union; UK

### Related Legislation

Council Dir 2004/38/EC

### Related Cases

McCarthy (European citizenship): C-434/09; Gerardo Ruiz Zambrano v Office national de l'emploi: C-34/09 [2011] All ER (D) 199 (Mar); Okafor v Secretary of State for the Home Department [2011] EWCA Civ 499, [2011] All ER (D) 217 (Apr)

### Related Digests

EU Ruling Gives Parents Right to Stay Put, LNB News 21/03/2011 171; ECJ Ruling Preserves Conditional Free Movement, LNB News 11/03/2010 85; Metock: Free Movement and 'Normal Family Life' in the Union, LNB News 07/05/2009 37; Accelerated Justice or a Step Too Far? Residence Rights of Non-EU Family Members and the Court's Ruling in Metock, LNB News 27/04/2009 18

### Abstract

**The ECJ recently ruled that Council Directive 2004/38/EC was not applicable to a dual national who had never exercised her right to move and reside freely within another EU state. Evelyn Reid talks to Adam Pipe, Barrister at No 8 Chambers, about the difficulties of using EU citizenship to regularise the residence of a non-EU spouse**

### Analysis

When can a foreign spouse benefit from Council Directive 2004/38/EC? In *McCarthy (European citizenship)*: C-434/09, Shirley McCarthy, a UK citizen and also an Irish National who had lived all her life in the UK thought her spouse, a Jamaican national, could. The Directive allows foreign spouses of EU nationals residing legally in another member state to stay with their spouse. However, the European Court of Justice (ECJ) has ruled this only applies if the EU national has previously exercised the right of free movement.

Adam Pipe explains: "The judgment focuses on the purpose of the Directive--which is to facilitate the exercise of the primary and individual right of a Union citizen to move and freely reside within the territory of the member states. On a literal, teleological or a contextual interpretation of the Directive an individual who had not exercised their right to free movement could not be a 'beneficiary'."

The ECJ went on to look at whether art 21 of the Treaty on the Functioning of the European Union (TFEU) assisted someone in Mrs McCarthy's position and found it did not. Pipe notes, however, the ECJ said someone in her position was not in a "purely internal situation" (that is it did not concern only national law) as her fundamental status was as a Union citizen although art 20 of TFEU precludes measures which effectively deprived her of the genuine enjoyment of the substance of a Union citizen. He adds: "The ECJ affirmed the recent landmark judgment of *Gerardo Ruiz Zambrano v Office national de l'emploi*: C-34/09; but Mrs McCarthy's situation was distinguishable from *Zambrano* as the national measure did not deprive her of the genuine enjoyment of her rights as a Union citizen.

"In the circumstances the ECJ did not answer the second question posed by the Supreme Court which was whether a person in Mrs McCarthy's position had 'resided legally' for the purpose of art 16 (right of permanent residence) of the Directive even though she was unable to satisfy the requirements of art 7 (right of residence).

"The Advocate General, in her opinion (*McCarthy (European citizenship)* ECJ 25.11.2010 C-434/09) answered the second question saying lawful residence can result from a member state's domestic law on foreign nationals but legal residence only arises where the right to free movement has been exercised by the individual concerned. The Advocate General's opinion was recently considered by the Court of Appeal in *Okafor v Secretary of State for the Home Department*. It remains to be seen whether the ECJ will endorse the position taken by the Advocate General in relation to the question of lawful residence under the Directive."

The message for practitioners says Pipe is: "Where there is no free movement the Directive does not apply, however it must be remembered that citizenship of the Union is the fundamental status of nationals of the member states and they are entitled to the full enjoyment of the rights that attach to that status."

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UK Legal News Analysis

## Court Considers Scope of Permanent Right of Residence

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9 May 2011

**Jurisdiction**

European Union; UK

**Related Legislation**

Council Dir 2004/38/EC; Council Reg 1612/68/EC; Immigration (European Economic Area) Regulations 2006, SI 2006/1003

**Related Cases**

Okafor v Secretary of State for the Home Department [2011] EWCA Civ 499, [2011] All ER (D) 217 (Apr); Teixeira v Lambeth London Borough Council: C-480/08 [2010] All ER (D) 249 (Feb); McCarthy v Secretary of State for the Home Department [2008] EWCA Civ 641, [2008] 3 CMLR 174, [2008] All ER (D) 124 (Jun); Mahad (previously referred to as AM) (Ethiopia) v Entry Clearance Officer [2009] UKSC 16, [2010] 2 All ER 535, [2009] All ER (D) 156 (Dec); Metock v Minister for Justice, Equality and Law Reform: C-127/08 [2009] QB 318, [2008] ECR I-6241, [2009] All ER (EC) 40, [2008] 3 FCR 425, [2008] All ER (D) 344 (Jul); Gerardo Ruiz Zambrano v Office national de l'emploi: C-34/09 [2011] All ER (D) 199 (Mar)

**Related Digests**

EU Ruling Gives Parents Right to Stay Put, LNB News 21/03/2011 171; ECJ Ruling Preserves Conditional Free Movement, LNB News 11/03/2010 85; Metock: Free Movement and 'Normal Family Life' in the Union, LNB News 07/05/2009 37; Accelerated Justice or a Step Too Far? Residence Rights of Non-EU Family Members and the Court's Ruling in Metock, LNB News 27/04/2009 18

**Abstract**

**The Court of Appeal has ruled that a father and his children did not have a right of permanent residence in the UK. Adam Pipe, Barrister at No 8 Chambers, talks to Evelyn Reid about the implications of the decision for non-EU citizen family members**

**Analysis**

In *Okafor v Secretary of State for the Home Department* the Court of Appeal had to decide whether art 12(3) of Council Dir 2004/38/EC (the Directive), standing on its own, provided a route to acquire the right to permanent residence in the UK and whether that right could be obtained under art 16.

Adam Pipe says: "Retained rights of residence are an important source of rights under the Directive for non-EU citizen family members of EU citizens in situations of death, divorce or departure from the Member State of the EU citizen as the instant case demonstrates."

In 2003 the right of residence in the UK was given to the mother as a citizen of the Netherlands, under art 7(1) of the Directive, while the father and the children were granted that right by art 7(2). It was common ground that before her death in 2007, the mother had not fulfilled any of the conditions in art 7(1) and that the children did not meet any of the qualifying conditions of that article. In January 2009, the father applied, pursuant to art 16 of the Directive, for a permanent residence card on the basis that he was a family member of an EU citizen who had died and he had resided in the UK for a continuous period of five years.

The application was refused and he appealed. However the appeal was also dismissed. Pipe explains: "The Court of Appeal clarified that art 12(3) of the Directive does not, on its own, provide a right of permanent residence. Art 12(3) provides for a continuing right of residence for the surviving children of a deceased EU national and the surviving parent with custody of the children where the children are in education. Art 12(3)

provides a right of residence similar to that provided for by art 12 of Council Reg 1612/68/EU (see *Teixeira v Lambeth London Borough Council: C-480/08*).

"Furthermore permanent residence is only derived from rights obtained under the Directive as opposed to residence that was not unlawful. In so finding Thomas LJ, who gave the judgment of the court, referred to the structure of the Directive; Chapter 3 (arts 6 to 15) deals with the acquisition of rights of residence and Chapter 4 (arts 16 to 21) deals with the right of permanent residence. It is the rights set out in Chapter 3 which form the basis for the right of permanent residence in Chapter 4."

The law in this area will receive further clarification says Pipe when the European Court of Justice (ECJ) "gives its judgment in *McCarthy v Secretary of State for the Home Department* which was referred by the Supreme Court for a preliminary ruling on two questions--the second of which concerned the concept of lawful residence for the purposes of art 16 of the Directive."

Pipe warns practitioners that they should "consider which article provides a right of residence for their client under Chapter 3 and where a permanent right is being claimed ensure they can demonstrate five years residence accordingly."

He adds: "The Directive has been given effect in the UK through the Immigration (European Economic Area) Regulations 2006, SI 2006/1003. However the Regulations are at points written in more restrictive terms than the Directive. Practitioners would do well to refer to the terms of the Directive in applications and submissions. Furthermore they should remember that unlike the Immigration Rules, which should be interpreted according to their plain meaning (see *Mahad (previously referred to as AM) (Ethiopia) v Entry Clearance Officer*), the Directive should be given a purposive interpretation in accordance with its aims, set out in recital 3, to 'simplify and strengthen the right of free movement and residence of all Union citizens'."

In recent years, says Pipe there have been a "string of groundbreaking decisions from the ECJ such as *Metock v Minister for Justice, Equality and Law Reform: C-127/08* and *Gerardo Ruiz Zambrano v Office national de l'emploi: C-34/09* which accepted arguments that had been rejected in national courts. Practitioners should keep pushing at the boundaries of the Directive all the way to the ECJ."

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UK Legal News Analysis

## Home Office Caught Operating Unlawful Secret Policy

LNB News 01/04/2011 118

### Published Date

1 April 2011

### Jurisdiction

UK

### Related Cases

*Lumba (Congo) v Secretary of State for the Home Department*, *Mighty (Jamaica) v Secretary of State for the Home Department* [2011] UKSC 12, [2011] All ER (D) 262 (Mar); *R (on the application of I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, [2002] All ER (D) 243 (Jun); *R v Governor of Durham Prison, ex parte Singh*, [1984] 1 All ER 983

## Related Digests

Press Release: 'A Serious Abuse of Power' - UK Supreme Court Rules Against Secret Home Office Detention, LNB News 23/03/2011 99; Press Release: Commission on a UK Bill of Rights Launched, LNB News 18/03/2011 83; Press Release: Home Secretary Proposes Tougher Deportation Laws, LNB News 04/05/2006 21; Home Office hunts down foreign national prisoners, LNB News 29/09/2006 3

## Abstract

**The Supreme Court has ruled the Secretary of State was guilty of falsely detaining foreign national prisoners. Adam Pipe, Barrister at No 8 Chambers, tells Evelyn Reid why the issues in *Lumba* are all too familiar**

## Analysis

In what circumstances are breaches of public law capable of rendering unlawful the detention of foreign national prisoners (FNPs) pending their deportation? The question arose because once again the Secretary of State was caught operating an unpublished policy which conflicts, and in this case flatly contradicts, the published policy, says Adam Pipe.

He explains: "In *Lumba* the published policy contained a presumption in favour of release with detention justified in some circumstances. However following the deluge of criticism in the press relating to FNPs in April 2006 the Secretary of State adopted an unpublished policy imposing a near blanket ban on the release of FNPs without amending the published policy which had existed from at least 1991. On 9 September 2008 the published policy was finally amended replacing all references to the presumption of release with the presumption of detention. However, following the judgment at first instance in *Lumba* the departmental eraser was brought out once again and the policy was amended to omit the references to a presumption in favour of detention."

Not surprisingly the nine judge panel in the instant case had divergent views on the issues before them. Pipe, a contributor to Butterworths Immigration Law Service, says: "The leading judgment of Lord Dyson helpfully clarifies the law in respect of policies and particularly unpublished policies. A policy must not be so rigid as to fetter the discretion of the decision maker and he should follow the published policy unless there is good reason not to do so.

"In general, policies should be published providing a transparent statement of how statutory criteria will be exercised. A person affected by the operation of a policy should be able to know its terms in order to make informed representations. It was therefore unlawful to apply an unpublished policy which was inconsistent with the published one and was in effect a blanket ban on releasing FNPs.

"Lord Dyson did however hold that a presumption in favour of detention was not in itself unlawful provided that detention is justified with reasons connected to the statutory purpose, *Hardial Singh* principles are observed and each case is considered individually. One can only hope that, as a result of this important judgment, Home Office policies find their way out of the unpublished darkness into the light of day--providing transparency and a check on the abuse of power."

The justices were divided on the question of the Secretary of State's liability to false imprisonment notes Pipe. The majority held the appellants had been falsely imprisoned as there was no lawful authority for the detention and no proof of harm was required. On the other hand a minority, including the President, applied a test of causation and found that because the appellants could and would have been lawfully detained the Secretary of State was not liable. Pipe says: "The majority, in my opinion, are correct in respect of liability for false imprisonment which is a trespass to the person and actionable *per se*. The focus of this tort must be on the right of the individual claimant not to be unlawfully detained."

Turning to the question of damages the key consideration is whether the appellants would have been

lawfully detained. A majority of the court held that because they had suffered no loss they were only entitled to nominal damages. A minority--Lords Hope, Walker and Lady Hale--dissented and held the appellants should be granted vindictory damages, albeit a modest sum, recognising the fundamental constitutional importance of being free from arbitrary imprisonment.

Pipe says: "In my view an award of nominal damages dilutes the importance of the appellants' fundamental rights and sends the wrong signal to the government and their officials. As Lord Hope powerfully says, something more is required than merely declaring such conduct as wrong. The government abused its power and acted in a deplorable manner--the concept of damages should be flexible enough to recognise the gravity of the breach."

The Court remitted the question of the reasonableness of the period of Mr Lumba's detention, under the *Hardial Singh* principles (see *R (on the application of I) v Secretary of State for the Home Department*) to the High Court. The case established the principle that the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; the deportee may only be detained for a period that is reasonable in all the circumstances; and if, before the expiry of the reasonable period, it becomes apparent the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention and should act with reasonable diligence and expedition to effect removal.

Pipe warns that practitioners should be "aware, when advising clients in unlawful detention cases, that the risk of re-offending is a relevant factor, as are the merits of any appeal the detained person is pursuing. The refusal of the detained person to voluntarily return to their country of origin is of limited relevance and where return is not possible it cannot be held against him."

In short he says: "Whilst the Supreme Court has struck a blow to the unlawful practice of the Secretary of State of maintaining inconsistent unpublished policies, it cannot be a matter for mere nominal damages and one hopes the progressive rights based approach of the minority as to vindictory damages will prevail in the future. Secret unlawful policies should cost the Secretary of State more than one pound."

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UK Legal News Analysis

## Do New Immigration Rules Favour Wealth Over Skill?

LNB News 29/03/2011 150

### Published Date

29 March 2011

### Jurisdiction

UK

### Related Digests

Press Release: New Recommendations to Raise UK Shortage Occupation List to Higher Skills Level, LNB News 03/03/2011 59; UK Slams Front Door on Migrant Workers, LNB News 28/02/2011 110; Tighter Rules on Recruiting Migrants Will Close Door to 270,000 Workers, LNB News 14/03/2011 11; Consultation Paper: The Student Immigration System, LNB News 24/01/2011 114; Immigration Cap Moves Cause Ongoing Dismay, LNB News 22/12/2010 66; Questions Raised as to Implementation of Immigration Cap, LNB News 26/11/2010 57

## Abstract

**The new statement of changes to the immigration rules reshapes Tier 1 and tightens the requirements for Tier 2 says Adam Pipe, Barrister at No 8 Chambers, speaking to Evelyn Reid**

## Analysis

The government will slash the number of skilled jobs open to migrants on 6 April 2011. It will remove 8 occupations from the points-based system's shortage occupation list. It means posts such as senior care workers, pipe welders, meat trimmers and sheep shearers will no longer be open to non-EU workers. Foreign chefs will also only be allowed to come if they have five years experience, are earning more than £28,000 and will not be working in a takeaway. However, care home managers and nurses working in care homes will not be affected.

Adam Pipe, Barrister at No 8 Chambers says: "The government's changes to the Shortage Occupation list and the reservation of Tier 2 for graduate level occupations only will clearly restrict migration under Tier 2--but may also lead to small businesses suffering. The government's aims are to allow firms to bring in people with the necessary skills without migrants being the first port of call for a wide range of jobs, and to get people in Britain back to work providing businesses with the skills they need from the British workforce. Takeaway owners will be concerned that they will not be able to find chefs with sufficient skill and experience from the resident labour market."

The decision follows two reports by the Migration Advisory Committee's (MAC) looking at graduate-level jobs and the shortage occupation list for Tier 2. The changes are likely to affect at least 5,000 migrants a year and is part of the government's wider commitment to bring overall net migration down from the "hundreds of thousands to the tens of thousands". The list could be cut even further after the MAC was asked to review it again.

However, while the government is clamping down on Tier 2 it is positively encouraging foreign entrepreneurs and investors. Under changes to the Immigration Rules, which were laid before Parliament on 16 March 2011, people who come to the UK under Tier 1 (Investor) of the points-based system will be able to settle here faster if they invest large sums of money. Those who invest £5 million will be allowed to settle after 3 years, and those investing £10 million or more after 2 years. This compares with the current minimum 5-year requirement. The right to accelerated settlement will apply to those investors who are already in the UK and have invested large sums, as well as new arrivals.

According to Pipe the new statement of changes reshapes Tier 1 and tightens the requirements for Tier 2. He notes: "In a measure designed to attract the super-rich to the United Kingdom the government's announcement of a fast track to settlement for investors and entrepreneurs was described by the Border Agency as rolling out the red carpet to those who have the most to offer--but the more cynical amongst us may see it as the admission price to coalition Britain. If you're buying a premiership football club you're in on the fast track but if you're cooking the footie fan his takeaway you're out."

For those advising high value clients, says Pipe, "The door has swung wide open and the changes to Tier 1 will be most welcome. However those advising small businesses face a challenge with the combined restrictions of the cap, increase in the minimum English language requirement and the restriction to graduate-level occupations under Tier 2."

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## EU Ruling Gives Parents Right to Stay Put

LNB News 21/03/2011 171

### Published Date

21 March 2011

### Jurisdiction

European Union; UK

### Related Cases

Gerardo Ruiz Zambrano v Office national de l'emploi: C-34/09 [2011] All ER (D) 199 (Mar); Chen and another v Secretary of State for the Home Department Case C-200/02 [2005] All ER (EC) 129; ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, [2011] All ER (D) 02 (Feb)

### Related Digests

Press Release: Judgment of the Court of Justice in Case C-34/09, LNB News 09/03/2011 33; Immigration: A Question of Best Interests, LNB News 09/02/2011 106

### Abstract

**The decision in Zambrano opens up a whole new line of argument to the immigration practitioner with a shift of emphasis from free movement to the rights of Union citizenship, says Adam Pipe, Barrister at No 8 Chambers. He talks to Evelyn Reid about the rights of third country national parents**

### Analysis

If practitioners were in doubt about who could claim EU residency the European Court of Justice in *Gerardo Ruiz Zambrano v Office national de l'emploi* has clarified the issue. Adam Pipe says: "This judgment is very significant: it extends the principle established in *Chen and Others (Free movement of persons)* and potentially has wider applicability. Third country nationals who are the parents of dependent minor children who are EU citizens have the right to reside and work in the Member State of which the child is a national notwithstanding that the child is not exercising free movement rights."

Mr Zambrano and his wife, both Columbian nationals, applied for asylum in Belgium. Their application was refused but the order included a non-refoulement clause stating that they should not be sent back to Colombia in view of the civil war in that country.

While they waited to have their residence situation regularised Mrs Zambrano gave birth to two children both of whom acquired Belgian nationality. Despite not holding a work permit Mr Zambrano obtained employment but then had a number of periods of unemployment and accordingly applied for unemployment benefit and residency. Those applications were refused because, in the view of the Belgian authorities, he did not comply with the foreigners' residence requirements under Belgian legislation and was not entitled to work in Belgium.

Mr Zambrano brought legal proceedings challenging the decisions on the ground that as an ascendant of minor Belgian children he is entitled to reside and work in Belgium.

The ECJ agreed. In coming to its decision it said while a Member State has sole jurisdiction to lay down the conditions to acquire nationality of that country, it is common ground that Mr Zambrano's children were born in Belgium and have acquired Belgian nationality.

"The Court relied upon art 20 of the Treaty on the Functioning of the European Union (TFEU) which confers on every person who is a national of a Member State the status of citizen of the Union. The Court reiterated that citizenship of the Union is intended to be the fundamental status of nationals of Member States. In order for children who are citizens of the Union to genuinely enjoy the substance of the rights conferred by their status their third country national parents should be granted permission to work and reside in the Member State," says Pipe.

Furthermore he notes: "The judgment in *Chen* led to a change in the immigration rules (257C) however it remains to be seen how the Border Agency will respond to the ruling in the instant case."

According to Pipe to benefit from the decision "dependency" will need to be shown but as it is not defined in the judgment practitioners will have to wait and see how the courts will interpret it. However he notes: "In the vast majority of cases where a child has British citizenship, and thus is a citizen of the European Union, one of their parents will have settled status or British nationality. However this judgment will be useful where the settled parent is estranged from the child."

Asked whether similar cases arising in the UK could rely on the judgment Pipe says: "Practitioners will be able to use *Zambrano* alongside the recent judgment of the Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* which confirmed that the best interests of children are a primary consideration in regard to art 8 of the European Convention on Human Rights. The fact that the child is a British citizen is a very significant and weighty consideration because of the benefits and advantages that citizenship carries with it."

Moreover he says: "The potential wider applicability of *Zambrano* is its effect upon adults with Union citizenship. If a third country spouse of a British citizen is refused entry on maintenance grounds does this prevent the Union citizen from enjoying the substance of her rights?"

He concludes: "Immigration practitioners need to be alive to the issues raised by *Zambrano* and be ready to test its limits beyond parents of Union citizen children. If an immigration/entry clearance decision deprives a Union citizen of the genuine enjoyment of their rights conferred by their status it is arguably unlawful."

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UK Legal News Analysis

## UK Slams Front Door on Migrant Workers

LNB News 28/02/2011 110

**Published Date**  
28 February 2011

**Jurisdiction**  
UK

### Related Cases

R (on the application of the Joint Council for the Welfare of Immigrants and another) v Secretary of State for the Home Department [2010] EWHC 3524 (Admin), [2010] All ER (D) 244 (Dec)

## Related Digests

Press Release: Government Outlines Visa Reforms for Workers, LNB News 16/02/2011 3; Immigration Cap Moves Cause Ongoing Dismay, LNB News 22/12/2010 66; Businesses Shocked by Overnight Foreign Worker Recruitment Bans, LNB News 22/07/2010 56

## Abstract

**The new annual limit on non-EU workers will reduce net migration to 1990s level. Adam Pipe, Barrister at No 8 Chambers, tells Evelyn Reid that small to medium size businesses could suffer**

## Analysis

A new annual limit on non-EU workers will come into force on 6 April 2011, the government has announced. Immigration Minister Damian Green is aiming to reduce net migration to 1990s levels: "tens of thousands, not hundreds of thousands". The limit will be brought in by a statement of changes to the immigration rules, which is subject to parliamentary scrutiny.

According to Adam Pipe: "It was the failure to adopt this procedure in respect of the interim limit that led to it being found unlawful in *R (on the application of the Joint Council for the Welfare of Immigrants and another) v Secretary of State for the Home Department*." In that case the High Court said ministers had "sidestepped" proper parliamentary scrutiny and approval.

In a departure from the way the current system operates employers will now have to apply for a Certificate of Sponsorship (CoS) in order to bring someone into the UK to fill a specific post. The new annual limit on Tier 2 of 20,700 will be allocated on a month-by-month basis although those earning over £150,000 will be exempt from the cap. The Intra Company Transfer route (ITC) will not be subject to the annual limit but under this route only those paid £40,000 or more will be able to stay in excess of a year. Those earning between £24,000 and £40,000 will only be able to stay for 12 months and will not be able to re-apply for a further 12 months.

Pipe says: "It remains to be seen how practical these changes will be. The availability of Tier 2 allocations is an important factor in making the UK an attractive destination for inward investment. The government says they have worked closely with business and makes it clear that those out of work and already in the UK should be the first port of call for employers. However the limit is clearly an attempt to close the UK's front door to migrant workers, although the door has been left ajar for the high earners (over £150,000)."

Furthermore says Pipe: "The new limit is likely to pose a recruitment challenge to some employers and favour the large employer over the small to medium. Once the monthly allocation is reached an employer will be forced to wait for the next month's allocation which will cause delay to the hiring process. The changes to the ITC route will significantly affect those multinationals who wish to bring in staff to their UK offices; it is unlikely they will increase salaries to £40,000 so will be forced to change over staff each year which cannot be a good thing."

In the event that the monthly allocation is over subscribed, CoS applications will be ranked using a points system designed to favour jobs on the shortage occupation list, scientific researchers and those with a higher salary. Once a CoS has then been granted to an employer it must be assigned to the prospective employee within three months.

Non-EU workers who want to come to Britain will need to have a graduate level job, speak an intermediate level of English, and meet specific salary and employment requirements.

The changes will be brought in on 6 April 2011 so little time remains notes Pipe: "Practitioners should advise their commercial clients of these changes so they can factor them into their business plans. The government is committed to playing the numbers game but it remains to be seen if the limit on non-EU

workers will be of real benefit to the economic recovery or mere political points scoring."

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UK Legal News Analysis

## **Greek Authorities Violate Asylum Seekers' Human Rights**

LNB News 04/02/2011 116

### **Published Date**

4 February 2011

### **Jurisdiction**

European Union; UK

### **Related Legislation**

Council Reg 343/2003/EC

### **Related Cases**

MSS v Belgium and Greece [2011] ECHR 108; R (on the application of Nasser) v Secretary of State for the Home Department [2009] UKHL 23, [2010] 1 AC 1, [2009] 3 All ER 774, [2009] All ER (D) 39 (May)

### **Related Digests**

Dublin II Grand Chamber Judgment - Expulsion within EU, LNB News 27/01/2011 26; Court Rules Dublin II Applies to Unaccompanied Children, LNB News 11/01/2011 53

### **Abstract**

**What for many is a popular holiday destination, for one asylum seeker was a Greek tragedy says Adam Pipe, Barrister at No 8 Chambers. He explains to Evelyn Reid why detention conditions in Greece cast doubt on the implementation of a common European asylum system**

### **Analysis**

The European Court of Human Rights has ruled Member States can no longer send asylum claimants back to Greece. Adam Pipe outlines the court's finding in *MSS v Belgium and Greece*: "The court found the detention and living conditions in Greece breached the applicant's art 3 and 13 rights. Furthermore Belgium had also violated the same articles by returning the applicant under the Dublin II Regulation (Council Reg 343/2003/EC)."

Under the Dublin II Regulation countries can send an asylum seeker back to the first Member State in which they arrived for their claim to be heard. It was aimed at preventing thousands of migrants entering Europe through weak borders, then applying for asylum in other countries. Pipe says: "The judgment in the instant case represents a major blow to the Dublin II system for determining which Member State is responsible for examining an asylum claim. It also raises questions over the implementation of a common European asylum system as Member States can no longer assume the system in other Member States comply with

fundamental human rights."

The court found the applicant was locked up in a small space with restricted access to the toilets. He was also forced to sleep on dirty mattresses or on the bare floor and was given very little to eat. Following his release he spent many months living on the street with no access to support or sanitary facilities. According to Pipe it is "reminiscent of Victorian England rather than a modern European state". He notes: "The court attached considerable importance to the applicant's status as an asylum seeker and 'as such, a member of a particularly underprivileged and vulnerable population group in need of special protection'."

The applicant was awarded EUR 24,900 in damages against Belgium for transferring him to Greece. The court said it was up to the Belgian authorities not merely to assume the applicant would be treated in conformity with the Convention standards but to verify how the Greek authorities applied their legislation on asylum in practice, which they had failed to do. Pipe notes: "This could well pave the way for claims for damages against the British government by aggrieved asylum claimants who had been bounced back to Greece under Dublin II and had their fundamental rights breached as a result."

Furthermore he says: "This case will fortify representatives in challenging Dublin II decisions. It is noteworthy the UK's courts have previously upheld decisions to return claimants to Greece (see inter alia *R (on the application of Nasseri) v Secretary of State for the Home Department*). It may also have an ancillary use in aiding asylum seekers in the UK whose credibility is challenged, by the Home Office and immigration judges, for not claiming asylum when they travelled through Greece. Practitioners have a new weapon in their arsenal in *MSS*; a claimant should not be criticised for failing to claim asylum in a country which breaches, what the court described as one of the most fundamental values of democratic societies--art 3."

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UK Legal News Analysis

## Families Illegally Held in Detention Centre

LNB News 24/01/2011 69

**Published Date**  
24 January 2011

**Jurisdiction**  
UK

**Related Legislation**  
Borders, Citizenship and Immigration Act 2009

### Related Cases

*R (on the application of Suppiah) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin), [2011] All ER (D) 31 (Jan); *R (on the application of TS) v Secretary of State for the Home Department* [2010] EWHC 2614 (Admin), [2010] All ER (D) 275 (Oct)

### Related Digests

Press Release: Response to Child Detention Ruling, LNB News 12/01/2011 79; Court Rules Dublin II Applies

to Unaccompanied Children, LNB News 11/01/2011 53; Press Release: New Compassionate Approach to Family Returns, LNB News 16/12/2010 51; Report: Alternatives to the Detention of Children for Immigration Purposes: A Contribution to the Review From the UK Children's Commissioners, LNB News 02/07/2010 71

## Abstract

**The High Court has ruled the UKBA illegally detained two families in Yarl's Wood immigration centre and their detention breached arts 5 and 8 of the European Convention for the Protection of Human Rights. Evelyn Reid talks to Adam Pipe, Barrister at No 8 Chambers, who says anyone with an interest in the rights of children "will be deeply troubled by the facts of this case and the statistics demonstrating the routine detention of children"**

## Analysis

Not for the first time the government's policy on the detention of children for immigration purposes has come before the court. Adam Pipe outlines the court's findings in *R (on the application of Suppiah and others) v Secretary of State for the Home Department*. "The judge found the United Kingdom Border Agency's (UKBA) policy regarding the detention of families with children was not itself unlawful but that the claimants had been unlawfully detained and their detention breached arts 5 and 8 of the European Convention for the Protection of Human Rights (ECHR). The UKBA had failed to have regard to the statutory duty to safeguard and promote the welfare of children (Borders, Citizenship and Immigration Act 2009, s 55). In addition it would not have detained these families if all the relevant matters had been considered. Under the policy, detention of families with children should be a measure of last resort but in the instant case the claimants had been detained 'by default'."

Pipe says anyone with an interest in the rights of children from lawyers to parents "will be deeply troubled by the facts of this case and the statistics demonstrating the routine detention of children where detention is not, in the circumstances, necessary."

Wyn Williams J said it was hard to see what justification there could have been for detaining the first claimant and her children and that no-one can seriously dispute detention is capable of causing significant and, in some instances, long-lasting harm to children.

Pipe notes: "The judgment clarifies that, whilst it cannot be said the detention of children could never be lawful, the UKBA must operate its policy rigorously and give primary consideration to their best interests. It is only as a result of the instant judgment and *R (on the application of TS) v Secretary of State for the Home Department* (also Wyn Williams J) that the full weight of the Borders, Citizenship and Immigration Act 2009, s 55 is being felt."

Asked whether reform is needed he says: "The Deputy Prime Minister has made a number of statements condemning the detention of children. It remains to be seen how any new policy will be operated in the future by UKBA officials. Hopefully the judgment of Mr Justice Wyn Williams will echo through the corridors of the Home Office and bring lasting change to this lamentable practice."

In December 2010 the coalition government unveiled a new approach to family removals following a wide-reaching review and consultation. The UKBA will now follow a new four-stage process focused on engagement with families during the decision making process, giving parents the opportunity to engage in when and how they return when they have no legal right to stay in the UK.

Where does this leave practitioners? According to Pipe they should ensure that in cases where families with children have been detained "the policy has been rigorously applied". He observes the Borders, Citizenship and Immigration Act 2009, s 55 applies more widely than detention cases and practitioners should be mindful that "if appropriate consideration is not given to children and their welfare treated as primary consideration, in accordance with the statutory duty, the lawfulness of the UKBA's decision can be challenged on that basis."

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UK Legal News Analysis

## Errors of Law Deprived Asylum Seeker

LNB News 16/12/2010 39

### Published Date

16 December 2010

### Jurisdiction

UK

### Related Cases

R (on the application of K) v Secretary of State for the Home Department [2010] EWHC 3102 (Admin), [2010] All ER (D) 50 (Dec); R (on the application of WL (Congo)) v Secretary of State for the Home Department; R (on the application of KM (Jamaica)) v Secretary of State for the Home Department [2010] EWCA Civ 111, [2010] 4 All ER 489, [2010] All ER (D) 221 (Feb); R (on the application of S) v Secretary of State for the Home Department [2007] EWCA Civ 546, [2007] All ER (D) 193 (Jun)

### Abstract

**The decision of Beatson J shows the importance of the creative application of UKBA policy by immigration lawyers and opens up the benefit of previous decisions to potential claimants scattered around the globe says Adam Pipe, Barrister at No 8 Chambers, speaking to Evelyn Reid**

### Analysis

The claimant in *R (on the application of K) v Secretary of State for the Home Department* applied for judicial review to determine whether he could rely on the *R(S)* policy from outside the UK.

Adam Pipe says: "The claimant was one of those individuals whose asylum applications had been put on hold in order for later applications to be dealt with within the government's target set out in a Public Service Agreement (PSA). However, in *R (on the application of S) v Secretary of State for the Home Department* the Court of Appeal found the shelving of asylum applications under the PSA was unlawful and fettered the discretion of the Secretary of State. Subsequent to the decision in *R(S)* the Secretary of State formulated a policy to address the effect of those adversely affected by the deliberate delay. But the claimant was administratively removed from the UK before the judgment in *R(S)* and the formulation of the policy. "

Following the publication of the *R(S)* policy the claimant, who had since moved to the Ukraine, made an application for exceptional leave to enter in order to apply under the policy. The application was refused on the basis the claimant was not eligible because he was outside the UK. The claimant sought judicial review.

In the instant case Beatson J examined the policy in *R(S)*, which had gone through a number of interim and draft versions, at length. According to Pipe an October 2007 version stated an applicant must be present in the UK to benefit from it but the final version did not contain that restriction. The policy did however refer to an unpublished version.

Pipe says: "It is commonplace that the Secretary of State maintains unpublished policy documents giving

guidance to caseworkers; these unpublished policies have led to a number of cases coming before the courts and previously unpublished policies being brought out into the open (for a recent example see *R (on the application of WL (Congo)) v Secretary of State for the Home Department*; *R (on the application of KM (Jamaica)) v Secretary of State for the Home Department* and Division D of Butterworths Immigration Law Service). The unpublished version of the *R(S)* policy also did not contain the restriction but advised caseworkers to refer cases where the applicant had left the UK to a senior caseworker. Both the published and unpublished versions of the policy are annexed to the judgment of the instant case and hopefully along with other cases concerning other unpublished policies will cause the Secretary of State to re-think her approach and we will see more information in the public domain."

Beatson J found the policy in its full form did not exclude those who were outside the UK and concluded it would be unreasonable to construe that it was. Pipe says: "The Secretary of State also sought to resist the claim arguing the claimant had delayed bringing his claim. But the Secretary of State had not previously relied upon that point in rejecting the claimant's application. Beatson J also rejected this argument on the basis the claimant was relying on an existing policy not one that had been withdrawn and his application was made two months after the publication of the policy. Consequently judicial review was granted and the decision of the Secretary of State was set aside to be re-considered."

Pipe adds: "This case will impact those who should have benefited from the *R(S)* policy but have been removed from the UK. The difficulty may be tracing them so they can apply for leave to enter the country.

"The Administrative Court has once again highlighted the significance of unpublished versions of policy documents which lurk in the redacted background impacting claimants without their knowledge. It is noteworthy there was nothing sensitive in the redacted portion of the guidance and the witness for the Secretary of State acknowledged it should perhaps have been in the published version."

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UK Legal News Analysis

## Asylum Seekers Given Go-ahead to Work

LNB News 13/08/2010 37

### Published Date

13 August 2010

### Jurisdiction

European Union; UK

### Related Legislation

Council Reg 343/2003/EC; Council Dir 2003/9/EC; Council Dir 2004/83/EC; Council Dir 2005/85/EC

### Related Cases

*R (on the application of ZO (Somalia)) v Secretary of State for the Home Department* [2010] UKSC 36, [2010] All ER (D) 296 (Jul); *R (on the application of ZO (Somalia)) v Secretary of State for the Home Department*; *R (on the application of DT (Eritrea)) v Secretary of State for the Home Department* [2009] EWCA Civ 442, [2009] All ER (D) 184 (May)

### Related Digests

Press Release: Rebuilding Confidence in Our Immigration System, LNB News 26/07/2006 33; Report: National Audit Office Release Results of Research into Management of Asylum Applications by UK Border Agency, LNB News 26/01/2009 29; Report: Asylum - Getting the Balance Right?, LNB News 26/02/2010 7

## Abstract

**Asylum seekers have won the right to work while the Secretary of State considers further submissions to their asylum application. Adam Pipe, Barrister at No 8 Chambers, tells Evelyn Reid the ruling means those who have been waiting for a decision on their fresh claim can have a dignified standard of living**

## Analysis

In *R (on the application of ZO (Somalia)) v Secretary of State for the Home Department* the Supreme Court ruled that Council Dir 2003/9/EC (the Reception Directive), which lays down minimum standards for the reception of asylum seekers in EU member states, should be interpreted as applying to second and subsequent asylum applications. Adam Pipe says: "In coming to this decision Lord Kerr examined the meaning of the phrase 'application for asylum' by comparing the definition in the Reception Directive with that contained in Council Dir 2005/85/EC (the Procedures Directive) as both Directives along with Council Dir 2004/83/EC (the Qualification Directive) and Council Reg 343/2003/EC (the Dublin Regulation) were meant to form a comprehensive charter dealing with the various aspects of asylum applications. After reviewing the legislative history the Supreme Court dismissed the Secretary of State's request for a preliminary ruling on the interpretation of the Reception Directive from the ECJ and said the meaning was 'beyond any doubt'."

"This is another much welcome decision of the Supreme Court which grows bolder by the day." says Pipe: "Lord Kerr delivered the single judgment of the court, which is becoming common practice in the Supreme Court. It upholds the decision of the Court of Appeal and is very significant to a large number of claimants who have fresh claims to asylum which have been pending, in the so-called legacy scheme, for more than 12 months. The Home Office estimate up to 45,000 could be affected by the judgment."

In 2006 the then Home Secretary John Reid committed the Home Office to clear the vast number of asylum 'legacy' cases--unresolved cases where a decision has been awaited for more than six months, with some dating back a decade or more--by the summer of 2011. However, the Home Affairs Committee's report on 7 April 2010, before the general election, said the government was not on track to clear the backlog (see UK Border Agency: Follow-up on Asylum Cases and E-Borders Programme, Twelfth Report of Session 2009-10).

Pipe notes that Lord Kerr adopts a purposive interpretation to the Reception Directive which chimes well with the introductory recitals to the Directive, especially recital 7 which states: "Minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down". The Home Secretary argued this interpretation will lead to abuse of the system Lord Kerr's answer was for the authorities to streamline and speed up the process.

Pipe says advisers should submit applications for permission to work for those who qualify under the Reception Directive. He warns: "There are indications the government are trying to thwart the impact of the judgment by restricting what jobs asylum seekers can apply for."

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## Exclusion from Humanitarian Protection Given in Boroumand

LNB News 12/03/2010 88

### Published Date

12 March 2010

### Jurisdiction

UK

### Related Cases

R (on the application of Boroumand) v Secretary of State for the Home Department [2010] EWHC 225 (Admin), [2010] All ER (D) 241 (Feb); R (on the application of MK) v Secretary of State for the Home Department [2010] EWCA Civ 115, [2010] All ER (D) 282 (Feb)

### Abstract

**Practitioners should be raising issues of humanitarian protection at the first available opportunity says Adam Pipe, a barrister at No 8 Chambers. He talks to Evelyn Reid about the decision in R (on the application of Boroumand) v Secretary of State**

### Analysis

In an appeal against a deportation order a tribunal had decided a claimant's removal would put the UK in breach of its obligations under the European Convention on Human Rights (ECHR). Consequently the Secretary of State granted leave to remain for six months and the tribunal did not explicitly consider the question of exclusion from or entitlement to humanitarian protection.

The question in *R (on the application of Boroumand) v Secretary of State* before the High Court was whether it implicitly meant the claimant was entitled to such protection or whether the Secretary of State was precluded from deciding to exclude him from that category.

In the judgment, Beatson J said: "The Directive (Council Dir 2004/83/EC) and the provisions of the Immigration Rules (HC 395) (Immigration Act 1971) implementing it contemplate that a person may fall into one of three categories. He may be a refugee: art 2(d) and para 334. Alternatively, while not a refugee, he may be entitled to subsidiary or humanitarian protection: arts 2(e), 15, para 339C. Thirdly, even if not a refugee and not entitled to subsidiary or humanitarian protection because he has committed a serious crime (art 17, para 17), he may not be subject to removal from the UK because he would face a real risk of suffering serious harm if returned to his country of origin."

The consequence of those categories he argued was a decision that a person's removal would be unlawful and did not implicitly involve determining which category he fell into whilst he was in the UK. In addition neither the Directive nor the Strasbourg jurisprudence required any particular status to be granted to a non-refugee whose removal from the UK was prevented by its human rights obligations. The only immediate obligation for the UK was not to remove that person.

Adam Pipe, a barrister at No 8 Chambers says: "This is an interesting case and part of the developing jurisprudence arising from the implementation of the minimum standards Directive (Council Dir 2004/83/EC). It goes some way to legitimise the practice of the Border Agency in granting six months' discretionary leave to individuals who have committed serious crimes or are alleged terrorists but cannot be removed on human rights grounds. Beatson J stresses the need for applications for renewal of such leave to be dealt with promptly."

Commenting on whether the Secretary of State was precluded from deciding to exclude the claimant from the humanitarian category because it had not formed part of the appeal at first instance Beatson J said the test was not whether the point had been raised, but whether the "Secretary of State's decision to raise it was inconsistent with what had been decided by the tribunal". In the instant case there had been no application for leave to remain on the basis of humanitarian protection under the ECHR.

The High Court also had to determine whether the operation of the Immigration Rules and the delay in determining the claimant's application to extend his leave meant the policy operated in a disproportionate manner either in general or in the instant case.

Beatson J said there was insufficient evidence to determine how the policy operated for the purposes of the ECHR, art 8. However, in the circumstances of the claimant's case the effect of the time taken to determine his applications for extensions to his discretionary leave did not constitute a disproportionate interference with his private life.

Asked how this decision will affect practitioners, Pipe says: "Practitioners should be raising issues of humanitarian protection at the first available opportunity. In my opinion humanitarian protection is underused by practitioners and its full impact has yet to be seen, see for example *R (on the application of MK) v Secretary of State for the Home Department*."

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UK Legal News Analysis

## **Court of Appeal Rule on the Allocation of Jurisdiction in Immigration Appeal Cases**

LNB News 28/01/2009 39

### **Published Date**

28 January 2009

### **Jurisdiction**

England & Wales; Scotland

### **Related Legislation**

Nationality, Immigration and Asylum Act 2002; Asylum and Immigration (Treatment of Claimants) Act 2004

### **Related Cases**

HT (Cameroon) v Secretary of State for the Home Department

[2008] EWCA Civ 1508, [2009] All ER (D) 24 (Jan); Gardi v Secretary of State for the Home Department

### **Related Digests**

LNB News 15/12/2008 56

### **Abstract**

**In HT (Cameroon) v Secretary of State for the Home Department [2009] All ER (D) 24 the Court of Appeal had to grapple with the distinction between 'reconsidered' in s 103B(1) and 'decided' in s 103B(5) under the Nationality, Immigration and Asylum Act 2002. Evelyn Reid talks to Adam Pipe, barrister from 8 Fountain Court, Birmingham**

### Analysis

The claimant applied for asylum to the Asylum and Immigration Tribunal (AIT) in Glasgow. He was refused. On a reconsideration hearing conducted in London he obtained permission to appeal to the Court of Appeal. However, the Secretary of State took a preliminary point that the jurisdiction to hear any appeal against the AIT's determinations lay with the Inner House of the Court of Sessions in Scotland rather than the Court of Appeal in London.

The Secretary of State submitted that there was a deliberate distinction between 'reconsidered' in s 103B(1) and 'decided' in s 103B(5). She argued that the claimant's appeal against her decision had been decided in Scotland but had then been reconsidered in England, with the consequence that the jurisdiction to hear any further appeal lay with the Inner House. Equally, she contended, s 103B contemplated an allocation of jurisdiction according to where the original decision had been taken, even if in such a case reconsideration had followed.

Pipe, barrister at 8 Fountain Court and contributor to *Butterworths Immigration Law Service* says: "The position of the Secretary of State does violence to the purpose of the legislation." Sedley LJ pointed out that the jurisdiction of the AIT extends to the whole of the UK and that any member of it may lawfully sit and adjudicate north or south of the border or across the Irish Sea. And that until the 2002 Act was amended by the Asylum and Immigration (Treatment of Claimants) Act 2004, the distribution of appeals from the tribunal was governed by a simple judicial policy of comity and discouragement of forum-shopping.

He adds: 'It [the distribution of appeals] was set out by *Brooke LJ in R (Majeed) v IAT [2003] EWCA Civ 615* and reflected by the Court of Session in *Tehrani [2004] Scot. CS 102*. One might have hoped--although it would have flown in the face of experience--that the Home Office would recognise the good sense of this and go on leaving it to the courts. But no: we now have to grapple with departmentally-promoted legislation which, far from resolving or clarifying the issue, has brought everyone into court to wrangle about it.'

The claimant said that the vocabulary and substance of the process were directed to establishing a single decision on any appeal from the Secretary of State. The Court agreed. Sedley LJ said: 'In my judgment, then, the "decision" referred to in s 103B is the Asylum and Immigration Tribunal's determination of an appeal against the Home Secretary's decision, whether that determination is the one first made or, where a reconsideration has been ordered, the one reached on reconsideration. This construction, as it seems to me, gives the correct effect to the language and purpose of the legislation.' It followed that the appeal would remain in the Court of Appeal.

Pipe says: "Lord Justice Sedley's judgment represents a common sense purposive approach to the interpretation of the word 'decided' in section 103B. As Raza Husain submitted on behalf of the appellant the whole point of the new system was that it was to be a single tier and therefore there was only one decision by the Tribunal which could be reconsidered. This decision is to be welcomed and avoids a repeat of the Gardi debacle, see [2002] 1 WLR 2755."

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UK Legal News Analysis

**Gurkha Veterans Win Their Fight**

LNB News 06/10/2008 7

**Published Date**

6 October 2008

**Jurisdiction**

UK

**Related Cases**

R (on the application of Limbu and others) v Secretary of State for the Home Department and others [2008] All ER (D) 122 (Sep)

**Related Digests**

See R (on the application of Gurung and others) v Ministry of Defence [2008] All ER (D) 15 (Jul)

**Abstract**

**A high court ruling found that the government's discretionary policy relating to settlement applications by Gurkhas who did not meet immigration rules is unlawful. Evelyn Reid talks to Adam Pipe, barrister from 8 Fountain Court, Birmingham, about the judicial review case**

**Analysis**

Under a policy known as the Armed Forces Concession soldiers recruited from the Commonwealth to the British army have a right to settle in Britain after four years of service anywhere in the world. However, Gurkhas who retired before 1 July 1997 were excluded. Five Gurkhas and a regimental widow brought a judicial review case against the government. The high court said the policy was unlawful, in R (on the application of Limbu and others) v Secretary of State for the Home Department and others.

Adam Pipe, a barrister at 8 Fountain Court and contributor to Butterworths Immigration Law Service, says: "The judgment of Blake J in these judicial review test cases is a welcome and important one. The judge, who himself was a leading immigration silk until his recent elevation to the high court bench, found the government's discretionary policy in relation to settlement applications by Gurkhas who did not meet the immigration rules unlawful as it was irrational and ambiguous as to the expression of its scope. The judge however rejected the claimant's contention that the policy was discriminatory. He set aside the decisions in relation to the claimants which will have to be re-determined under a revised rational policy. At the conclusion of his judgment Blake J gives a hint at the appropriate outcome where he states: 'Rewarding long and distinguished service by the grant of residence in the country for which the service was performed would, in my judgment, be a vindication and enhancement of this covenant'."

The government had argued that since the Gurkhas' regimental headquarters were in Hong Kong until 1997, those who retired before then would not have developed significant ties to the UK. Historically, Gurkhas had also received a much smaller pension--at least six times less--than British soldiers but they won a partial victory in March 2007, when Defence Minister Derek Twigg announced that all those who retired after July 1997 would get the same pension as the rest of the Army.

Pipe says: "This case is of interest legally, apart from its recognition of the Gurkhas as loyal and distinguished servants of the UK, for its approach to government policies which exists outside of the immigration rules. Blake J is clear that it is not for the judiciary to determine what future policy should be; but that the court will intervene where a policy is contradictory and at odds with its purpose such as to render it unlawful. The judgment emphasises the need for those charged with the implementation of such policies (in this case entry clearance officers and immigration judges) to know precisely what the scope of the policy is. It

now remains to be seen how the government will reformulate the policy and whether these Gurkhas will receive the residence that they richly deserve."

Home Secretary Jacqui Smith said that, in light of the court's ruling, the government will revise and publish new guidance and honour its commitment to the Gurkhas by reviewing all cases by the end of the year.

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