

Court decisions on entitlement to work for asylum seekers¹

August 2009

Overview

Over the past twelve months, there have been key legal challenges to UKBA's² policies relating to granting permission to work to asylum seekers. These have focused on the European Council's Reception Directive³ and Article 8 of the Human Rights Act 1988 – the right to respect for private and family life.⁴ A more detailed history of two of the cases is provided in the following sections. In summary:

Fresh Claim for Asylum Applications and the Reception Directive: *ZO (Somalia) and MM (Burma) and the Secretary of State for the Home Department*⁵

ZO and MM were successful in the Court of Appeal in arguing that fresh claims for asylum applications⁶ are covered under the Reception Directive.

The Court of Appeal's decision in *ZO and MM* is binding which means fresh claims are covered by the Reception Directive. Therefore, asylum seekers who have made fresh claims are able to apply for permission to work after twelve months. *ZO*, *MM* and *Tekle* all received permission to work as a result of the Court of Appeal's decision.

However, the Secretary of State for the Home Department has lodged a petition to the House of Lords challenging the Court of Appeal's decision in the above cases. The Home Office are citing this petition to the House of Lords as a reason for not currently processing applications for permission to work from applicants with fresh claims for asylum outstanding. This position may be open to Judicial Review, (an option which the Refugee Council will be discussing with legal agencies).

¹ This briefing paper provides a summary of some of the key issues covered by legal challenges to the government's policy on permission to work for asylum seekers. It is for information purposes and does not constitute legal advice.

² The United Kingdom Border Agency is the part of the Home Office responsible for asylum.

³ The UK incorporated the *European Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers* (hereinafter 'the Reception Directive'). Article 11 allows an asylum seeker to apply for permission to work if they have not received an initial decision on their asylum claim after twelve months. Article 11 was incorporated into the Immigration Rules under Rule 360 Part 11B – Asylum, Rule 360. See

<http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11B/>, last searched 27 May 2009

⁴ Human Rights Act 1988, Schedule 1, Part 1, Article 8 is the Right to Respect for Private and Family Life. See

http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_3, last searched 28 May 2009

⁵ *The Queen on the Applications of ZO (Somalia) and MM (Burma) and Secretary of State for the Home Department* [2009] EWCA Civ 442

⁶ Fresh claims for asylum are made following a previous asylum application being fully decided and refused. The fresh claim is made on the basis that its content is significantly different from the previously refused asylum application.

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The right to respect for private and family life and permission to work: *Tekle and the Secretary of State for the Home Department*⁷

Tekle was successful in the High Court in arguing that the employment restrictions on asylum seekers who were faced with an extended period of time without a clear end date waiting for UKBA to make a decision on their claim was a violation of Article 8 of the Human Rights Act.

The High Court also concluded that permission to work should include business start up and self employment. At present, the Home Office does not allow asylum seekers to be self employed or to start their own business; only to be an employee.

The High Court's decisions, on Article 8 and the types of work asylum seekers can engage in, are not binding (i.e. law). However, they can act as a persuasive precedent⁸ for future legal challenges.

Applying for permission to work

The Court of Appeal's decision in *ZO and MM* means that if you are the main applicant on a fresh claim for asylum which was made more than twelve months ago and you have not received a decision from the Home Office, you are entitled to apply for permission to work under the Reception Directive.

The Reception Directive enables the main asylum applicant to apply for permission to work if:

- you waited more than 12 months for an initial decision by the Home Office on your asylum claim or fresh claim for asylum;
- the delay in the Home Office's decision was not your fault; and
- your claim for asylum or fresh claim application is ongoing, even if it is now at the appeal stage.

If the Home Office does not grant you permission to work on the basis that they are waiting for a decision on a petition to the House of Lords following the Court of Appeal's decision, or for reasons not listed above, you should seek legal advice on challenging this position.

See the Refugee Council's briefing paper

(<http://www.refugeecouncil.org.uk/policy/briefings/2006/permissiontowork.htm>) on applying for permission to work under the Reception Directive for further details.

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⁷ *Dawit Tekle v Secretary of State for the Home Department* [2008] EWHC 3064 (Admin).

The Court's written judgement can be found at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2009/442.html&query=zo&method=boolean>, last searched 28 May 2009

⁸ A persuasive precedent is non-binding but can be taken into account in future legal decision making.

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Omar and Min Min v Secretary of State for the Home Department

*High Court, 25 June 2008: Omar and Min Min v the Secretary of State for the Home Department*⁹

Overview

The claimants (Omar and Min Min) argued that fresh claims for asylum should be considered as applications for asylum and therefore covered by the European Council's Reception Directive. The position is summarised below.

1. The Reception Directive defines an application for asylum as 'a request for international protection from a Member State, under the Geneva Convention'¹⁰, a definition shared by the Procedures Directive.¹¹
2. A fresh claim for asylum in the UK is a request for international protection from a Member State, under the Geneva Convention.
3. Therefore the claimants under Article 11 of the Reception Directive should be entitled to permission to work after twelve months of submitting a fresh claim.

The Secretary of State for the Home Department (SSHD) contended that fresh claims are not covered under the Reception Directive. The SSHD's main arguments for refusing the claimants' applications for permission to work are set out below.

1. The Reception Directive only covers the first application for asylum as it relates to the *reception* of asylum seekers (i.e. to those who have made 'an application for asylum in respect of which a final decision has not yet been taken').¹² Those making fresh claims have already had a final decision made on a previous application for asylum and had therefore gone through the 'reception' process.
2. Allowing fresh claims (i.e. subsequent applications for asylum) under the Reception Directive would lead to an abuse of the asylum process. Persons refused asylum would be tempted to lodge fresh claims in order to become eligible for permission to work.
3. The resulting increase in fresh claims would cause further delays in the decision making process thereby allowing more people to become eligible to apply for permission to work after twelve months.

High Court decision

The judge found in favour of the SSHD in agreeing that the Reception Directive only covered persons who had not received a final decision on an asylum claim (i.e. their first claim for asylum). The judge accepted the argument that the Reception Directive provides initial reception benefits to asylum seekers. The judge found that asylum seekers making fresh claims have already been through their reception in the UK and therefore fall outside of the Reception Directive. The judge also agreed with the SSHD's

⁹ *Min Min and Zahra Ali Omar and The Secretary of State for the Home Department* [2008] EWHC 1604 (Admin). The Court's written judgement can be found at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2008/1604.html&query=min+and+min&method=boolean>, last searched 28 May 2009

¹⁰ *Article 2, (b)*

¹¹ *Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status*

¹² *Article 2, (c)*

argument on the potential for abuse of the system if fresh claims were deemed to be covered by the Reception Directive.

*Court of Appeal, 20 May 2009: ZO (Somalia) and MM (Burma) and Secretary of State for the Home Department*¹³

The Court of Appeal disagreed with the High Court judgement and found in favour of ZO (Omar) and MM (Min Min). The Court decided that a person making a subsequent application for asylum does fall within the Reception Directive. The main arguments made by ZO and MM which the judge accepted are set out below.

1. The Reception Directive applies to *applications* 'in respect of which a final decision has not yet been taken'. The fact that an *individual* may previously have had an application for asylum covered under the Reception Directive is not relevant.
2. The Reception Directive does already allow for different treatment of applicants deemed to be abusing the system. This is when a person has more than one application for asylum running at any given time.
3. The abuse argument the SSHD put forward¹⁴ was based on prioritising Home Office resources rather than a principled interpretation of the Reception Directive. Decision could be made within a reasonable time frame (i.e. within twelve months of submitting a fresh claim) if the process was resourced adequately.

Conclusion

The Court of Appeal's decision is legally binding and means that fresh claims are now covered by the Reception Directive. The Secretary of State for the Home Department has lodged a petition to the House of Lords challenging the Court of Appeal's decision and is waiting to hear if this will be allowed.

Dawit Tekle v Secretary of State for the Home Department

Background

The case involved, Dawit Tekle, an Eritrean national who applied for asylum in the UK in November 2001. His application was fully refused on 31 May 2002. In April 2004, a fresh claim was made. Since April 2004, it was accepted that Tekle was not destitute, being supported by a friend, and would be eligible for Section 4 support if it was not for the friend's support.

On 5 July 2007 in *R (FH and Ors) v Secretary of State for the Home Department* the court expressed a reluctance to establish grounds for challenging Home Office decision making on the basis of delays to processing claims. However, it did establish that there was an obligation on the Home Office to ensure that *as far as possible claimants do not suffer because of this delay*.

¹³ *ZO (Somalia) and MM (Burma) and the Secretary of State for the Home Department* [2009] EWCA Civ 442. The Court's written judgement can be found at <http://www.baillii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2009/442.html&query=zo&method=boolean>, last searched 29 May 2009

¹⁴ That allowing fresh claims (i.e. subsequent applications for asylum) under the Reception Directive would lead to an abuse of the asylum process. Persons refused asylum would be tempted to lodge fresh claims in order to become eligible for permission to work.

Tekle's solicitors wrote to the Home Office on 7 August 2007 requesting that the conditions of his temporary admission be varied to include permission to work. The Home Office wrote to the solicitors on 8 October 2007 stating that the conditions for remain in the UK would not be changed and that no indication could be given for when the request for further leave to remain would be actioned.

The solicitors subsequently made two claims for judicial review. The second claim of 5 May 2008 was granted, allowing a challenge of the refusal to grant permission to work.

High Court, 11 December 2008: Dawit Tekle and Secretary of State for the Home Department

Tekle's main arguments do not relate to whether fresh claims fall within the scope of the Reception Directive as in *Omar and Min Min*. Instead, the case was built around the Secretary of State for the Home Department's (SSHD) policies for dealing with the backlog of asylum cases waiting to be fully concluded and how these led to a violation of Article 8 of the Human Rights Act 1988, the right to respect for private and family life. The arguments used are outlined below.

1. The SSHD prioritised certain groups within the backlog of asylum cases for decision making.
2. Tekle did not fall within any of the priority groups.
3. Therefore, Tekle was faced with an extended period of time without an end date waiting for the SSHD to make a decision on his fresh claim.

In addition, Tekle argued that the Home Office's policy on fresh claims discriminated against his eligibility under Rule 360 of the Immigration Rules.¹⁵ The argument is set out below.

1. The Home Office only accepts fresh claims as eligible under Rule 360 once it has decided that they amount to an application for asylum.
2. The Home Office's practice is that when it is decided that a fresh claim amounts to an application for asylum, this should be followed by a decision on the asylum application itself (i.e. decision at first instance).
3. Therefore, Tekle would be excluded from the provision to gain permission to work under Rule 360 as, even if it was decided that his fresh claim amounted to an application for asylum, the Home Office's decision at first instance would never take longer than twelve months.

High Court decision

The Judge found in favour of Tekle and outlined the decision as follows.

1. There was a deliberate policy of delay to Tekle's fresh claim as he did not fall within the priority groups the Home Office set for clearing the backlog of cases.
2. Although there is no right to a decision on fresh representations or on permission to work due to delays, *'undue delay that is the responsibility of the Home Office's inefficiency both increases the right to respect to private life that is carried on of necessity during the period of delay, and can be said to diminish the strength of immigration control factors that would otherwise support refusal of permission to work'*.
3. The ability to take employment, self employment or establishing a business is an aspect of private life, in particular the ability to *'develop social relations with others in the context of employment, as well as the ability to develop an ordinary life when one is in possession of the*

¹⁵ Rule 360 of the Immigration Rules incorporates Article 11 of the Reception Directive relating to applications for permission to work.

means of living [i.e. having cash] *to permit travel and other means of communication with other human beings*.

4. The claimant has been in the country for seven years and *'he cannot be expected to put his life on hold'* (a key phrase repeated in the judgement).

The High Court judge concluded:

'What I can and do declare for the reasons given in this judgment is that the present policy is unlawfully overbroad and unjustifiably detrimental to claimants who have had to wait as long as this claimant has. I will hear counsel on any other orders that may need to be made if they are not agreed. I would expect the policy to be reviewed and reformulated in the light of this judgment within approximately three months.'

The SSHD was given leave to appeal the decision.

Court of Appeal, 20 May 2009: DT v Secretary of State for the Home Department

The SSHD appealed the High Court's decision in favour of *Tekle*. The appeal was heard by the Court of Appeal at the same time as *ZO and MM v the SSHD*. The Court of Appeal judge did not hear arguments relating to the SSHD's appeal against the *Tekle* decision on the basis that it was not good use of the Court of Appeal's time. The judge dismissed the SSHD's appeal but not on the basis of the High Court's decision (i.e. that it was a violation of Article 8). The appeal was dismissed as *Tekle* was now eligible to apply for permission to work under the Reception Directive as a result of the decision in *ZO and MM*.

Conclusion

The High Court's decision that denying *Tekle* paid work and access to cash benefits after a period of time was an infringement of Article 8 still stands and acts as a persuasive precedent in future cases. As a result, it has the potential to affect asylum seekers, and other migrants, who are not covered by the Reception Directive. In particular, the judge highlighted two key issues which are outlined below.

1. Access to cash

The High Court judgement makes clear that access to cash is key to Article 8 of the Human Rights Act 1988 - the right to respect for private and family life.

*In my judgment, the positive prohibition on being able to take employment, self employment or establishing a business, when placed alongside the inability to have recourse to cash benefits, restricts the claimants ability to form relations either in the work place and outside it. When such a requirement is imposed on someone who cannot be removed from the United Kingdom and it is maintained against someone who has been physically resident in the United Kingdom since the fresh claim was made 4 ½ years ago this restriction can thus be said to be an interference with right to respect for private life.*¹⁶

But the High Court judgement goes further in directly linking of the ability to access paid work and Article 8.¹⁷

¹⁶ *Dawit Tekle v Secretary of State for the Home Department* [2008], para.36

¹⁷ Asylum seekers refused asylum or who have made fresh claims but have not received a decision from the Home Office can apply for Section 4 support. Section 4 support is not given as cash payments but is provided through vouchers. The Home Office will be piloting a Section 4 Support Card which can be used at a limited range of shops for certain goods. Other Refugee Council publications are available at www.refugeecouncil.org.uk

*The ability to develop social relations with others in the context of employment, as well as the ability to develop an ordinary life when one is in possession of the means of living to permit travel and other means of communication with other human beings is thus an aspect of private life.*¹⁸

The link between paid employment, cash benefits and Article 8 is relevant to other migrants who are denied permission to work due to their immigration status but cannot return or be returned. The High Court judgement did not establish at what point the immigration control restrictions (i.e. prohibition on employment) become unjustifiable, although the indication was between 3-5 years.¹⁹

2. Types of work allowed

The High Court's judgement also includes areas of work currently excluded under Rule 360 of the Immigration Rules - self employment and business start-up. At present, asylum seekers granted permission to work are only able to be employed. This restricts the range of work an asylum seeker is able to take up. For example, a person with language skills may want to become a self employed interpreter. It also limits enterprise and business development with the dynamism and innovation that these bring to local and the national economies. Research has shown that refugees in the UK were often involved in business enterprise and self employment before their arrival.²⁰

¹⁸ *Dawit Tekle v Secretary of State for the Home Department* [2008], para.36

¹⁹ *Dawit Tekle v Secretary of State for the Home Department* [2008], para. 40, vii)

²⁰ Islington Enterprise Agency (2005) *Refugee Enterprise Partnership Research Report*. Refugee Enterprise Partnership

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