www.migrationwatchuk.org

Recent Case Law on Asylum and Immigration

The government has recently suffered a number of setbacks in asylum and immigration cases in the High Court and Court of Appeal.

Abbreviations

In the next two cases summarised, abbreviations having meanings as set out below are used:

ECHR - European Convention on Human Rights
HIV - Human immuno-deficiency virus
MOU - Memorandum of Understanding
SIAC - Special Immigration Appeals Commission

The Libyan case

This was a case before the Court of Appeal on an appeal against a decision of SIAC. SIAC was established by the Special Immigration Appeals Commission Act 1997 to hear appeals against asylum or immigration decisions in cases in which the Home Secretary has certified that the removal or exclusion of the appellant from the United Kingdom is either in the interests of national security or in the interests of the relationship between the United Kingdom and another country. (See Immigration and Asylum Appeals Act 2002, section 97.) By section 7 of the 1997 Act an appeal lies from SIAC to the Court of Appeal on a point of law only with the leave of SIAC or of the Court of Appeal.

This was an appeal by the Home Office against a decision by SIAC in the case of two Libyan nationals. Both are Islamist extremists with links to the Taleban and Al Qa'eda. One of them is a major opponent of the Gadaffi regime in Libya, which he views as anti-Islamic according to his view and against which he countenances and supports the use of violence. Both respondents were held by SIAC to be threats to the national security of the UK and this finding was not disputed before the Court of Appeal. The appeal was concerned solely with the issue of safety of the respondents on their return to Libya. The governments of the United Kingdom and Libya signed a MOU on October 2005, in which the latter gave assurances that anyone deported to Libya from the United Kingdom would be properly treated. In the Court of Appeal the appellant, the Home Secretary, accepted that in the absence of the MOU there would be substantial grounds for believing that there was a real risk of the two

respondents being tortured on their return to Libya. It was accepted by the respondents that if Libya complied with the MOU there would be no such risk. SIAC found that the Government of Libya had entered into the MOU in good faith and intended to honour it, but went on to form the view that Libya's motivation and reasoning might change, giving rise to the consequence that the respondents might be tortured on return. The importance of these considerations is that Article 3 of ECHR provides : "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The United Kingdom and other Contracting States are not permitted any derogation from this absolute prohibition and it is now well established by case law that the rights conferred by Article 3 extend to any case in which a person is otherwise liable to be deported to another country in which there is a possibility that he might face torture.

SIAC found on considering the evidence before it, in particular the evidence of a recently retired British ambassador to Libya, that Libya would probably keep its word and observe the MOU, but there was a serious element of unpredictability in the actions of Colonel Gadaffi. Reference was made to the Lockerbie bombing in 1988 and the more recent event of the trial of Bulgarian nurses working in Libya who in 2004 were convicted on charges of deliberately infecting patients with HIV. The nurses were sentenced to death after a trial based on evidence obtained by torture, in spite of evidence that the outbreak of disease had been caused by poor hygiene at the hospital where they worked. A retrial in 2005 reached the same conclusion and again imposed the death sentence. The nurses were eventually released and repatriated. SIAC accepted that Colonel Gadaffi could determine the outcome of the trial and commented on "the willingness of the regime to endure international opprobrium and diplomatic pressure …..in a way which cannot be explained other than by the vital importance of maintaining a particular domestic posture". The Colonel had publicly declared the defendants guilty and was under pressure from the families of patients affected by HIV for a guilty verdict. SIAC accepted that its conclusions about what might happen to the respondents on deportation to Libya were inevitably in large measure speculative, but the hazard for the respondents was the unpredictability of the regime's behaviour.

The Court of Appeal concluded that SIAC had applied proper tests in considering the validity of the MOU and had correctly taken account of unpredictability on the part of the Libyan regime. SIAC had found that there were substantial grounds for believing that there was a real risk that the respondents might be tortured in Libya, notwithstanding the terms of the MOU.

The Abu Qatada case

Judgment in this case was delivered on 9 April 2008, the same date as judgment in the Libyan case. Both appeals were heard and determined by the same bench of three Lords Justice of Appeal.

Abu Qatada, otherwise known as Othman, is a Jordanian citizen, found by SIAC to be a danger to the national security of the United Kingdom. He challenged unsuccessfully before SIAC the decision of the Home Secretary to deport him to Jordan on the ground that it would be inconsistent with the United Kingdom's obligations under ECHR. SIAC found on the evidence that the appellant was an Islamist extremist who advocated changing the regime in Jordan from monarchy to an Islamic republic governed by sharia law. He had clear links to numerous terrorist

groups and individuals and was seen as a threat to the stability of Jordan. He arrived in the United Kingdom in 1993 and was granted asylum. In April 1999 he was convicted in his absence at a trial in Jordan of conspiracy to commit terrorist offences and sentenced to life imprisonment. Evidence was accepted by SIAC that the majority of defendants at the same trial complained that they had been tortured and as a result had made false confessions of involvement in plotting to cause explosions. They were not seen by doctors while they were detained and no defence lawyers were present during their interrogation. In 2000 Abu Qatada was one of 28 defendants in a trial based on another conspiracy to cause explosions. He was again convicted in his absence and sentenced to 15 years' imprisonment. Again, evidence was accepted by SIAC that other defendants at the same trial had had evidence extracted under torture. It was accepted that Jordan's human rights record was poor and accordingly the Foreign and Commonwealth Office entered into a MOU with the Kingdom of Jordan which offered safeguards in relation to the treatment of persons such as the appellant who might be returned to Jordan.

In this case SIAC had accepted that the MOU would be sufficient protection against the appellant's being tortured on being returned to Jordan and to that extent there would be no breach of his rights under Article 3 of ECHR. However, a further issue arose under Article 6 of ECHR, dealing with the right to a fair trial, which provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. etc. etc. "

The evidence relating to the functioning of the legal system in Jordan supported SIAC's finding that the appellant would receive a fair hearing before an independent and impartial tribunal, and on that the Court of Appeal did not disagree. However, SIAC also concluded that notwithstanding the evidence given of torture in connection with the two trials in which the appellant was convicted in his absence, there was not such a possibility of reliance at a future trial on evidence obtained by torture as to amount to a breach of the requirements of Article 6. Article 6 does not make any specific reference to evidence obtained by torture, but there is case law on the subject from which the Court of Appeal drew the conclusion that to expel the appellant to Jordan where he would face a further trial in which there was a strong probability that such evidence might be used would amount to a breach of the United Kingdom's obligations under Article 6.

The appeal was successful and the Home Office is prevented from deporting Abu Qatada to Jordan. There is likely to be an appeal by the Home Secretary to the House of Lords. In the meantime Abu Qatada is free on Immigration Act bail subject to reporting restrictions.

A note on ECHR

Formerly a case such as that of Abu Qatada would have fallen to be decided in the UK in accordance with the 1951 Geneva Convention on the Status of Refugees – the Asylum Convention. If he had wished to raise an issue under ECHR he would have had to go to the Court of Human Rights in Strasbourg. The Human Rights Act 1998, incorporating ECHR into UK law, was brought into force in October 2000. Since

then, appeals against refusal of asylum have almost invariably raised additional issues under ECHR.

Under the Asylum Convention there are provisions under which asylum can be denied to persons who might otherwise qualify. Under Article 1F of the Convention asylum can be denied *inter alia* to any person who has committed a serious non-political crime outside the country of refuge. Article 33.1 of the Convention prohibits any Contracting State from returning a refugee to any country where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Article 33.2 denies the benefit of this provision to a refugee if *inter alia* there are reasonable grounds for regarding him as a danger to the security to the country of refuge.

Abu Qatada had already been granted asylum in the United Kingdom in 1993. He was tried in his absence in 1999 in Jordan and there may well have been charges pending against him when he fled the country in 1993. However, it seems likely that the charges eventually brought related to conspiracies to commit acts of terrorism which would be regarded as political, so the exemption under Article 1F, limited to non-political crimes, would not apply. However, it appears that there was ample evidence before SIAC which enabled it to conclude that he was a serious danger to the security of the United Kingdom and therefore Article 33.2 could have been invoked in the United Kingdom in the event of any appeal against deportation. Before the passing of the Human Rights Act 1998 and its coming into effect in October 2000, any appeal for the protection of the ECHR would have had to be taken to the court in Strasbourg.

Prima facie the Articles of ECHR bind only the actions of the authorities of Contracting States. However, before the passage of the Human Rights Act 1998 it was already clear from cases decided by the Strasbourg court that certain of the Articles of ECHR could be and were extended in their scope to protect individuals from being deported to other states where their human rights might be breached. The leading case on this is *Chahal* (1996) 23 EHRR 413, which settled this point so far as Article 3 was concerned. A similar extraterritorial effect has been extended to other Articles by case law in Strasbourg and in the United Kingdom courts.

The highly skilled migrants programme (HSMP)

This was a case in the Administrative Court, a division of the High Court, in which judgment was delivered by Sir George \Newman, sitting as a High Court judge, on 8 April 2008. The claimants, HSMP Forum Limited, representing people admitted under the HSMP, contested the validity of changes made to the Immigration Rules which gave effect to the HSMP. The original scheme was introduced in 2002, setting out requirements for entry under the scheme. Applicants had to satisfy a score on points based on qualifications, work experience, past earnings and achievement in their chosen fields. Permission to enter to those who satisfied these requirements was initially for a period of one year, later increased to two years. Thereafter the migrant would be able to obtain an extension to remain for a further three years and finally permanent settlement by a grant of Indefinite Leave to Remain. For an extension of leave to remain the applicant had to show that he had taken "all reasonable steps to become lawfully economically active" but in order to be granted Indefinite Leave to Remain he had to show that he was in fact lawfully economically active at the time of application.

In November 2006 certain significant changes were made to the HSMP. On an examination of the working of HSMP the Home Office found that many successful applicants already holding HSMP visas were employed in occupations which were far from being highly skilled and concluded that more robust tests on such matters as salary levels and job titles were needed in assessing applications for extensions. This resulted in a decision to amend the Immigration Rules so as to impose more onerous requirements which had to be met if extensions were to be granted. The contentious aspect of these requirements, which gave leave to the application for judicial review to the High Court, was that they were made to apply to persons already in the UK on HSMP visas as well as to new applicants. Under the original scheme assurances had been given in 2003 to HSMP visa holders that they would "be allowed to stay and apply for settlement after four years' qualifying residence, *regardless of revisions to HSMP*." [Emphasis supplied.] In 2007 the Parliamentary Joint Committee on Human Rights enquired into the effects of the changes and in its report published on 9 August 2007 criticised the changes in the following terms:

> "…individuals with leave to enter or remain under the HSMP have taken a number of important and long-term steps to establish their main home in the UK: they have left permanent jobs in their home countries, sold their homes, relocated their families (spouses and children) to be in the UK also, entered into financial commitments such as mortgages, transferred businesses, entered into long term financial arrangements, made long term economic and contractual plans, and the lives of their families have been transferred…"

The court's conclusion was that the holders of HSMP visas under the original scheme had a legitimate expectation that any subsequent revisions to the scheme would not affect their rights of applying for extensions. That expectation had been wrongly frustrated by the introduction of amendments to the scheme which were intended to have retrospective effect on their rights. The court held that this amounted to an abuse of power which was exacerbated by the "conspicuous unfairness involved in encouraging people to sever links with their home countries and make the UK their main home, by issuing statements about their future entitlement to remain in the UK and thereafter subsequently withdrawing the applicability of the statements." [Judgment paragraph 49.] In reaching this conclusion the court was exercising a long established jurisdiction of the High Court to strike down subordinate legislation made by Ministers under statutory powers if, for example, the subordinate legislation goes beyond the powers conferred by the statute in question or, as in this case, there has been an abuse of power.

The court emphasised that the discretionary power of the Home Secretary to make changes to the scheme by amendments to the Immigration Rules was not challenged and the reasons for making the changes were not being questioned. The only successful challenge was to the purported retrospective effect of the amendments on HSMP visa holders who had been admitted under the original scheme. It appears that the numbers of people affected were small.

Harry Mitchell QC
16 April 2008