ILPA information sheet

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Permission to Work Judgment

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In May 2009, the Court of Appeal gave judgment in *R (ZO (Somalia) & Ors) v Secretary of State for the Home Department* [2009] EWCA Civ 442. The judgment is about permission to work for people who have been refused asylum, and have made a fresh claim for asylum. A copy of the judgment is available at: http://www.bailii.org/ew/cases/EWCA/Civ/2009/442.rtf

This information sheet gives information about the judgment, and the UK Border Agency's response.

European Reception Directive

The UK has signed up to several European Directives which set out European law on minimum standards for dealing with asylum claims. These aim to establish a common approach to asylum across the European Union.

One of these European Directives is known as the Reception Directive. Article 11(2) of this Directive requires each European State that has signed up to the Directive to set out the conditions under which an asylum seeker is to be granted permission if he or she has waited for a year for an initial decision on his or her asylum claim. In the UK, the 'initial decision' is made by the UK Border Agency. Thus, Article 11(2) applies if an asylum claim is awaiting a decision from the UK Border Agency after one year.

UK Immigration Rules

The Home Office has implemented Article 11(2) by paragraphs 360 and 360A of the Immigration Rules. However, the Home Office has considered Article 11(2) to apply only to an asylum-seeker's first asylum claim; and does not, therefore, consider these paragraphs of the Immigration Rules to apply to fresh claims for asylum after a first claim has been refused and any appeal dismissed. (For further information on fresh claims, see the May 2007 "Fresh Asylum Claims" information sheet.)

Paragraphs 360 and 360A of the Immigration Rules:

- allow an asylum-seeker to apply for permission to work if he or she has been waiting for an initial decision on his or her asylum claim for one year
- state that the application will only be considered if any delay in making an initial decision on the claim has not been caused by the asylum-seeker
- state that if permission to work is granted it will only last up until the point at which the asylum-seeker's claim (including any appeal) is finally decided
- state that permission will not be granted for an asylum-seeker to become self-employed or

set up in business

Thus, paragraphs 360 and 360A of the Immigration Rules allow for an asylum-seeker to be given permission to work if he or she has waited for a year for a decision from the UK Border Agency on his or her asylum claim.

Paragraph 353 of the Immigration Rules relates to fresh claims. It indicates that the UK Border Agency will not treat further submissions as a fresh claim until it has made the decision whether to accept or reject the further submissions. This means that the initial (i.e. the UK Border Agency) decision on a fresh claim effectively takes place at the same time as the UK Border Agency decides to treat a further submission as a fresh claim. The UK Border Agency does not apply paragraphs 360 and 360A of the Immigration Rules to asylum-seekers who have made a fresh claim.

The Court of Appeal judgment

The judgment of the Court of Appeal is based upon Article 11(2) the Reception Directive. The Court of Appeal decided that Article 11(2) applied equally in the following situations:

- where an asylum-seeker has been waiting for a year for an initial decision on his or her first asylum claim
- where an asylum-seeker has been waiting for a year for an initial decision on his or her fresh claim for asylum

The Court of Appeal decided that a fresh claim is made as soon as the asylum-seeker (or his or her representative) submits it – not when the UK Border Agency decides to treat it as a fresh claim.

Accordingly, the Court of Appeal decided that an asylum-seeker, who has submitted a fresh claim and waited for a year for a decision from the UK Border Agency on it, is entitled to apply for permission to work.

The UK Border Agency response to the judgment

The UK Border Agency is seeking permission to appeal to the House of Lords against the judgment of the Court of Appeal. In the meantime, the UK Border Agency has said that it will not make a decision on applications for permission to work by asylum-seekers who have been waiting for a year for a decision on their fresh claims. Instead, it will wait for a decision from the House of Lords.

It is arguable that the UK Border Agency's position is unlawful, because the Court of Appeal's judgment represents the current law in the UK (unless and until the House of Lords reaches a different decision) . A refusal by the UK Border Agency to consider an application for permission to work, which falls within the Court of Appeal judgment, could be challenged by judicial review.

However, it will be important to consider whether the Court of Appeal judgment does apply. A refused asylum-seeker who has not made a fresh claim will not be able to benefit from the Court of Appeal judgment. A refused asylum-seeker who has made a fresh claim, but has not been waiting for at least one year for a decision by the UK Border Agency on that fresh claim, will not be able to benefit from the judgment.

Note

If someone has been waiting for a year for a decision on an initial or fresh asylum claim, he or she does not gain permission to work automatically. An application must be made, and be granted by the UK Border Agency, before he or she can lawfully begin working.