ILPA information sheet

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Permission to Work Judgment 2

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On 28 July 2010, the UK Supreme Court gave judgment in the case of *ZO (Somalia) & Ors v Secretary of State for the Home Department*. This was the court's decision on the appeal by the UK Border Agency against the decision of the Court of Appeal, which was the subject of the August 2009 "Permission to Work Judgment" information sheet. The decision of the Supreme Court now replaces the decision of the Court of Appeal. The Supreme Court's judgment is available at:

http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0151_Judgment.pdf

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

Background information

The August 2009 "Permission to Work Judgment" gives information about the European Reception Directive (2003/9/EC) and UK Immigration Rules. That information is not repeated here. However, that information is equally relevant to the Supreme Court judgment.

The Supreme Court's judgment

The Supreme Court agreed with the Court of Appeal, and dismissed the UK Border Agency's appeal. The Supreme Court decided that Article 11(2) of the European Reception Directive, which makes provision for asylum-seekers to be granted permission to work, applies 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

For these purposes, a 'fresh claim' is made as soon as the asylum-seeker submits further submissions claiming asylum – not when the UK Border Agency decides whether or not further submissions amount to a fresh claim. Accordingly, 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. For more information on fresh claims, see the May 2007 "Fresh Asylum Claims" information sheet and the two October 2009 "Making Asylum Claims and Further Submissions" information sheets.

The UK Border Agency response to the judgment

The Supreme Court is the highest court in the UK. The UK Border Agency asked the Supreme Court to refer the case to the Court of Justice of the European Union (previously called the

European Court of Justice). The Court of Justice can make decisions on matters of European Union law (such as the meaning of the European Reception Directive) if a national court asks it to do so (by referring the case to it). The Supreme Court refused to refer the case to the Court of Justice. It was satisfied that there was no real difficulty in understanding the meaning of the European Reception Directive. There is no further appeal remaining to the UK Border Agency in this case.

On 28 July 2010, the UK Border Agency released a statement on the Supreme Court's judgment. The statement is available at:
http://www.ind.homeoffice.gov.uk/sitecontent/newsarticles/2010/july/55-supreme-court-judgement

The statement explains that the Government is considering what restrictions to impose on access to the job market by those asylum-seekers who have been waiting for a year for a decision from the UK Border Agency on an initial or fresh asylum claim. It says an announcement will be made, but does not say when. While that announcement is awaited, the statement says:

> "*In order to ensure good administration of* [applications for permission to work]*, fair processes and the effective implementation of the judgment, we will not process any permission to work applications from failed asylum seekers whose further submissions have been outstanding for more than 12 months until that announcement.*"

It has been reported that the Government wants to restrict access to the job market to only skilled jobs on the Government's shortage occupation list (i.e. where the Government says there is a shortage of skills in the UK labour market). Article 11(2) of the European Reception Directive permits conditions on access to the job market to be imposed. Article 11(4) permits priority access to the job market to be granted to others before asylum-seekers. It may be arguable that these provisions do not permit the restrictions the Government wants to introduce.

It is arguable that the decision by the UK Border Agency to refuse to make a decision on an application for permission to work, while waiting for the announcement, is unlawful. The European Reception Directive was introduced in January 2003. The UK has had several years to work out any conditions or restrictions to be imposed, and there is no good reason why an application for permission to work by someone, who has been waiting for a year for a decision from the UK Border Agency, should now be delayed.

Wider effect of the Supreme Court judgment

The Supreme Court judgment is important in making clear that when someone, who has been refused asylum, makes a fresh claim for asylum, he or she is then again an asylum-seeker for the purposes of the European Reception Directive.

The European Reception Directive provides for other minimum standards that the UK and other European Union states are required to ensure for asylum-seekers. These include provision for an adequate standard of living and access to healthcare.

Information on asylum-seeker's access to healthcare is available in the October 2009 and April 2009 information sheets on "Access to Healthcare". These provide information about access to healthcare in England. Over the last year, the situation in Scotland and Wales has developed; and access to healthcare for asylum-seekers and those refused asylum is now significantly better protected in Scotland and Wales than it is in England. The Supreme Court judgment, however, may improve the situation for those refused asylum, who then make a fresh asylum claim, in England. The judgment may show that someone who has made a fresh asylum claim should have access to free NHS treatment in the same way as someone who is still waiting for a final decision on his or her initial asylum claim and any appeal.