FRESH CLAIMS: RIGHT TO WORK FOR FAILED ASYLUM SEEKERS: COURT OF APPEAL DECIDES

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A significant number of people have applied for asylum in the UK and they were turned down for various reasons. Appeals were lodged and were also unsuccessful. Further applications for either reconsideration or judicial review were made but still to no avail. The UK Border Agency considers such asylum claims as appeal rights exhausted. Applications for fresh claims have since been made in some cases and they have really taken long to be decided. A few fortunate applicants have had positive decisions made pursuant to fresh claims and some have had their applications refused. The majority of fresh claim applicants have been waiting for quite a while. Applicants have been waiting for a number of years. Many such applicants still awaiting decisions in their fresh claims could be familiar with letters from the UK Border Agency to the effect that:

Your client's case is among the backlog of older cases, which the UK Border Agency is currently working to conclude...Your client's immigration status and entitlements will remain unchanged until such time as the UK border agency has considered the case.....the back log shall be decided by 2011...

In essence, the applicant is not allowed to take up employment until a positive decision is made. It is the waiting which is painful particularly if it has taken a number of years whilst a person is in limbo. No work and no freedom to bring family from home.

In a landmark decision, the Court of appeal has ruled that asylum seekers even those asylum seekers who have made fresh claims for asylum are entitled to work if they have waited for at least one year after making their applications. The court of appeal has had to combine three cases to deal with the right to work by asylum seekers. In the case of R (ZO (Somalia), MM (Burma) and DT (Eritrea), v SSHD the court of appeal decided that a person who makes further submissions after the refusal of his asylum claim and the exhaustion of his appeal rights is still an asylum seeker for the purposes of the EU Reception Directive. That means one must be allowed to work if a year has elapsed since he lodged his further submissions and no decision has been taken on them. He does not have to wait for the secretary of state to decide whether those further submissions constitute a "fresh claim".

The three appellants had all made unsuccessful asylum claims and their appeals had been dismissed. They then made further submissions or fresh applications for asylum (DT's in 2004, in the cases of ZO and MM in 2005) which applications they argued were fresh claims but had never been decided. Instead the Home Office regarded them as "legacy cases", and they joined the back log awaiting determination by the case Resolution Directorate, which is not expected to be cleared until the middle of 2011. Priority is being given to first time applications.

Proceedings were brought to the court not only based on the delay but also because the applicants had been refused permission to work. The case was decided in favour of the three applicants after the Reception Directive 2003/9/EC was interpreted by the court of appeal. The EU directive clearly states that:

1. Member States shall determine a period of time, starting from the date on which an application for asylum was lodged during which an applicant shall not have access to the labour market.
2. If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay is not attributed to the applicant, member States shall decide the conditions for granting access to the labour market for the applicant.
3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.

The issue which was before the court was whether a person whose asylum claim has been determined in country against him or her and who makes a subsequent claim for asylum in country come within the ambit of the above cited European Union "Reception Directive" and thus able to enjoy the benefits thereof such as access to the labour market. The court decided that a person making a subsequent application for asylum does fall within the Reception directive outlined above.

Thus if a person has made a subsequent claim for asylum is within the ambit of the reception Directive, then the Secretary of State for the Home Department is obliged to grant permission to work, in accordance with Rule 360 of the Immigration Rules, if a decision at first instance has not been taken within one year of the presentation of a subsequent application for asylum (fresh asylum claim) and this delay cannot be attributed to the applicant. This would help many applicants whose fresh claims have not been decided for the past years since their applications were lodged with the Home Office. The directive applies to all third country nationals and stateless persons who make an asylum application at the border or in the territory of a member State.

The court accepted the contention that a subsequent asylum seeker, pending a decision on the subsequent application, is a person in respect of whose application a final decision has not yet been taken, and not to a person in respect of whom a final decision has not yet been taken.

The principle established by the court of appeal, that failed asylum seekers who make a further application should be given permission to work if their application is undecided after a year, potentially affects many asylum seekers who by now qualify for the right to work on application. This position has remained unclear for some time and the court of appeal has shed more light on how to proceed in such cases