

## Ullah & Do - House of Lords Judgment

The purpose of this notice is to:

- Inform you of the House of Lords judgment in Ullah & Do which was handed down on 17 June.
- Advise you as to how this judgment affects the consideration of human rights claims.
- Advise you that the standard paragraph based on the Ullah & Do Court of Appeal judgment should no longer be used - a revised paragraph has been included in this notice (see paragraphs 10 & 11).

### Background

2. Ullah & Do based their asylum and human rights claims on a fear of persecution by reason of their religious beliefs. Both claims were refused and the appeals to the adjudicator dismissed. Permission to appeal to the Court of Appeal was granted to consider whether Article 9 of the ECHR (freedom of thought, conscience & religion) could be engaged where Article 9 rights would be infringed in the country of return.

3. Although the Court of Appeal was considering Article 9, its judgment had much wider implications for human rights claims. In its judgment delivered on 16 December 2002, it found that where the anticipated treatment in the receiving state was not sufficiently severe to engage Article 3, removal would not engage the UK's obligations under the ECHR. This judgment was appealed to the House of Lords by the applicants.

### House of Lords judgment

4. The House of Lords judgment was handed down on 17 June. It found for the Home Office on the facts (and the two appeals were dismissed) but not on the legal issue. The House of Lords disagreed with the Court of Appeal and found that there was no reason in principle why Articles other than Article 3 could not be engaged where rights under that Article would be breached in the country of return.

5. The House of Lords found, however, that there would need to be a flagrant violation of a non-Article 3 ECHR right in the receiving state in order for the UK's obligations to be engaged. The Lords endorsed as correct the approach taken by the Immigration Appeal Tribunal in *Devaseelan v SSHD* [2003 Imm AR1] whose judgment stated, "**flagrant denial or gross violation is....where the right will be completely denied or nullified in the destination country**".

6. The House of Lords stressed that in order for any Article other than Article 3 to engage the UK's responsibilities when seeking to remove someone, a very high threshold test would always have to be satisfied. To meet this high threshold, it would be necessary to establish "at least a real risk of a flagrant violation of the very essence of the right".

## Implications of the judgment

7. Since 16 December 2002 IND has relied on the Court of Appeal judgment in *Ullah & Do* to reject non-Article 3 human rights claims based on treatment in the country of return where the alleged treatment would not amount to a breach of Article 3. For example, IND would reject a claim that treatment in the country of origin would breach Article 9 where this treatment did not meet the Article 3 threshold on the basis that the UK's ECHR obligations were not engaged in these circumstances.

8. Following the House of Lords judgment on 17 June IND can no longer rely on that argument. Where a person claims that treatment they would face in their home country would breach their ECHR rights under a particular Article that is not Article 3, IND must consider whether there would be a flagrant violation of their rights under that particular Article in their home country. Indirect breaches (i.e. breaches occurring in the country of return) of an ECHR right other than Article 3 may engage the UK's obligations where the breach amounts to a flagrant violation of the right in question.

9. A flagrant breach will only occur where conditions in a country are such that it is impossible for a person to exercise any meaningful aspect of a non-Article 3 ECHR right. The following examples would not be flagrant breaches because they do not amount to a complete denial of the right in question (i.e. they do not meet the *Devaseelan* test):

- trials where quality of legal representation is poor or where the standard of proof was balance of probabilities
- someone who had to travel a long way to exercise their religion and had to do so in a discreet way

10. The flagrant violation threshold is very high and treatment in the country of return will only engage an Article other than Article 3 without engaging Article 3 itself in exceptional cases. Caseworkers should refer any case where it is considered that there would be a flagrant violation of the applicant's rights under a particular Article in the home country without there being a breach of Article 3 to a senior caseworker for advice.

11. The House of Lords judgment in *Ullah & Do* does not affect consideration of claims that Article 3 ECHR will be breached in the country of return.

## Standard paragraphs

12. The following standard paragraph found at section 4.7 (Indirect breach of Articles other than Article 2, Article 3 and Protocol 6: General) of Annex B of the API on ECHR **should no longer be used:**

"You have claimed that if returned to (COUNTRY) you would face treatment contrary to Article (INSERT) of the ECHR. However, in order to engage the

United Kingdom's obligations under the ECHR you would have to show that such treatment would be so serious as to amount to torture or inhuman or degrading treatment or punishment which would make removal a breach of Article 3 of the ECHR. It is not considered that you have demonstrated that because (insert reasons why a breach of the non-Article 3 Article would not occur or would not amount to treatment in breach of Article 3 if it did, i.e. does not reach threshold)."

**13. The above paragraph should be replaced by:**

"You have claimed that your return/removal to (COUNTRY) would be a breach of Article (INSERT) of the ECHR. In order to engage the United Kingdom's obligations under the ECHR you would have to show that there was a real risk of you suffering a flagrant denial of your rights under that Article. It is not considered that you have shown such a risk (ADD REASONS)."

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