Ensuring procedural fairness in asylum applications (AM (Afghanistan) v Secretary of State for the Home Department)

13/09/2017

Immigration analysis: What steps should be taken to ensure a fair hearing is given and adequate account is taken of an applicant's account for asylum as well as any objective evidence testifying as to the risk to the applicant in refusing that application? Raza Halim, barrister at Garden Court Chambers, outlines the details of AM (Afghanistan) v Secretary of State for the Home Department and says the case provides useful practical guidance concerning a collective approach that gets to the core of what has actually happened to an individual prior to their case coming to court.

Original news

AM (Afghanistan) v Secretary of State for the Home Department (Lord Chancellor intervening) [2017] EWCA Civ 1123, [2017] All ER (D) 25 (Aug)

The Court of Appeal, Civil Division, gave guidance on the general approach to be adopted in law and practice by the tribunals to the fair determination of claims for asylum from children, young people and other incapacitated or vulnerable persons whose ability to effectively participate in proceedings might be limited. As the substantive issues were compromised, it remitted the appellant's asylum claim for a fresh decision.

What is the significance of this case? Why is it important for practitioners?

The case is important partly because it is the first in a long time that has seen the Court of Appeal grapple with issues surrounding statutory asylum appeals. There has been a tendency to give substantial deference to the First-tier Tribunal, and Upper Tribunal, involving those cases requiring the most anxious scrutiny of our highest international obligations towards the most vulnerable. This has been a welcome instance in which the senior president of the tribunal promulgated clear guidance, having himself recognised that something had gone quite badly wrong.

The case involved a very vulnerable young Afghani, a child at the time of the appeal, who had been forcibly recruited by the Taliban. He was vulnerable not only due to his age, his experiences in Afghanistan, and the often overlooked but very distressing experience of migration itself, but also because of acute learning difficulties. This difficulty in particular impacted on the evidence he would give when engaging with the appellate process. The tribunal had taken an approach to his appeal that had scant regard for these vulnerabilities, and had failed to take a dynamic approach to assessing the body of evidence and medical evidence available in respect of the appellant.

The Court of Appeal has, by this ruling, encouraged a more panoramic approach to asylum examination and the assessment of credibility, moving away from the atomised approach that had set in. This is of value not only in stressing the significance of wider medical and objective evidence, but also in giving due regard to the context of flight as well as guidance promulgated by international bodies with unique competence in the area.

How helpful is this judgment in clarifying the law in this area? Are there any remaining grey areas?

It has done a great deal to provide both principled and practical steps concerning litigation in this area. The judgment will have alerted the Secretary of State, the tribunal, and representatives of claimants as to the active role each party must play in ensuring that a just outcome is achieved in such cases.

In addition to wider points, the judgment included useful practical guidance concerning a collective approach that gets to the core of what has actually happened to an individual prior to their case coming to court. This process needs to be regulated through proactive case management—this includes a more candid approach to the assessment of credibility and agreeing evidence where that is viable having considered all of the materials in the round. The judgment also provided a salutary reminder of procedural safeguards that are in place but had fallen dormant.

Also of significance is the decision of the Court of Appeal, for the first time, concerning the right of a vulnerable individual to the appointment of a litigation friend. This upholds the judgment of Picken J in *R (C) v First-tier Tribunal* [2016] EWHC 707. The court also concluded that the common law was able to fill the lacuna in the tribunal's express procedure rules, concerning the provision and use of a litigation friend where a child or incapacitated adult cannot obtain adequate access to justice without one (see *Wiseman v Borneman* [1971] AC 297, [1971] 3 All ER 27, *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 108, *BPP Holdings v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 121 applied at paras [38]–[46]).

That this has been made clear is of great value—vulnerable people often face protracted and very difficult questioning in their experience of the asylum process, and this is an aid to which they are entitled.

What are the practical implications of the judgment?

The first thing the judgment has done is to encourage a more holistic and candid approach to the assessment of credibility. Rigorous case management is a critical procedural process that should be deployed to achieve this end. The judgment also provides a salutary reminder that appellants come before the Secretary of State and the tribunals having endured a profound dislocation and often trauma—the reality of the persecution that caused them to take flight is not correlative with an ability to recount that experience in rigorous detail. The Court of Appeal recognised this point as follows ‘a child is foremost a child before he or she is a refugee’.

Interviewed by Julian Sayarer.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.