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Asylum and Temporary Admission

For a general discussion of the 1951 Geneva Convention relating to the Status of Refugees together with the New York Protocol of 1967, (together referred to in this paper as “the Convention”) you are referred to [Legal Briefing Paper MW 91 “Asylum Seekers – a serious case of misunderstanding”](#) and also to the definitions of “asylum”, “asylum seeker”, “humanitarian protection” and “refugee” in [Legal Briefing Paper MW 174](#).

2 The Supreme Court has recently made an important ruling on the Convention in the case of *ST v. Secretary of State for the Home Department* [2012] UKSC 12. It had to consider Article 32.1 which provides: “The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.” By contrast Article 33.1 provides the core protection contained in the Convention in the following words:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

3 The following is a brief summary of complex and protracted litigation. The appellant is a national of Eritrea, which was formerly a province of Ethiopia, the country in which she was born. She claimed asylum on arrival in the United Kingdom in 1998 on the grounds that she feared persecution if returned to either Eritrea or Ethiopia. In 2006 the then Asylum and Immigration Tribunal ruled that her fear of persecution if returned to Eritrea was well founded. However, later in 2006 the Home Secretary informed the appellant that although it was accepted that she was a citizen of Eritrea she could safely be removed to Ethiopia, as the Home Secretary now intended. The appellant contested this decision by judicial review, successfully in the High Court, but the High Court’s decision was reversed by the Court of Appeal. The appellant finally appealed to the Supreme Court.

4 The ground for contesting this decision was that it would contravene the requirement of Article 32.1 because the appellant was lawfully in the United Kingdom

and could not therefore be expelled except on grounds of national security or public order, neither of which arose. At the time the basis of the appellant's continued presence in the UK was "temporary admission" under paragraph 21 of Schedule 2 to the Immigration Act 1971. This is normal for asylum seekers and continues as the basis for their continued stays in the UK, even though, as in this case, they may be here for many years while their applications and any subsequent appeals or other litigation are pending. Before the Supreme Court it was contended on behalf of the appellant that by virtue of her temporary admission she was lawfully in the country and therefore she enjoyed the protection of Article 32.1. At first glance it might well be thought that this was a valid argument since temporary admission is granted by immigration officers in accordance with the legal provision quoted, and indeed that argument was accepted in the first instance by the High Court. However, both the Court of Appeal and the Supreme Court rejected the argument.

5 The main basis for rejection is to be found in section 11(1) of the Immigration Act 1971, which so far as material provides:

" A person arriving in the United Kingdom by ship or aircraft shall be deemed not to enter the United Kingdom unless and until he disembarks.....and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, *or temporarily admitted or released while liable to detention* [emphasis supplied]..."

Applying this section, persons lawfully enter the United Kingdom if they are able to pass immigration barriers because they hold British or other EEA passports or, if they are subject to immigration control, hold visas or are otherwise able to meet the requirements of the Immigration Rules. Paradoxical though it may seem, persons who apply for asylum on or after arrival and have not otherwise entered or remained lawfully, are not given leave to enter the country but are granted temporary admission to enable their applications to be considered. If their applications or appeals against refusal succeed they may only then be given leave to enter.

6 A complication to which paragraphs 59-61 of the judgment of Lord Dyson draw attention is that the word "refugee" is used in the Convention in two different senses. The present day terminology distinguishes between "asylum seeker" and "refugee" as explained in Legal Paper MW 91, but the former expression is of recent origin and did not exist in 1951 when the Convention was drafted. In paragraph 59 he states:

"...[T]he generous protection afforded by Article 32 should be confined to those whose claims for asylum have succeeded. The fundamental objective of the Convention is to protect persons who have a well-founded fear of persecution for the reasons stated in...the definition. Article 33 is an essential part of that protection." (See paragraph 2 above.)

He then clarifies further at paragraph 61:

"Article 33 applies to refugees whether they are lawfully present in the territory or not. It applies to any refugee to whom the Convention applies. It provides the protection that lies at the heart of the

Convention. Article 32.1 does not provide protection to a refugee against the risk of persecution. It provides protection against expulsion in any circumstances except on grounds of national security or public order.[I]t is not surprising that it was intended....that this degree of protection was not to be accorded to a refugee who has been granted temporary permission to remain in a territory pending the determination of her claim to asylum. If a refugee who is claiming asylum is to be protected from the risk of persecution, she needs the protection afforded by Article 33. She does not need the additional protection afforded by Article 32.1”

Applying contemporary terminology, “refugee” means a person who has been granted asylum either on application or on a subsequent appeal and is entitled to the protection of both Articles. He will normally be granted leave to remain for a specific period of years. By contrast “asylum seeker” means a person whose application is still under consideration or whose application has been refused but whose appeal against refusal is still pending. He is entitled to the protection of Article 33.1 and may not be returned to an unsafe country as defined in that Article, but is not otherwise protected against expulsion by the operation of Article 32. This important distinction results from the Supreme Court’s judgment.

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