



Right to Family Life - New Immigration Rules

The Home Office has recently promulgated a document running to 45 pages which substantially amends those paragraphs of the Immigration Rules which relate to family life. In this paper I am concentrating on those amendments which relate to the ability of convicted immigrant criminals to plead in accordance with Article 8 of the European Convention on Human Rights (ECHR) that deporting them would not be compatible with their right to family life. Cases in which such pleas have been successful have caused much public concern and sometimes anger in recent months.

2 First a word of explanation about the Immigration Rules. They are made under powers conferred on the Home Secretary by section 3(2) of the Immigration Act 1971 which in summary describes them as “statements of the rules...as to the practice to be followed in the administration of this Act for .regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and conditions to be attached in different circumstances”. The Rules contain hundreds of detailed paragraphs having the force of law for the guidance of immigration officers in the United Kingdom, entry clearance officers at missions abroad and immigration judges and other judges dealing with appeals against adverse decisions in immigration and asylum cases or judicial reviews or other cases which affect the rights of individuals to enter or remain in the United Kingdom. The rules state for example the requirements for bringing in a spouse or children from abroad, work permits and family or other short term visits They require approval by both houses of Parliament and are frequently amended.

3 Article 8 of the ECHR states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Earlier briefing papers on this site have drawn attention to cases decided in recent years in which the scope of Article 8 has been considered, in particular Legal Paper MW 187 on Deportation and Human Rights, MW 231 and MW 251 on the ECHR. MW 187 summarises two cases, decided respectively by the Court of Appeal and Supreme Court, both on the basis of the right to family life.. In the first case, the appellant had served a 4 years sentence for rape but his plea on the basis of family life because he had married a woman by whom he acquired two children after his discharge from gaol was successful in defeating an order for his deportation. In the second case the appellant, a young single man of 32, was subjected to a control order under the Prevention of Terrorism Act 2005, which included a residence requirement which obliged him to live at an address 150 miles from his family. There was no question of his being deported, but the difficulty of having regular contact with his family was held to be sufficient hardship to justify quashing the residence requirement.

4. There have been numerous similar cases which have caused much public anger and it is difficult to understand why the very clear and comprehensive exclusions set out in Article 8.2 do not appear to have persuaded the judges concerned that convicted foreign criminals and identified terrorists are not entitled to enjoy the benefits of Article 8.1. A new set of additions to the Immigration Rules, paragraphs 396 to 400, seek to spell out in more precise detail how Article 8.2 should be interpreted by the judges. In what follows I have summarised the main features of the amendments only, in the interests of keeping this paper within a reasonable compass. Paragraph 396 states that where a person is liable to deportation the presumption shall be that the public interest requires deportation. Paragraph 397 states that a deportation order must not be made if removal in accordance with the order would be contrary to the UK's obligations under the Refugee Convention or the ECHR., but if that is not the case it will only be in exceptional circumstances that the public interest in deportation is outweighed.

5. Paragraph 398 applies when a person in respect of whom a deportation order is made claims that deportation would be in breach of Article 8 but deportation is conducive to the public good for one or other of the following reasons:

- i. the person has been convicted of an offence for which he has been sentenced to a period of imprisonment of at least 4 years;
- ii. the person has been convicted of an offence for which he has been sentenced to a period of less than 4 years but at least 12 months;
- iii. in the view of the Home Secretary the person has by his offending caused serious harm or his record as a persistent offender shows a particular disregard for the law.

Case (iii) applies even where the person has been convicted of a crime and has been sentenced to a period of imprisonment of less than 12 months or even, it would seem, where he has merely been fined or indeed has not been convicted of any crime, but the Home Secretary will obviously need good grounds to support the view required by case (iii).

In all such cases and subject to defined family circumstances described in paragraphs 399 and 399A it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

6. Paragraphs 399 sets out circumstances which may outweigh the public interest in deportation:

- i. where the person contesting a deportation order has a genuine and subsisting relation with a child under 18 who is a British national, has lived at least 7 years in the UK, cannot reasonably be expected to leave the UK and has no other family member able to care for him in the UK;
- ii. where the person has a genuine and subsisting relationship with a partner who is in the UK, is a British citizen or has settled status, has lived in the UK with valid leave for at least 15 years and there are insurmountable obstacles to family life with that partner continuing outside the UK.

7. This is a bold attempt to restrict the damage caused by what critics would regard as unduly liberal interpretation of the scope of Article 8 by the judiciary. The amendments to the Immigration Rules came into force on 9 July 2012 and it remains to be seen how effective they will be. Specific provision is already made for the automatic deportation of foreign criminals by section 32 of the UK Borders Act 2007, which may be regarded as setting a precedent for these amendments. That section makes it mandatory for the Home Secretary to make a deportation order in a respect of a foreign criminal who has been convicted of one or other of a number of specified offences and been sentenced to a term of imprisonment of at least 12 months. However, the operation of section 32 is limited by a large number of exceptions set out in section 33 of the Act, notably cases where a deportation order would breach the UK's obligations under the Refugee Convention or the person's rights under the ECHR. The amendments to the Immigration Rules may well be regarded as carrying less authority than section 32 because they are subordinate legislation and the Home Secretary has conceded that if they are not effective enough the government may have to introduce primary legislation to achieve its purpose. Much will depend on the degree of understanding evinced by the judiciary. In paragraph 3 I have mentioned certain adverse decisions. However, there is at least one recent decision of the Court of Appeal which shows a greater readiness on the part of the judges to understand and accommodate the genuine need for effective immigration control. I refer to the case of Gurumg which is summarised and discussed in Legal Paper MW 251. In Legal Paper MW 252 I

have given space to a summary of a dissenting judgment by Lord Brown in the case of Quila, a recent decision by the Supreme Court.

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