

ILPA information sheet

Information sheets provide general information only, accurate as at the date of the information sheet. Law, policy and practice may change over time.

ILPA members listed in the directory at www.ilpa.org.uk provide legal advice on individual cases. ILPA does not do so.

The ILPA information service is funded by the Joseph Rowntree Charitable Trust.

An archive of information sheets is available at www.ilpa.org.uk/infoservice.html

Steve Symonds ILPA Legal Officer 020-7490 1553 steve.symonds@ilpa.org.uk

Immigration Law Practitioners' Association www.ilpa.org.uk 020-7251 8383 (t) 020-7251 8384 (f)

Article 8 – No. 2

26th July 2012

On 13 June 2012, the Home Office published changes to the Immigration Rules affecting applications by family members to come to or remain in the UK, see the “Family Migration – Changes to Immigration Rules 1” information sheet [<http://tinyurl.com/blz7zq6>]. When the new Immigration Rules were published, an Explanatory Memorandum (a short statement explaining the rules which is not legally binding) was also published. That Memorandum stated:

“The new Immigration Rules provide a clear basis for considering family and private life cases in compliance with Article 8... The new Immigration Rules will reform the approach taken as a matter of public policy towards [Article 8] – the right to respect for family and private life – in immigration cases. The Immigration Rules will fully reflect the factors which can weigh for or against an Article 8 claim. The rules will set proportionate requirements that reflect the Government’s and Parliament’s view of how individuals’ Article 8 rights should be qualified in the public interest to safeguard the economic well-being of the UK in controlling immigration and to protect the public from foreign criminals. This will mean that failure to meet the requirements of the rules will normally mean failure to establish an Article 8 claim to enter or remain in the UK...” (paragraphs 6.1 & 7.1)

The Government has made clear its intention that, other than in exceptional cases, Article 8 will no longer provide a basis for a person to be permitted to come to or stay in the UK if the requirements of the new Immigration Rules are not met. This information sheet provides information about this.

The Government’s position

On 19 June 2012, Damian Green MP, Minister for Immigration, said about the new Immigration Rules:

“Applicants will have to meet clear requirements in the rules which reflect an assessment of the public interest. Those requirements are a proportionate interference with article 8 because they draw on the relevant case law, because there is a strong rationale and evidence for the fact that they will serve the public interest, and because, if Parliament agrees to the motion [the motion (see below) was agreed]... they will reflect the correct balance between individual rights and the public interest.

“No set of rules can deal with 100% of cases, and there will be genuinely exceptional circumstances in which discretion is exercised outside the rules. However, it is in the interests of both the public and applicants for there to be a clear system to ensure fairness, consistency and transparency. The public, applicants and caseworkers need to know who is entitled to come or stay, and on what basis, and who is not. If there is to be a system of that kind, there must be rules: rules that deliver sustainable family migration to the UK that is right for the migrants, for communities and for the country as a whole, rules that properly reflect individual rights and the wider public interest, and, above all, rules that are set in Parliament, and not by individual legal cases...” (Hansard HC, 19 June 2012 : Column 823)

Is the Government's position correct?

In 2008, in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, the House of Lords made clear that:

“The search for a hard-edged or bright-line rule to be applied in the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires.”

The Government is correct, therefore, to recognise that no set of rules can deal with 100% of cases. The Government is incorrect, however, to suggest that the rules will deal with the generality of cases, and it is unsafe for the Government to predict that only in exceptional circumstances will a case, which does not meet the requirements in the Rules, succeed under Article 8. The day after the Minister's statement (see above), the Supreme Court in a different but related context made clear that consideration of Article 8 (and children's best interests) could not be reduced to an 'exceptionality' test – see the “Children's Best Interests 2” information sheet [<http://tinyurl.com/dyzqcrx>].

The Supreme Court, and the House of Lords before it, have repeated on several occasions similar statements that there is no 'exceptionality' test. There are other problems with the Government's position such as:

- There are several factors, which are generally relevant in considering Article 8 cases, which are not reflected in the new Rules. For example, there is no specific requirement in the Rules to consider the best interests of children, there is nothing in the Rules concerning delay on the part of the UK Border Agency and the Rules do not make any reference to the age, health or vulnerability of any individual.
- The public interest in immigration cases is not and cannot be fixed. For example, where children are involved, there is a public interest in ensuring they are properly brought up, and in a case where a child in the UK faces being separated from his or her parent that public interest may point strongly against the removal of the child's parent. Where there has been significant delay on the part of the UK Border Agency, the weight to be given to the public interest in favour of a person's removal may be reduced by that delay.

The motion to which the Minister referred (see above), and the debate in the House of Commons, can be found at:

<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120619/debtext/120619-0001.htm#12061972000001>

The day before the debate in the House of Commons, the House of Commons' Library published a note relating to the debate. The note included the following comment on the use of the motion:

“The House of Commons Journal Office has advised that the use of an approval motion for rules normally subject to negative procedure is unusual, and that the contention that “Parliament's view is subject to review by the Courts” is also surprising. Article IX of the Bill of Rights prohibits the impeaching or questioning of proceedings in Parliament in court. Proceedings can be used to establish facts, and the Courts have referred to ministerial statements in Parliament in the course of judicial review.”

ILPA agrees. We consider that views expressed in the debate, including by Ministers, cannot be relied upon before a court or tribunal to establish what the new Rules mean and how they are to be applied. The House of Commons' Library's note can be found at:

<http://www.parliament.uk/briefing-papers/SN06355>

The required approach in relation to Article 8 remains as explained in the August 2008 “Article 8” information sheet [<http://tinyurl.com/6skjen6>].