ILPA information sheet

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Family Migration – Article 8 (4)

This information sheet provides supplementary updating information to the information sheet "Article 8 - No. 3, 21 December 2012" which can be found at http://www.ilpa.org.uk/data/resources/16611/12.12.21-Article-8-No-3.pdf

General Background

The Government's intention to restrict Article 8 in immigration cases to the rules that were introduced in July 2012, has been expressly considered by the Upper Tier Tribunal in two cases. In these cases, the tribunals have held that the immigration rules do not change the meaning of Article 8, as established by caselaw and that most, if not all, cases that would have succeeded on Article 8 before last July will still succeed.

Subsequent to these cases, the Home Secretary, the Rt Hon Theresa May MP, has said that the Government will be introducing a new bill to restrict how judges can interpret Article 8, particularly in respect of foreign national offenders and ex-offenders. This is in direct response to the decisions described below. There is no bill yet, and no timescale has been announced. In any event, even if a law is passed about the meaning of Article 8 this will not stop a person taking his/her case to the European Court of Human Rights in Strasbourg.

Upper Tier Tribunal Decisions

MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC) was the first of two decisions to date and is discussed in detail in the information sheet "Article 8 - No. 3.

Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC) is the most recent decision on the new rules and is described below.

Background

This case concerned a Nigerian national who had entered the United Kingdom on multiple occasions and overstayed twice for periods of 10 months and two years respectively. During her stay in the United Kingdom she met a British citizen and they later married in Nigeria before she applied for entry clearance to return to the United Kingdom. This application was refused and whilst the appeal was pending Ms Izuazu attempted to return to the United Kingdom as a visitor. Upon entry it was discovered that she had previously been using false documents to work in the United Kingdom. She was subsequently prosecuted and sentenced to 12 weeks imprisonment. She applicant applied for asylum and was put in the detained fast track. Her appeal was successful on grounds of article 8, right to respect for family and private life. The Secretary of State for the Home Department appealed this decision.

The main question for the tribunal was to assess whether the new immigration rules did provide for an assessment of Article 8 without further considerations being necessary.

Tribunal Findings

The tribunal found that tribunal judges should first consider the immigration rules. Where an applicant fails to meet the requirements of the rules, an assessment of Article 8 will be necessary. This is the two-stage test examined in *MF (Nigeria)*.

The tribunal said that immigration rules are not the same as Acts of parliament. Parliament may debate the rules, but they are not debated line by line.

It said that there can be no presumption that the rules will normally deal with applications on the basis of private and family life (Article 8). It will be necessary to look at the facts of the individual case. The more the new Rules prevent relevant and weighty considerations from being taken into account, the less they will be the last word on whether the interference with private and family life is disproportionate or not.

The tribunal said that it has been authoritatively established by the higher courts that the tests to be applied are not "exceptional circumstances" or whether there are "insurmountable obstacles to a couple's living together in the UK. The tribunal looked at the caselaw of the European Court of Human Rights on 'insurmountable obstacles'. The distinction made by the tribunal was made that in the case law of the European Court of Human Rights, whether there are such 'insurmountable obstacles' is one of a number of factors to be considered, usually in cases where the applicant entered or remained unlawfully. It is not a decisive factor. The tribunal specifically stated that the rules have made 'insurmountable obstacles' into a minimum requirement which is not in accordance with guidance from the European Court on Human Rights. It is fine to have a rule which mentions insurmountable obstacles, but where there are no such obstacles it will be necessary to consider the case under the "real" Article 8.

The tribunal in *MF (Nigeria)* had suggested held that deference should be given to the view of the Secretary of State of the balance between a person's right to respect for family and private life and the public interest in removing that person. The tribunal in the present case did not go as far. They said

> *The weight to be attached to any reason for rejection of the human rights claim indicated by particular provisions of the rules will depend both on the particular facts found by the judge in the case in hand and the extent that the rules themselves reflect criteria approved in the previous case law of the Human Rights Court at Strasbourg and the higher courts in the United Kingdom.[paragraph 43]*

The tribunal does not expressly say that the tribunal in *MF* was wrong, but it does appear to say that the Secretary of State's views are important insofar they determine who succeeds under the immigration rules, but not to the question of who succeeds under Article 8.

The current position

Tribunal judges are taking the approach that where an appellant fails to meet the requirements of the immigration rules they will then consider whether the appellant's removal would be a disproportionate breach of that person's right to respect for a private and family life in the United Kingdom. The assessment will be based on the jurisprudence on the caselaw on Article 8. For the moment therefore it is business as usual on Article 8, but given the Home Secretary's recent statements regarding Article 8 things may change. Watch this space.