1996

ILPA'S MINIMUM STANDARDS IN RELATION TO DEPORTATION AND REMOVAL

1) The right to be represented and appropriate means to challenge deportation and removal. That is, all appeals to be reviewed in the light of the merits and the legality of the case, including illegal entrants already present in the United Kingdom. Illegal entrants should be expelled by deportation powers, not removal.

2) The Bouchereau test/principles should be applied to persons settled in the United Kingdom where deportation action is threatened.

3) If a settled person is not re-admitted to the United Kingdom, this should be treated as a form of deportation and there should be a right of appeal.

4) Persons lawfully residing (not settled) for 10 years or more should only be expelled if it is proven that they have breached national security, and should have a right of appeal in a forum with power to consider all the merits of the case (as in 1 above). The National Security Panel should be abolished.

5) Persons with strong family ties or long residence from infancy should in general not be expelled. Parents of children who are British citizens (or entitled to register as British citizens) should not in general be expelled. In addition, parents with care and/or access should be treated in the same way.

6) Abolition of the court's right to recommend deportation in criminal matters.

7) The European Convention on Human Rights 1950 should be incorporated into domestic law, in order to:-

a) protect persons from being returned to in-human/ degrading treatment (Article 3);

b) protect the rights to private/family life (Article 8);

c) ensure effective remedies to prevent unwarranted interference with basis rights (Article 13);

d) ensure non-discrimination on grounds of sex and ethnic origin in exercising rights (Article 4).

8) The European Social Charter 1961 should be incorporated into domestic law.

A. THE RIGHT TO BE REPRESENTED AND APPROPRIATE MEANS TO CHALLENGE DEPORTATION AND REMOVAL

That is, all enforcement action to be reviewed in the light of the merits and the legality of the case, including illegal entrance already present in the united kingdom. A person's illegal entry should be a further ground in s.3(5) IA 1971 upon which the SSHD can initiate deportation action. Summary removal of illegal entrants should be abolished.

1) Current Law

a) Deportation

A person who is not a British citizen is liable to be deported from the United Kingdom if:-

i) Having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave; or

ii) The Secretary of State deems deportation to be conducive to the public good; or

iii) Another person to whose family he belongs is or has been ordered to be deported. (S.3(5) 1971 Immigration Act)

In addition, a person who is not a British citizen shall be liable to deportation if, after he has attained the age of 17,

imprisonment and on his conviction is recommended for deportation by a Court empowered to do so (Section 3 (6) Immigration Act 1971)

b) Removal

A person is liable to be summarily removed if he is found to have entered or sought to have entered the United Kingdom unlawfully. Accordingly there is a distinction in Immigration Law between persons who entered the United Kingdom lawfully who may in certain circumstances be deported, and persons who entered or sought to enter unlawfully who may be removed.

2) **Current Appeal Rights**

Persons who are being deported have appeal rights. A criminal conviction inspired deportation (under s.3(6)) will carry an appeal to the relevant appellate criminal court against a recommendation for deportation. There will be a right of appeal on the merits where deportation action is taken unless the putative deportee was last given leave to enter less than seven years before deportation action is taken and unless such action is taken under s.3(5)(a) (overstaying/failing to comply with a condition attached to leave) or s.3(5)(c) (being a family member of such a person) In the latter circumstance there is a far narrower right of appeal. There is no in country appeal right for persons being removed as illegal entrants.

a) Deportation

By virtue of Section 5 of the Immigration Act 1988 a person who has had a decision to deport made against him because he:

i) has breached his limited leave to remain, or

ii) because he belongs to the family of a person who has been ordered to be deported due to a breach of limited leave

may only appeal on the ground that there is in law no power to make the deportation order for the reason stated in the decision to deport if he was last given leave to enter less than 7 years before the date of the decision. If he has been in the United Kingdom for 7 years or more at the date of the decision to deport, he will have an appeal on the full merits of the case.

Fresh leave to enter given following an absence from the UK and re-entry during the currency of extant leave will be disregarded for the purposes of the calculation required by s.5 1988 IA, namely whether 7 years have passed between last entry and the date of decision to deport.

b) Illegal Entrants

Currently, an illegal entrant can only appeal in country against the validity of removal directions to the country or territory to which he is to be removed if and only if unless entry was effected in breach of an extant deportation order and there is a dispute as to the identity of the person named

in the deportation order.

Otherwise he can only appeal out of country to dispute whether or not he could have been removed consequential upon classification as an illegal entrant, but has no right of appeal which involves balancing considerations against expulsion with those in favour of removal.

3) **Unfairness of Current Law and Appeal Rights**

The current law, as stated above, is unfair for the following reasons:-

a) Where the right of appeal is restricted by s.5 IA 1988, all the SSHD has to show is that there was in law power to make the deportation order, eg. in a s.3(5)(a) case, that the immigrant breached a condition of his leave. There is no power to consider whether the decision is in accordance with the law (eg. whether it is procedurally fair, or whether the SSHD has taken his own policies into account in reaching the decision). There is further no power to review exercise of discretion.

b) It is unfair that a person who is an illegal entrant will not have an appeal on the merits of his case, even though he may have very strong ties in the United Kingdom, and may have spent many years here. The evil of entry in breach of the immigration laws should be weighed in the balance by an independent adjudicator on appeal. It

should not be determinative of whether there is an appeal at all.

c) At present challenges to removals of illegal entrants are made by way of judicial review. The Court enquires whether the jurisdictional fact necessary for removal, ie. whether the applicant is an illegal entrant, is made out. Although this approach is preferable to the narrow Wednesbury approach on review, manifestly it does not provide a remedy whereby compassionate features may be balanced against removal.

4) Recommendation

It is recommended that all appeals against expulsion from the UK should be reviewed in the light of the merits and the legality of the case, including illegal entrants already present in the United Kingdom.

In considering the case on the merits, the appellate authority will balance the "public interest" against the compassionate circumstances of the case.

B. IF A SETTLED PERSON IS NOT RE-ADMITTED TO THE UNITED KINGDOM, THIS SHOULD BE TREATED AS A FORM OF DEPORTATION AND THERE SHOULD BE AN IN-COUNTRY RIGHT OF APPEAL ON THE MERITS

Current Law

The current immigration rules provide that a returning resident "may" be admitted for settlement if the immigration officer is satisfied that he:-

a) Had indefinite leave to enter or remain in the United Kingdom when he last left, and

b) Has not been away from the United Kingdom for more than two years; and

c) Did not receive assistance from public funds towards the cost of leaving the United Kingdom; and

d) Now seeks admission for the purpose of settlement.

The Immigration Rules state that a returning resident may still be re-admitted if he has spent more than two years out of the United Kingdom "if, for example, he has lived here for most of his life".

There retention of a permissive (as opposed to a presumptive) discretion in the immigration officer entails a serious risk that such discretion may be exercised on an unjustfiable basis (eg. on the basis of an allegation, later held to be ill-founded, that

previous leave was obtained by deception). Accordingly a returning resident may inappropriately be refused re-admission for settlement. Presently such a person will only have a right of appeal from abroad.

Recommendation

Accordingly, the law should be amended to allow an in-country right of appeal on all the merits of the case for such persons, in the light of the substantial connections with UK which will have been enjoyed by such persons.

Exclusion of persons with indefinite leave to remain in the UK is sufficiently similar in logic to expulsion of such persons from the UK so as to require equal remedies in respect of both administrative decisions.

C. THE BOUCHEREAU TEST/PRINCIPLES SHOULD BE APPLIED TO PERSONS SETTLED IN THE UNITED KINGDOM WHO APPEAL A DECISION TO DEPORT

1) Current Law

At present, European Union ("EU") and non-European Union ("non-EU") nationals have different principles applied by the Courts to their case, when the Court is considering deportation. EU nationals are treated more favourably than non-EU nationals.

On considering whether an EU national should be deported, the Court should apply the principles established the case of Bouchereau (1978) 1 QB 732.

EU nationals exercising treaty rights in the United Kingdom are protected by EEC directives which provide that member states should not derogate from the free movement rights guaranteed by the treaty except on grounds of "public policy, public security or public health". Directive 64/221 makes it clear that expulsion on such grounds would have to be "based explicitly on the personal conduct of the individual concerned", and that "previous criminal convictions shall not in themselves constitute grounds for the taking of such measures".

On examining these provisions in the Bouchereau case, the European Court of Justice ("ECJ") held that:

> "A previous criminal conviction can only be taken into account insofar as the circumstances which gave rise to the conviction are evidence of personal conduct constituting a present threat to the requirement of public policy".

There were held to be two ways in which this threat might exist. Firstly, if there was "a propensity to act in the same way in the future"; or secondly, if "past conduct alone may constitute such a threat".

The Bouchereau test currently only applies to EU nationals exercising their treaty rights; it does not apply to non-EU nationals. The principles applied to non-EU nationals are those found in the Immigration Rules, which require a balancing exercise to be performed between the public interest and any compassionate circumstances of the case. This is different from the Bouchereau test which requires the Secretary of State to meet the higher test of whether the presence of the putative deportee constitutes a present threat to the requirements of public order and so on.

2) Unfairness of Current Law

At present, EU nationals are treated more favourably than settled non-EU nationals on deportation. In certain respects, the fact that a non-EU national with indefinite leave to

remain in the United Kingdom may remain without a time limit and may claim public funds for an indefinite time, places him in a more favourable position than EU nationals, who may not claim public benefits for an indefinite time. The non-EU nationals settled status may accordingly be considered to be superior to that of the EU national. Therefore, that a lower test may be used on considering whether a decision to deport is correct is unfair.

Recommendation

ILPA recommends that the principle set out in the Bouchereau case should be applied to all persons settled in the United Kingdom who are being considered for deportation on conducive grounds.

Topic 4

PERSONS LAWFULLY RESIDING IN THE UK FOR 10 YEARS OR MORE SHOULD ONLY BE EXPELLED IF IT IS PROVEN THAT THEY HAVE BREACHED NATIONAL SECURITY, AND SHOULD HAVE A RIGHT OD APPEAL IN A FORUM WITH THE POWER TO CONSIDER ALL THE MERITS OF THE CASE. THE NATIONAL SECURITY PANEL ('3 WISE MEN') SHOULD BE ABOLISHED.

The Current Law

1. A person lawfully resident in the UK for 10 years or more may apply to the Secretary of State to be granted leave to remain indefinitely in the UK. Such an application is considered by the Secretary of State as part of his policy, and will only fail to be granted if there are strong countervailing factors.

2. In any case, a person lawfully resident in the UK for 10 years or more may be expelled from the UK under s3(5)(b) IA 1971, i.e. that deportation would be conducive to the public good. If such deportation is deemed also to be conducive in the interests of national security or of the relations of the UK and any other country or for other reasons of a political nature, there is no right of appeal (s15 (3) IA 1971).

3. Further such a person, if convicted of an imprisonable criminal offence may be recommended for deportation by the criminal court, and the SSHD may accept that recommendation.

Deficiencies

4. There is no recognition under the Immigration Rules that long residency of 10 years should lead to an application for an applicant to be granted indefinite leave to remain. The fact that such an application can only be considered at the discretion of the Secretary of State places insufficient weight upon the significant period of time an applicant has spent in the UK.

5. The s3 (5) (b) and s(6) power presents too low a threshold for the SSHD when attempting to expel a person who has enjoyed such a substantial period of lawful residence in the UK. The case law is clear that an absence of a propensity to reoffend will not bar the SSHD from successfully instituting deportation proceedings under s3 (5) (b) (see Ex p Florent).

6. As to cases where the ground for the decision is that deportation is conducive to the public good as being in the interests of national security etc., the lack of appeal rights renders the situation highly unsatisfactory. It deprives the deportee of the internationally recognised right to an effective legal remedy.

7. The sole remedy is the right under the Immigration Rules to make representations to a panel of advisors (Para 374). Such a deportee may only be informed "so far as is possible, of the nature

of the allegations against him" (Para 374) and after receiving representations the panel only has the power "to tender advice to the Secretary of State" (Para 374).

8. There is no right to legal representation before the national security panel of advisors.

9. The procedure is in breach of natural justice given that national security deportees may have no idea of the case they have to meet.

10. The foregoing procedure also runs counter to the 1967 report of the Wilson Committee: "After discussion with the Home Office we are satisfied that there is no need to exclude a case from the appeal system merely because the decision was taken on security grounds." (Para 94, Committee on Immigration Appeals 1967 Comnd 3387).

11. Note that the position for EU nationals arguably entails a right of appeal (see Puttick [1984] Imm AR 1189 and Shingara which is pending before the ECJ).

12. Asylum applicants are deprived of a right of appeal not only response to a decision to proceed with deportation action on national security grounds, but also in relation to a decision to refuse to recognise an asylum applicant either because the SSHD finds his claim raises no protection issues under the 1951 United Nations Convention or because the applicant is excluded from protection for reasons of national security.

Recommendations

13. The requirement that expulsion is justified as in the interests of national security is an appropriate threshold for removal of persons lawfully residing in the UK for 10 years. This gives effect to the European Convention on Establishment.

14. Further there should be a right of appeal against such a decision. Anything less presents an insufficient safeguard as to the exercise of the power. Full appeal rights entail:
a. the ability to present evidence
b. the ability to litigate the merits of the case
c. that the decision of the appellate body (e.g. IAT) is binding on the SSHD.

15. There should be a full right of appeal for national security detainees whose asylum claims have been refused by the SSHD.

16. An applicant who has been lawfully resident in the UK for 10 years should be entitled to apply for settlement under the Immigration Rules.

E. PERSONS WITH STRONG FAMILY TIES OR LONG RESIDENCE FROM CHILDHOOD SHOULD IN GENERAL NOT BE EXPELLED. PARENTS OF CHILDREN WHO ARE BRITISH CITIZENS (OR ENTITLED TO REGISTER AS BRITISH CITZENS) SHOULD NOT BE EXPELLED OTHER THAN FOR REASONS OF THE PUBLIC GOOD. IN ADDITION, PARENTS WITH CARE AND/OR ACCESS SHOULD BE TREATED IN THE SAME WAY.

1) Current law

There is a concession for persons with long residence to be granted indefinite leave to remain if they have spent 10 years lawfully or 14 years lawfully/unlawfully.

If a person is born in the United Kingdom after 1 January 1983, and is not a British citizen, s/he may become eligible to register as a British citizen after having resided for 10 years.

Currently, the European Convention on Human Rights ("ECHR") is not incorporated into domestic law. However, Home Office guidelines DP/2/93 (recently superseded) on cases involving marriage and children was inspired by Article 8 of the ECHR Convention relating to the right to family life.

There is no provision for parents of children who are British citizens, or entitled to register as British citizens, to remain with them in the United Kingdom.

Unfairness of Current Law

The long residence concession which provides for persons with long residence and ties in the United Kingdom to be granted indefinite leave to remain, does not appear to have been specifically drafted with children in mind, but rather adults. Children adapt quicker to their surrounding and form strong ties quicker than adults do. It is unfair to expect an individual who has spent, for example, up to 5 of his/her developmental years in the United Kingdom to sever his/her ties with the United Kingdom and start life again in the foreign country.

Parents should not be denied the right to be with their British citizen children (or those entitled to register as British citizens). In addition, parents with care and/or access should not be denied this. The child's welfare as a paramount consideration is recognised in English law (s1 Children Act) and by the International Convention on the Rights of the Child, to which the United Kingdom is a signatory.

It would be unfair for parents with children who are British citizens to be expelled. It is unreasonable to expect a child to have to chose between the country of which s/he is a national and being with his/her parent(s) in order to maintain family unity and life. A British child should have the presumptive right to have his/her parents being permitted to reside with him/her in the United Kingdom. The rights of parents with care and/or access are dealt with as follows in DP2/93:-

"The fact that the European Court is strongly disposed to find a breach of Article 8 of the European Convention where the effect of an immigration decision is to separate a parent from his/her child is also relevant in cases involving divorced or separated parents. Where one parent is settled in the United Kingdom and removal of the other would result in deprivation of frequent and regular access currently enjoyed by either parent, Section 3(5)(a), 3(5)(b) (in non-criminal cases) or illegal entry action should be abandoned. Reliance cannot be placed on the argument that the United Kingdom settled parent can travel abroad to continue access".

Further, the guidelines provide that:-

"Cases will arise where a person to be deported/removed has custody of a child with a right of abode in the United Kingdom by a previous partner who is no longer in contact with the child. Here the crucial question is whether it is reasonable for the child to accompany the parent to live abroad"

and outline issues to be considered before any deportation action is taken.

It is unfair that these provisions now superseded are not included in the Immigration Rules to give them the force of law. At present, the current Immigration Rules only allow a

parent access for 12 months, prohibit the parent from working or having recourse to public funds and do not fully reflect the provision for the right to family life under the ECHR. The Immigration Rule provisions are also restricted to parents who are either legally divorced or separated.

Recommendation

Persons with long residence since childhood should not be expelled. The policy should be made more flexible for individuals who have resided in the United Kingdom for a long period of time since childhood. A person who has resided in the United Kingdom illegally for a period of 5 to 10 years from ages ranging between birth and the late teens, would have spent the most formative period of their lives in the United Kingdom. It is unreasonable to expect individuals who have spent his/her developmental years in this country to cut-off ties built in the United Kingdom, and begin life again in a foreign country.

The proposal is therefore that children aged up to 18 years old should be allowed to remain indefinitely in this country if they have spent 5 years with either a legal status or without status. The Secretary of State should also continue to exercise discretion on those cases of less than 5 years residence, taking into account the ties built up in the United Kingdom, and the overall child's welfare.

When considering the child's welfare, account should be taken of

connections with the United Kingdom as opposed to the country to which the person may be removed, language difficulties, impact on education, ability to adapt abroad without being disadvantaged and any medical needs.

Parents with children who are British citizens should not be expelled.

The old Home Office guidelines of DP/3/93 should be included in the Immigration Rules.

F. ABILITY OF THE COURT TO RECOMMEND DEPORTATION IN CRIMINAL MATTERS

1. Current Law/Unfairness of the Current Law

Criminal Courts are presently entitled to make a decision to recommend the Home Office to proceed with a decision to make a deportation order where an individual has been convicted of a criminal offence. While the Courts are able to listen to arguments in mitigation aimed at preventing such a recommendation, the grounds upon which such argument can be made is severely restricted. The Courts are only able to take into account an individual's circumstances in the United Kingdom. The Court of Appeal held in Nazari that the Courts do not have the power to examine an individual circumstances abroad, (ie. in his/her home country or the country to which the deportee is to be removed). Courts are therefore presently making recommendations to deport based upon restricted information. This goes against fairness and the ability of the Courts to make fully considered decisions.

On the other-hand, the Home Office has the power to consider all circumstances relating to a convicted persons immigration case, including their circumstances abroad when making a decision of intention to deport under s5 Immigration Act 1971. The Home Office are also able to take into account a person's overall immigration history, including detailed information held on their files which may span several years.

Taking into account the severity of a decision to deport, the need for a fully considered decision is essential. The Home Office has the ability to spend time reviewing papers, it can conduct interviews with concerned parties and receive representations. These are opportunities not available to the Courts.

Criminal Judges and Magistrates do not receive adequate training in Immigration Law to be able to understand all aspects of that Law, and the effect that a deportation order may have upon a deportee and his or her family. This means that decisions to issue recommendations to deport are often based on inadequate consideration.

Criminal Solicitors and Barristers providing representation are often inexperienced in Immigration Law and ignore relevant factors, or the consequences which the recommendation for deportation entails for the individual concerned. It is not unusual for argument in mitigation of a deportation order either not be made or to be dealt with in a cursory manner in submissions lasting only a few minutes.

Those presently being subjected to recommendations for deportation by the Court as a consequence of a criminal conviction are therefore being denied adequate representation in matters relating to immigration by criminal lawyers. On the other-hand the Judges and Magistrates dealing with these cases lack sufficient knowledge of the Immigration Law, and in

any case are prevented from considering all factors relating to an immigrants case for a fully considered and reasonable decision to be made.

The Criminal Courts and the Home Office aim to make decisions for deportation for those convicted of criminal offences for the public good or the public safety. The consequences of this reasoning for the immigrant concerned are serious in the extreme. The first consequence is that the immigrant receives a double punishment simply because he or she is an immigrant. Whereas a national with British citizenship is released into the community after serving sentence on the basis that s/he poses no danger to the public, the immigrant is viewed as being of continuing danger despite having served the same sentence for the same offence. This discriminatory treatment is not sensibly grounded.

At the same time the immigrant detained for a criminal offence is almost always denied parole or temporary release pending the Home Office's consideration of a recommendation for deportation and often serves time in prison, sometimes amounting to several months beyond the total sentence of the Court. This problem could also be alleviated if the Home Office begin their considerative process in response to the recommendation for deportation during the period of detention rather then after the time when a convicted person has either served a criminal offence or is about to be paroled for release. In addition bail (in the immigration jurisdiction)

should be a possible remedy for those held beyond their parole date or completion of sentence.

A deportation order results in a deportee being unable to reapply to revoke the deportaion order and apply to re-enter the United Kingdom for least 3 years, and even then the chances of success are small. The deportee is often removed to a country which s/he may not have been for several years and where no family members, friends or other support system exist. Those left behind in the United Kingdom may include spouse and children, who have to face the emotional trauma of separation, and often financial hardship.

Recommendation

a) That Criminal Courts should not have the power to make recommendations for deportation.

b) Notification of conviction should be passed to the Home Office.

c) If action towards deportation is taken and detention is maintained, a detainee should be given the right to apply for bail as of the parole date.

TOPIC 7 - ECHR

The Current Law

1. The ECHR is not at present incorporated into domestic law.

2. Its effect was considered in Ex p McQuillan (CO/861/94)when Sedley J stated:
"Through the jurisprudence of the ECJ the principles, though not the test of the ECHR now inform the law of the EU. If, as the Government has accepted in Vilvarajah, an irrationality challenge can be mounted where a real risk of an infringement of article 3 can be shown to have been ignored; and if on a wider scale it is for the courts of the UK to apply principles of European law wherever appropriate; the principles and standards set out in the ECHR can certainly be said to be a matter of which the law of this country now takes notice in setting its own standards...Once it is accepted that the standards articulated in the ECHR are standards that both march with those of the common law and inform the jurisprudence of the EU, it becomes unreal and potentially unjust to continue to develop English public law without reference to them. Accordingly, and without in any way departing from the ratio decidendi in Brind [(1991) AC 696] the legal standards by which the public bodies are supervised can and should differentiate between those rights which are recognised as fundamental and those which, though known to the law, do not enjoy such pre-eminent status.. Once this point is reached, the standard of justification for infringements of rights and freedoms by executive decision must vary in proportion to the significance of the right which is at issue. Such an approach is indeed already enjoined by EX p Bugdaycay in relation to the predominant value of the common law - the right to life - which , as it happens, the ECHR reflects. Whether this in itself is a doctrine of proportionality I do not now pause to ask; if it is, the HL has long since contemplated its arrival with equanimity." pp. 39-40.

Deficiencies

3. It is artificial for the UK Government to be bound by a Treaty containing principles governing the relationship of individuals to the state, where those principles are not enforceable in the English courts.

~~4. Judicial review offers no substitute for incorporation of the ECHR into domestic law.~~

5. Individuals who petition the Commission must wait for an inordinate period of time before their cases are litigated.

Recommendation

6. The ECHR should be incorporated into domestic law.

TOPIC 8 - THE EUROPEAN SOCIAL CHARTER

The Current Law

1. The European Social Chapter 1961 (ESC) is not at present incorporated into domestic law. Its legal domestic effect is analogous to the ECHR.

2. Article 19(1) ESC provides that the Contracting Parties undertake:

"(1) to maintain or satisfy themselves that there are maintained adequate and free services to assist (migrant) workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration;

(6) to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;"

Deficiencies

3. It is artificial for the UK Government to be bound by a treaty containing principles governing the relationship of individuals to the state, where those principles are not enforceable in the English courts.

~~4. Judicial review offers no substitute for incorporation of the ESC into domestic law.~~

5. The definition of the 'family' is narrow (spouse and dependant children under 21).

Recommendation

6. The ESC should be incorporated into domestic law.

7. The effect of incorporation would, inter alia, entail proceedings to be taken against sensationalist xenophobic coverage of immigration issues in the media.