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Immigration Act: Article 8

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Article 8 of the European Convention on Human Rights protects the right to respect for private and family life. A key provision of the Immigration Act, section 19, attempts to constrain the interpretation and application of Article 8 by the courts in immigration cases. This Information Sheet discusses the possible impact of that provision.

What is Article 8?

Article 8 provides that everyone has a right to family life and to a private life. It encompasses relationships with family members, social and cultural life, friendships, and so on. Article 8 protects these rights by limiting the State's power to interfere with them, for example by preventing someone from living with their family members by removing them from the jurisdiction. It stipulates that any interference must be for a specified aim, necessary in a democratic society and proportionate to the aim in question.

Article 8

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.

This Article frequently comes into play in immigration cases where there is a balance to be struck between the State's right to control its borders and the rights of those who have family or private life connections within the UK. Over the past decade, the UK Courts have frequently found the Home Office to be acting in breach of this Article, by separating families and thereby breaching their human rights. For example, by denying a person leave to remain in the UK without having due regard to the effect that this would have on the person's UK-based children.

Background to the changes

This is the second attempt by the Government to control the scope of Article 8 and the important rights it protects. The first attempt was by way of changes to the Immigration Rules in 2012. When this was challenged, in a case called *MF (Nigeria)*¹, the Court of Appeal made clear that the Courts have the same flexibility they have always had to weigh factors up and make an overall assessment as to whether a person's family life rights outweigh the State's right to remove them. This judgment in essence meant that the Government's intention delimit the scope of the right to family life failed. Undeterred, the Government has now made provision in the Immigration Act to attempt to do much the same thing, this time by way of primary legislation.

What do the new provisions say?

The Immigration Act specifies certain matters to which Courts and Tribunals must "have regard" when deciding a case involving family and / or private life rights. It purports to set out what the "public interest" is, on the State's side of the balancing exercise involved in Article 8. It does this by specifying that it is in the public interest that a person seeking to enter or remain in the UK speaks English and the person is 'financially independent'. By setting out these matters it appears that the government wants the courts to give them especial weight.

The Act then goes further and arguably strays into the realm of attempting to specify the weight given to factors on the individual's side of the balancing exercise. However the courts have long held that there are no firm rules in this area – everything is fact-specific. For example, it states that little weight should be given to any family life established while a person was in the UK unlawfully, and that little weight should be given to any private life established during a time when a person's immigration status in the UK was "precarious".

Analysis

Many of these matters are not on their face controversial – they are relevant factors which courts can and do take into account in cases involving Article 8. Thus it remains to be seen what, if any, impact the Government will have had by spelling these matters out as mandatory requirements. It is arguable that a court is still free to say "I have had regard to X factor, but do not give it much weight for the following reason". As Article 8 is part of the European Convention on Human Rights, the ultimate arbiter of the scope of its protection is the Court in Strasbourg. Thus it is to be hoped that the UK courts and Tribunals will remain guided primarily by the judgments of the European Court on this article, rather than by government statements or attempts to address the scope of parts of the Article in primary legislation. However as the Government's approach is a relatively novel one, we do not yet know what impact this new provision will have on the interpretation of the rights in question in future.

¹ *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192