

Recent Article 8 decisions and Legacy Cases

Introduction:

1. This short note accompanies a short discussion session at the Terrence Higgins Trust on Wednesday, 16th July 2008.
2. On 25 June 2008, the House of Lords delivered four important judgments – of which three were directly related to Article 8 (the right to respect for private and family life) in the context of immigration control, and the remaining one gave some consideration to Article 8.
3. The judgments are relevant to a variety of immigration cases – whether or not in the current legacy; and whether or not these cases are or were connected to asylum claims. However, since it is clear that the judgments will have importance for a number of legacy cases, and legacy cases are generally a matter of considerable interest, it has been decided to discuss these together.
4. This note sets out some important extracts from the judgments. However, these extracts, and the brief explanations of the judgments, cannot replace the need to give full and careful consideration to the judgments themselves (and other caselaw) when advising on or making representations on Article 8. Links to the judgments mentioned in this note are provided at the end of this note.

Article 8 – general points

5. Article 8 provides protection against interference with a person's private or family life. In immigration cases, this often involves:
 - cases where someone wants to join his or her family in the UK
 - cases where someone faces being separated from his or her family in the UK
 - cases where someone has established other private life interests in the UK and faces being separated from these

6. It is well established that Article 8 can, depending on the particular circumstances of a case, provide a way to challenge what would otherwise be a lawful exercise of immigration control in removing someone from, or refusing someone's entry to, the UK. In broad terms this will depend upon:
- the relative importance of the individual's family and private life
 - the degree to which removal or refusal of entry would interfere with that individual's private and family life
 - whether, taking all factors into account, it is disproportionate to insist upon immigration control (removal/refusal of entry) despite the degree of interference this would cause

7. When considering making a claim or appeal relying on Article 8, it is important to carefully consider what private and family life are all about. The following extract from the opinion of Lord Bingham in *Huang* [2007] UKHL 11 is helpful:

"...the main importance of the case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant."

8. The focus here on family should not be taken as an indication that the discussion has no or less relevance to other important human relationships and activities, which constitute private life. The same factors and general approach would be equally valid in seeking to understand what was meant by private life in the context of Article 8. Moreover, in Article 8 claims and appeals, it is important to remember that Article 8 protects a right to respect for both private and family life. When seeking to establish the degree of interference that may be caused by immigration control (removal/refusal of

entry) or assessing proportionality, it is necessary to consider all relevant factors together – including those that may relate to private life and those that may relate to family life.

Article 8 – recent judgments

9. These are briefly described in turn in the following paragraphs.

10. ***Beoku-Betts* [2008] UKHL 39:** In this case, the House of Lords considered the question of whose private and family life rights ought to be considered in an Article 8 appeal – should the Asylum and Immigration Tribunal (AIT) consider only the rights of the individual appellant; or should the rights of all the relevant family members be considered? The House of Lords decided that all the relevant family members should be considered.

“The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed.”

11. An example of how this should work: Mr A and Ms B are cohabiting partners; and they have a child C. Ms B is British and so is C. Mr A is facing removal to his country of origin, having been refused asylum. Mr A appeals. On his appeal, the AIT must consider the full impact upon the private and family life of each of the three family members of the possible separation of the family unit; or any expectation that the family leave the UK in order to stay together.

12. ***Chikwamba* [2008] UKHL 40:** In this case, the House of Lords considered one of the standard Home Office responses in family life cases – that someone who was not entitled to be in the UK, but who had established a family life in the UK, should ordinarily return to his or her country of origin and join the entry clearance queue. The House of Lords decided that the Home Office approach was wrong.

“...it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad.”

13. An example of how this would work: Mr A and Ms B are married and have a child, C. Mr A and Ms B are from the same country or origin, but Mr A has been refused asylum while Ms B has been granted asylum. If Mr A's Article 8 claim (based upon the family life shared between him, his wife and child) would otherwise succeed, it will ordinarily not be a good answer to his claim to be granted leave to remain in the UK with his family that he could return to his country of origin to make an application for entry clearance to join his family here.
14. **EB (Kosovo) [2008] UKHL 41:** In this case, the House of Lords decided the question of how relevant was a period of delay on the part of the Home Office in resolving someone's immigration situation when that person made an Article 8 claim or appeal. The House of Lords decided that delay was relevant in three ways. Firstly, the longer the delay, the more likely it was that the individual's private or family life was of increased substance. Secondly, the longer the delay, the more likely that any feeling of impermanence (which might lessen the significance of a relationship) had lessened or disappeared. Thirdly, where the Home Office was seriously culpable in the delay, this might undermine the importance of immigration control in the individual case.

“First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened...”

“Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship... A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine

but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.

“Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes.”

15. An example of how this would work: Ms A met Mr B soon after her arrival in the UK; and shortly after her asylum claim. They have been living together for several years. Ms A has been waiting many years for her asylum decision; but in the meantime she has kept in regular touch with the Home Office. Ms A and Mr B remain together, and would like to marry. The relationship is stronger because of the length of time over which it has developed. It is also stronger because, even though the couple may be expected to have regarded the relationship as “precarious” when the relationship began, there is now a strong sense of permanence about it. Had Ms A’s case been considered much earlier, she would have benefited from a policy relating to asylum-seekers from her country of origin. The policy has now been withdrawn. The importance of immigration control in Ms A’s case may be taken to be reduced because of the Home Office delay; and because it was not thought necessary to remove others (who got leave to remain under the previous policy) in a similar situation to Ms A.

16. ***AL (Serbia) & Rudi [2008] UKHL 42***: This case was about whether unaccompanied children could get the benefit of the family ILR exercise, introduced by the Home Office in October 2003 (later revised in June 2006). That exercise (policy) remains available at:
<http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apunotices/oneoffexercise.pdf?view=Binary>

17. The Article 8 argument in this case was about whether there was a discriminatory interference with the private life of unaccompanied children who were treated less favourably than accompanied children. The case is not discussed in detail here. It is simply noted that the House of Lords rejected the case that unaccompanied children should have the benefit of the family ILR

exercise, though deciding that it was open to the Home Office to consider any compassionate and other circumstances of each individual case.

Legacy Cases

18. ILPA has produced a number of information sheets on legacy cases and short papers to accompany workshops and other events. These are available on the ILPA website (www.ilpa.org.uk) in the “Info Service” section; and the information is not reproduced here.

19. However, it is noted that many legacy cases may raise significant Article 8 issues. Individuals and families who have been in the UK for substantial periods of time are likely to have developed important private and family life rights. This may include matters that go far beyond matters of family relationships, marriage or children – though these would obviously be very important.

20. An individual’s healthcare could well be an important aspect of his or her private life. The quality of his or her life – the capacity to live a “*full and fulfilling*” life; and the quality of family and/or other relationships and social activities may be profoundly affected by the care and treatment the individual receives or the health risks to which he or she is not exposed in the UK. The individual may have a significant degree of dependency on healthcare – developed over a period of time. This might include dependency on a particular drugs regime; it might include the importance of a relationship with a particular health professional or health team (this may be especially relevant in respect of counselling services). It might include the support that a wider community provides in sustaining an individual’s sense of self-worth, dignity and general enthusiasm for life – including engagement with their care or treatment. And it might include the social life (family or private), which the individual is able to engage in because of any or all these other factors. All of these factors would need to be supported by evidence (including witness statements demonstrating the life enjoyed, its importance and how removal would interfere or destroy it).

21. Insofar as how legacy cases are considered, it is relevant to note that a wide range of factors should be considered in any legacy case – as and when it is actively considered: see in particular, ILPA information sheet “Legacy Cases 4”. Plainly, ongoing healthcare or treatment, and indeed any private and family life an individual is exercising in the UK, and any consequences for the individual if removed from the UK, are relevant factors to be considered.
22. As regards how to contact the Case Resolution Directorate (that part of the Home Office responsible for legacy cases), information is provided in ILPA information sheet “Legacy Cases 6”. As to when or whether it is sensible to take steps to contact the Case Resolution Directorate, or update them with any information, relevant information is also provided in ILPA information sheet “Legacy Cases 5”.

Legal advice

23. Please note that ILPA cannot provide advice or representation on individual cases. Many ILPA members provide immigration advice. Several of them have their contact details available on our website (www.ilpa.org.uk) in the “Directory” section.

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Article 8 judgments referred to in this note:

Beoku-Betts

<http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080625/beoku.pdf>

Chikwamba

<http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080625/chikwa.pdf>

EB (Kosovo)

<http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080625/kosovo.pdf>

AL (Serbia) and Rudi

<http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080625/serbia.pdf>

Huang

<http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070321/huang.pdf>