



Convicted Foreign Criminals and the Right to Family Life

The paper which appears below under the title "Convicted foreign criminals and the right to family life (2)" was completed on 13 February 2013. It is appropriate to precede it with further comments following the Home Secretary's article on the subject which appeared in The Mail on Sunday on 17 February. The Home Secretary accuses the judges of disregarding the will of Parliament in failing to implement the provisions of HC 194 (see below for an explanation of HC 194) when considering appeals against deportation by convicted foreign criminals. Her anger appears to have been provoked by three recent decisions of the Upper Tribunal (Immigration and Asylum Chamber), the most recent of which is discussed below. One of her complaints is that "some judges seem to believe that they can ignore Parliament's wishes if they think that the procedures for parliamentary scrutiny have been weak". This appears to be a reference to another case *Izuazu* [2013] UKUT 45. The way Immigration Rules are made is explained in Legal Paper MW . Under the provisions of section 3(2) of the Immigration Act 1971 they are subject to approval by both Houses of Parliament by the negative resolution procedure. The Rules contained in HC 194 went through this procedure in June 2012 and were debated at some length by the House of Commons. However, the Tribunal in *Izuazu* made a disparaging and unjustifiable reference to this procedure by saying that it "provided a weak form of Parliamentary scrutiny" (paragraph 49).

I have the following comments on the Home Secretary's article:

1. The judges who have been criticised by her are senior immigration judges in the Upper Tier of the Immigration and Asylum Chamber. No cases dealing with HC 194 have yet reached the Court of Appeal. In her article the Home Secretary appears to spare High Court judges from her more severe criticisms, so as noted in point 3 below the Court of Appeal might yet save the day.
2. There have been just three cases decided by the Upper Tier which have given rise to the criticism. The case of *Izuazu* was an appeal by the Home Secretary against a decision in the case of a Nigerian woman criminal who successfully appealed to the First Tier of the Tribunal against deportation. Notwithstanding some of the remarks to which the Home Secretary has taken exception, her appeal to the Upper Tier was successful. In the two other cases appeals by the claimants against deportation were upheld by the Upper Tier.
3. An appeal on a point of law lies with permission against any decision of the Upper Tier in accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007. I am not aware whether the Home Secretary has taken any steps to appeal against the two determinations of the Upper Tribunal which went against her. An early decision in the Home Secretary's favour from the Court of Appeal might obviate the need to introduce primary legislation.

4. The Home Secretary states, referring to her intention to bring forward a Bill later this year: "Once the primary legislation has been enacted, it is surely inconceivable that judges in this country will maintain that it is they, rather than Parliament, who are entitled to decide how to balance the foreigner's right to family life against our nation's right to defend itself." This appears to overlook the provisions of section 4 of the Human Rights Act 1998, which empowers a court to determine that a provision of primary legislation is not compatible with the rights set out in the European Convention on Human Rights and if so satisfied to make a declaration of incompatibility. Such a declaration does not invalidate the legislation in question but puts a strong political obligation on Parliament to amend the law.
5. Whatever happens about the future interpretation of the ECHR, HC194 and any legislation which may be passed on the subject, no deportation order will be able to require a child who is an EU citizen to be deported. This follows from, the decision of the European Court of Justice in Zambrano, mentioned in paragraph 5 of the following paper.

Convicted Foreign Criminals and the Right to Family Life (2)

Article 8 and HC 194

The subtitle of this paper is convenient shorthand for discussion of Article 8 of the European Convention on Human Rights (ECHR) which enshrines the right to respect for private and family life and House of Commons Paper 194 (HC194) which enacted the amendments to the Immigration Rules made in June 2012 by which the Home Secretary sought to restrict the ability of convicted foreign criminals to avoid deportation by relying on Article 8.

2 In order to avoid repetition I invite the reader to consult [Legal Paper MW 270 issued in July 2012](#) which sets out in detail the provisions of Article 8 and of the new Immigration Rules in HC 194. The new Rule 397 states that while no deportation order will be made if removal would be contrary to the UK's obligations under the ECHR, it will only be in exceptional circumstances that the public interest in deportation is outweighed. Rules 398, 399 and 399 provide for deportation for convicted criminals over certain thresholds such as periods of imprisonment, but provide also for exceptions.

3 A recent decision by the Upper Tribunal (Immigration and Asylum Chamber) *Ogundimu v Secretary of State for the Home Department* [2013] UKUT 60 is the latest of a number of decisions indicating the restrictive manner in which the Tribunal views the proper interpretation of the new Rules, and is particularly significant as it was presided over by Mr Justice Blake, President of the Tribunal. The appellant was a citizen of Nigeria born in 1984. He joined his father who was settled in the UK in 1991 and in 1999 was granted indefinite leave to remain. He began on a long criminal career at the age of 15 and after 30 convictions, including some for drug offences, and various periods of imprisonment, the decision was taken that he should be deported as a persistent offender, this being one of the categories recognised by Rule 398(c), which means that only in exceptional circumstances will the public interest in deportation be outweighed by other factors. He has had a relationship with a woman in the UK over several years and they have a son aged 5. He pleaded the right to family life under Article 8 and this plea was accepted by the Tribunal, but was not accepted as conclusive, having regard to the new Rules introduced by HC 194.

4 The Tribunal gave careful consideration to the new Rules which were drafted in such a way as to make it clear that they were not intended to conflict in any way with the provisions of Article 8. Article 8.2 permits public authorities to interfere with the right to private and family life created by Article 8.1 in "accordance with the law and as necessary in a democratic society in the interests of national security or the economic well being of the country..... etc." The purpose of the new Rules was to spell out the level of criminal convictions which would justify the application of Article 8.2 and to emphasise that where that level is reached by a particular person "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors." As noted above, the appellant had a string of convictions, some for serious offences, from the age of 15, and could readily be classed as a persistent offender. What saved the appellant from being deported in the end was his relationship with his 5 year old son, which the Tribunal regarded as material in coming to the conclusion that notwithstanding the new Immigration Rules the appellant's rights under Article 8 should prevail. The appellant's relationship with his son was closer than

that of the son's mother and it was concluded that the son could not be deported with his father and equally could not reasonably be left in the UK with his mother because of the relatively weaker relationship. In reaching these conclusions the Tribunal concluded that there were close ties between father and son and surprisingly does not appear to have considered the possibility that the father's life of crime meant that he was a bad influence. The Tribunal found that the provisions of the new Rules which could with safeguards require children of appellants being deported to accompany their parents were contrary to section 55 of the Borders, Citizenship and Immigration Act 2009 which spell out the obligations of the Home Secretary in relation to the application of immigration legislation to children under 18. A further obstacle in this case was that the child was born in the UK and was a British and therefore also an EU citizen. As a result of the decision of the European Court of Justice in the case of Zambrano (2011) an EU citizen cannot be expelled from the territory of the EU.

5 It might have been thought that the fact that the appellant had been resident in the United Kingdom for many years would be in his favour, but the Tribunal did not so rule. Another matter which the Tribunal had to consider was whether deportation was a proportionate action to take. Rather surprisingly the Tribunal thought it was disproportionate, because in spite of his many past convictions he had apparently been going straight since 2008.

6 On the basis of the matters discussed in paragraphs 3,4 and 5, the appellant's appeal against deportation was allowed.

7 It was to be expected that the new Rules, however carefully drafted, would not obviate all the difficulties involved in enforcing the deportation of convicted criminals. The Upper Tribunal in this case has interpreted the Rules meticulously and apart from its conclusion on the application of the Rules in relation to children of convicted criminals has not sought to strike them down. It appears that the right to family life is likely to prevail in cases where the family includes any child under 18 who is in the UK and an EU citizen. This case and one or two others in recent months have tested the new Rules and may have reduced their intended strength but so far without fatally weakening them. It remains to be seen whether the Home Office will seek to take this latest decision to the Court of Appeal.

Harry Mitchell QC
Honorary Legal Adviser
Migration Watch
18 February 2013