ARTICLE 8 AND DEPORTATION:

CHANGES TO THE RULES AND AREAS OF CHALLENGE

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1. As from 9 July 2012, the Immigration Rules were amended to include substantial changes in the way in which the rules deal with family relationships and in particular Article 8 of the European Convention on Human Rights. The changes follow the consultation process, started in July 2011, on Family Migration. It is clear that the changes will generate extensive litigation. This paper is limited to a particular area which is already *sub judice*: the changes to the Rules in respect of deportation.

2. Firstly, this paper considers the statutory framework for deportation and how Article 8 arguments were dealt with prior to the rule changes. Secondly, it will consider the rule changes themselves. Thirdly, it will consider the extent to which those new rules can themselves be subject to challenge and the type of arguments which may be pursued by those who seek to avoid deportation because of their family and/or private life in the UK.

Statutory framework for deportation

3. Section 3 Immigration Act 1971 provides for circumstances in which a person is liable to deportation: where the Secretary of State deems that his deportation is conducive to the public good; where another family member is being deported; and where upon conviction deportation is recommended by a court empowered to do so.

4. Automatic deportation is provided for those who are sentenced to more than twelve months imprisonment: s 32 UK Borders Act 2007. There is no discretion but to make a deportation order, subject to s 33. Notably, however, among the exceptions in s 33 is where the removal pursuant to the deportation order would breach the person's Convention rights.

5. It is also worth remembering the structure of the Human Rights Act 1998. Section 6 prohibits a public authority from acting inconsistently with Convention rights. That applies to the Secretary of State but also to the Tribunal and the courts. Section 3 imposes an

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interpretative obligation, so that legislation is to be construed so far as possible in a way which is compatible with Convention rights. Finally, a court or tribunal must take into account relevant jurisprudence from Strasbourg (s 2).

New rules

6. In short, the changes to the rules seek to elucidate the circumstances in which deportation may be considered a disproportionate interference with the deportee's Article 8 rights. Having done so, they purport to impose a test of "exceptional circumstances" for all other cases where Article 8 is relied upon, but the person does not fall within the circumstances identified in the rules.

7. The rules merit more detailed consideration:

   a. Paragraph A362 provides that where Article 8 is raised in deportation cases, the claim "will only succeed" where the requirements of the rules as at 9 July 2012 are met, "regardless of when the notice of intention to deport or the deportation order... was served". The point is clear: the rules purport to apply to all determinations after the date the rules took effect;

   b. Paragraph 390A imposes the requirements of paragraphs 398 to 399A to decisions to revoke deportation orders and again sets down an exceptionality test;

   c. Paragraph 396 provides that where the Secretary of State is required to make a deportation order under s 32 UK Borders Act 2007, it is in the public interest to deport. There is a certain circularity here: if it was not in the public interest to deport, the Secretary of State would not be required to make a deportation order because the interference with the deportee's Article 8 rights would not be in the public interest, and accordingly s 33(2) would be engaged and the Secretary of State would not be required to make the order;

   d. Paragraph 397 provides that a deportation order will not be made where it would be contrary to the UK's obligations under the Refugee Convention or the ECHR, and that is only in "exceptional circumstances" that the public interest in deportation will be outweighed where the deportation would not be contrary to those conventions. This paragraph seems to suggest that the exceptionality test arises only

where it has first been concluded that there is no breach of Article 8. That appears to be an entirely proper use of the rules. However, the subsequent paragraphs suggest a further application of the exceptionality test to the assessment of Article 8;

e. Paragraph 398 provides that where Article 8 is relied on, the "Secretary of State in assessing that claim will consider whether paragraph 399 and 299A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors". The paragraph also identifies three different classes of offender: (a) those imprisoned for at least 4 years; (b) those imprisoned for 12 months to 4 years; and (c) those cases where the offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law;

f. Paragraph 399 applies only to classes (b) and (c) above. It applies where:

   i. The person has a genuine and subsisting parental relationship with a child under the age of 18 in the UK and the child is a British citizen or has lived in the UK for at least 7 years prior to the decision. In either case it must also be shown that the it would not be reasonable to expect the child to leave the UK and there is no other family member who is able to care for the child in the UK; OR

   ii. The person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK, or in the UK with refugee/humanitarian protection and the person has lived in the UK with valid leave continuously for at least 15 years immediately preceding the date of the decision excluding imprisonment) and there are "insurmountable obstacles to the family life with that partner continuing outside the UK";

g. Paragraph 399A applies to classes (b) and (c) only and applies where:

   i. The person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting

any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go; OR

ii. The person is under 25, has spent at least half his life living continuously in the UK immediately preceding the date of the immigration decision (discounting periods of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go.

h. Paragraph 399B anticipates a grant of leave not exceeding 30 months if paragraphs 399 or 399A apply and paragraph 399C provides for further leave thereafter provided the applicant continues to meet the criteria set out in paragraph 399 or 399A. It is to be noted that there may be circumstances in which a person meets a category (say, for example, a 24 year old who arrived in the UK aged 11 with no ties to his home country) but merely through the passing of time would fall out of that category when he came to seek further leave under 399C;

i. Paragraph 400 provides that where it is claimed that removal under any of the removal provisions would be contrary to the UK's obligations under Article 8, the Secretary of State may require an application to be made under the other new rules (276ADE and Appendix FM). This is perhaps a slightly confusing provision because if removal would be a breach of Article 8, it would be unlawful to remove regardless of whether an application is made. However, it might be a means of declining to grant any form of leave until a formal application is made.

Challenges to the new rules

8. In a sense, the Upper Tribunal has beaten any appellant to challenging the scope of these new rules in *Sanade and others (British children - Zambrano – Dereci)* [2012] UKUT 00048 (IAC). The UT considered whether the proposals contained in the consultation document should affect the outcome of the case before them, albeit the rules had not changed at that point. It is worth setting out the UT's analysis:

> 32. In July 2011 the Secretary of State issued a consultation document called Family Migration. In section 8 of that document the following appears:-
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> "8.11 As a starting point for discussion we suggest that, as a general rule, where a person is convicted of an offence that meets the automatic deportation threshold –

where Parliament has imposed a duty on the Secretary of State to make a deportation order – then it is reasonable to presume that the public interest will warrant deportation and that only in exceptional circumstances will it be a breach of the right to respect for private and family life to remove the person from the UK.

8.12 We note that the courts in England and Wales have indicated that this is the right approach. In AP (Trinidad & Tobago) [2011] EWCA Civ 551,120 the Court of Appeal commented that where the automatic deportation criteria are met, it is at least arguable that the court should give greater weight to the public interest in deportation proceeding and it is likely to be rare that the public interest would be outweighed by Article 8."

(our emphasis)

33. Although we have received no submissions to this effect from the Secretary of State in these appeals, we have examined whether this proposition is accurate and should be applied by us. We have reached the conclusion it should not for three reasons: i) the general scheme of the provision; ii) consideration of the relevance of a twelve month sentence to the other related exceptions; iii) previous authority binding on us.

34. A person sentenced to 12 months or more must be deported unless he falls within the exceptions. It can therefore be said that Article 8 provides an exception to the presumption that deportation will be automatic. The Secretary of State's consultation document puts a gloss on this by saying that where the twelve month threshold is passed only in exceptional circumstances will deportation be a breach of the right to respect for private and family life. This is not what the statute says; it nowhere suggests that the Article 8 claim must itself be exceptional. Indeed it is difficult to see how it could do so. The exception is necessary to comply with the obligation of domestic law to ensure the Secretary of State acts compatibly with the duty to respect the claimant's Article 8 rights, reflecting the United Kingdom's international obligations.

35. The task in Article 8 assessments is whether interference with established family or private life that is to be respected is necessary and proportionate, that is, strikes a right balance. If the factors in the balance are weighted by an ill-defined exceptionality test, the process ceases to reflect the task to be performed under the settled jurisprudence of the Strasbourg Courts as applied in the United Kingdom.

36. We now turn to the Refugee and European Union exceptions to automatic deportation. In neither case could there be a presumption that the exception will not generally apply in the case of a sentence of twelve months or more. A refugee is entitled to the protection of Article 33 of the Refugee Convention and is not subject to the application of the exclusions clauses unless convicted of a serious (non-

political) crime or guilty of similar conduct. Section 72 of the Nationality Immigration and Asylum Act applies a rebuttable presumption that this is the case where a person has been sentenced to two years imprisonment. In European Union law deportation cannot be based on the existence of a criminal conviction alone and it must be demonstrated that the person represents a personal threat to public policy before his or her rights of residence under Community law can be interfered with (see the principles now set out in Part VI of EP and Council Directive 2004/38/EC (the Citizens Directive). Indeed there is no scope for automatic deportation at all: see C-348/96 Calfa [1999] ECR I-11; each case requires assessment of the circumstances to see whether the person is a threat C-145/09 Tsakouridis [2011] ECR I-0000, BAILII: [2010] EUECJ C-145/09.

37. We now turn to the case law. Exceptionality has been authoritatively held not to be the applicable principle in the related context of reliance on Article 8 in removal cases where a person is unable to comply with the provisions of the Immigration Rules: see Huang v SSHD [2007] UKHL 11 [2007] 2 AC 167 per Lord Bingham at [20]. Wherever removal would amount to an interference with private or family life that ought to be respected, the judge must decide whether removal is justified as a proportionate response to a legitimate aim identified in Article 8(2) of the ECHR. We conclude that there is no greater scope for exceptionality as a relevant principle in deportation cases than in removal cases.

38. It is indeed conceptually difficult to apply an exceptionality principle in either removal or deportation cases where the circumstances of the claimant and the family members may be many and varied as to nationality and immigration status, circumstances of entry, length of residence, existence or age of children, degree of criminality revealed in the sentencing remarks of the judge and other relevant factors. Instead the learning of both the Strasbourg court and the courts of the United Kingdom reveal that attention should be given to factors of particular weight, including the seriousness of the offending, in the balance to be performed in the proportionality exercise.

39. In AP (Trinidad) [2011] EWCA Civ 551 the Court of Appeal was concerned with a foreign criminal who was subject to automatic deportation having been sentenced to 18 months imprisonment for a drugs offence. A panel of the Asylum and Immigration Tribunal had allowed his appeal, reconsideration was ordered on the basis that sufficient weight had been given to the public interests in deportation as set out in the authorities of N (Kenya) [2004] EWCA Civ 1094 [2004] INLR 612 and OH (Serbia) [2008] EWCA Civ 694 [2009] INLR 109. The Court of Appeal concluded that reconsideration should not have been ordered as the first panel had not misdirected itself and had reached a decision it was entitled to reach without misdirection. Concurring in the result, Carnwath LJ noted the decision of Sedley LJ sitting in the Upper Tribunal in SSHD v BK [2010] UKUT 328 as to the potential effect of the legislative changes made by s.32 the UK Borders Act 2007.

40. What Sedley LJ said both in that case and another case SSHD v MK [2010] UKUT 281 IAC heard in the Upper Tribunal at about the same time was that under the previous regime it was for the Secretary of State to establish that the immigrant had conducted him or herself in such a way as to make deportation conducive to the public good and in that context regard should be had to the Secretary of State's policy in maintaining respect for the law by seeking the deportation of serious foreign criminals such as the offenders in N (Kenya) and OH (Serbia). Under the automatic deportation regime this stage in the process has been made the subject of a statutory assumption that it is in the public interest to deport a foreign offender subject to the application of the exemptions. Accordingly there is less room for giving weight to the Secretary of State's policy and it is the court's own assessment of the competing claims of respect to family life and the public interest in deportation that counts. A twelve month sentence will be a sufficient basis for deportation unless the exception applies.

41. Nowhere in BK or MK did Sedley LJ indicate that in assessing the application of the human rights exemption to automatic deportation the court should also assume that deportation was a proportionate interference with family life by reason of such a sentence save in exceptional cases. Nor did Carnwath LJ in his concurring observations in AP Trinidad suggest this was the case. Rather in each of the three cases under consideration the judges concluded that the AIT or the First tier Tribunal was entitled to allow the appellant's appeal in automatic deportation appeals where sentences considerably longer than 12 months had been passed, because of the degree of interference with private and/or family life was not justified and disproportionate.

42. In RU Bangladesh [2011] EWCA Civ 651, the Court of Appeal drew attention to the previous case law that has recognised that Parliament has decided that in a case of a sentence of 12 months or more deportation will be automatic unless a human right or other exception applies[1].

43. In each of the appeals, we recognise that deportation will be in the public interest and should result unless an evaluation of the human rights claim prevents it. In automatic deportation cases if there are no human rights claims that can be seriously advanced, deportation will follow. This may be why the threshold for deportation is comparatively low. Where there is family or private life that should be respected but is being interfered with by immigration action, the issue is whether the State can justify the interference as necessary, that is say a proportionate and fair balance in pursuit of a legitimate aim.

9. I do not attempt to paraphrase the Tribunal's analysis. The question which remains is whether the change in the rules changes the position set out by the Tribunal. In my view it does not:

a. The Secretary of State (and in due course, the Tribunal) is bound not to interfere with Convention rights. There is a defence afforded to public authorities in s 6(2) HRA 1998 which relies on statutory authority, but the Immigration Rules grant no such statutory authority: see *R (Quila) v SSHD* [2012] 1 AC 621 at [61]. Accordingly the rules cannot constrain Convention rights such as to permit what would otherwise amount to a breach;

b. The suggestion that the rules might lay down what is correct balance to strike in assessing the proportionality of deportation is inconsistent with *Huang v SSHD* [2007] 2 AC 167, at [17]: "So here, it was said, the appellate immigration authority should assume that the Immigration Rules and supplementary instructions, made by the responsible minister and laid before Parliament, had the imprimatur of democratic approval and should be taken to strike the right balance between the interests of the individual and those of the community. The analogy is unpersuasive... This cannot be said in the same way of the Immigration Rules and supplementary instructions, which are not the product of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented... It is a premise of the statutory scheme enacted by Parliament that an applicant may fail to qualify under the rules and yet may have a valid claim by virtue of article 8";

c. Whether the interference in a particular case is disproportionate is a matter for the Tribunal. This is a well-established point of domestic human rights law: see *Huang* and further *R (SB) v Governor of Denbigh High School* [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420. It is also entirely clear from the Strasbourg jurisprudence that the assessment is a fact specific exercise: see *Maslov v Austria* [2008] ECHR 546;

d. As the Tribunal noted in *Sanade*, the Article 8 test is not one of "exceptionality": see *Huang* at [20]. The rules cannot unilaterally re-write the legal test to be considered in an Article 8 claim;

e. Nor, it would seem, can the rules overcome the finding in *RG (Nepal) v SSHD* [2012] EWCA Civ 62 that "while the public interest in deportation has already been established by legislation, its content and extent in the particular case have to be

separately evaluated, initially by the Home Secretary and thereafter if necessary by the tribunal, if the proportionality of deportation comes into question". Accordingly it is difficult to see how paragraph 396 can take the Secretary of State further than the legislative policy already established in s 32.

10. In short, it seems that the rules cannot properly subvert the Article 8 assessment that the Secretary of State and the Tribunal is bound to carry out. What, then, is there effect? Three points are suggested:

    a. The rules in 398-399A do not seek to limit the principle in 397 that deportation orders will not be made where it would breach Convention rights, but instead identify circumstances that are "exceptional" whether or not there would be a breach of Convention rights. This is a strained interpretation but would at least give the new paragraphs some meaning;

    b. The rules establish when deportation will be disproportionate without seeking to establish when it will not. Such rules are permissible: see *Maslov* at [66];

    c. The rules are simply guidance, and the reference to "exceptionality" is to be taken to mean that Article 8 claims where the circumstances set out in the rules are not met are unlikely to succeed, without purporting to lay down a rule. However, that of course is not the role of the Immigration Rules.

11. In summary, it seems that the rules are unlikely to achieve what they set out to do. In human rights jurisprudence every case is "exceptional" in a sense, because the law mandates a fact specific exercise. The impact of a decision or a rule may be a disproportionate interference with one person's rights, but not a disproportionate interference with another's. To put it another way, the answer to the question: "Is it disproportionate to deport foreign criminals?" is "That depends on which foreign criminal you are talking about". In those circumstances, it is expected that the Upper Tribunal will be bound to find that it is still for the Secretary of State and the Tribunal to assess proportionality on the facts of the case before them, even though the person does not fall within a class in paragraphs 399 or 399A.

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