

Deportation and Article 8 ECHR

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Legal framework – Immigration Act 1971



Section 3(5) of the Immigration Act 1971:

A person who is not a British citizen is liable to deportation from the United Kingdom, amongst other things, if the Secretary of State deems his deportation to be conducive to the public good.

Section 5(1):

Where a person is liable to deportation under section 3(5), the Secretary of State may make a deportation order against him (and in certain circumstances against the spouse, civil partner or child of that person).

Legal framework – UK Borders Act 2007



Section 32 of the UK Borders Act 2007 (the "2007 Act") (Automatic Deportation):

The Secretary of State is required to make a deportation order if the provisions in section 32 (the “foreign criminal” conditions) are satisfied and none of the exceptions in section 33 apply.

One exception (section 33(2)(a)):

Where removal of the foreign criminal would breach a person's Convention rights

Immigration Rules



Applications for the revocation of deportation orders are determined by the Secretary of State and his officials in accordance with Part 13 of the Immigration Rules.

A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

- (i) the grounds on which the order was made;
- (ii) any representations made in support of revocation;
- (iii) the interests of the community, including the maintenance of an effective immigration control;
- (iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

A398. These rules apply where:

- (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
- (b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

- (a) they have been sentenced to a period of imprisonment of at least 4 years;
- (b) they have been sentenced to a period of less than 4 years but at least 12 months;
- (c) in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law;

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

399. (cont)

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

- (a) the person has been lawfully resident in the UK for most of his life; and
- (b) he is socially and culturally integrated in the UK; and
- (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

Right of appeal



Section 82(1) of the Nationality, Immigration and Asylum Act 2002:

The right to appeal to the First Tier Tribunal against "an immigration decision" includes the decision to make a deportation order and to refuse to revoke such an order.

The grounds upon which an appeal can be brought are set out at section 84(1) and include at (g) that removal would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's convention rights.

The 2002 Act



Since 28 July 2014, where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's Article 8 rights, the provisions of section 117A-D of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") apply.

When considering the "public interest question", i.e. the question of whether an interference with a person's Article 8 rights is justified, the court or tribunal is required to have regard, in all cases, to the considerations set out in section 117B and in cases concerning the deportation of foreign criminals, to the considerations set out in section 117C: see section 117A.



Section 117B:

The maintenance of effective immigration controls is in the public interest.

It is in the public interest ... that persons who seek to enter or remain in the United Kingdom are able to speak English

It is in the public interest that persons who seek to enter or remain in the United Kingdom are financially independent

117B cont.

Little weight should be given to a private life, or a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

117B cont.

In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.



Section 117C:

The deportation of foreign criminals is in the public interest.

The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

117C cont.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

“Precarious”



Rhuppiah v Secretary of State for the Home Department [2016] 1 WLR 4203

Supreme Court heard an appeal on 10 July 2018

- The meaning of precarious in s.117B(5) of the 2002 Act;
- The weight to be given to private life established at a time when the appellant’s immigration status was precarious when conducting the balancing exercise under art.8; and
- The weight to be given to financial independence and proficiency in English when conducting the balancing exercise under art.8.



- Appellant: a Tanzanian national in the UK from 1997 to 2010 on various grants of leave to remain as a student.
- Since 2010 she has been in the UK unlawfully , living with and caring for a friend. Her brother, sister-in-law and niece also live in the UK.
- Sought leave to remain outside the rules on the basis of Article 8.
- Applying the 2002 Act, the FTT held statute required it to give little weight to her private life as it was established whilst her immigration status was precarious. It also held that fluency in English and financial independence were neutral factors in the art.8 balancing exercise and that in any event she was not financially independent as she relied on others for lodging and maintenance.
- UT dismissed the appeal.

Court of Appeal dismissed the appeal:

- A person who is granted leave to enter or remain for a limited period in order to complete a particular course of study has an immigration status which is precarious.
- The concept is distinct from an unlawful presence in the UK.
- Ability to speak English is a neutral factor.
- Financially independent does not mean “financially independent of the state”.

“Unduly harsh”



KO (Nigeria) v Secretary of State for the Home Department [2016] EWCA Civ 617

Previous position: ***MAB (USA)*** [2015] UKUT 435:

“The phrase ‘unduly harsh’ ... does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual (whether child or partner of the deportee). The focus is solely upon an evaluation of the consequences and impact upon the individual concerned.”

Court of Appeal (Laws LJ) in *KO (Nigeria)*:

The context to the phrase invites emphasis on two factors:

- the public interest in the removal of foreign criminals and;
- the need for a proportionate assessment of any interference with Article 8 rights.

The more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh.

What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history.



Supreme Court heard an appeal against the decision in ***KO (Nigeria)*** on 17-18 April 2018, linked with another appeal - ***IT (Jamaica) v The Secretary of State for the Home Department*** [2016] EWCA Civ 932 - as well as a set of appeals concerning another phrase in the same statutory provisions ...

“Not reasonable to expect the child to leave the UK”



MA (Pakistan) v Upper Tribunal (Immigration and Asylum Chamber) [2016] EWCA Civ 705

The question is how the test of reasonableness in section 117B(6) should be applied when determining whether or not it is reasonable to remove a child from the UK once he or she has been resident here for seven years.

Court of Appeal:

- relevant factors to be taken into consideration are not limited to those relating to the child but include all considerations bearing upon the public interest, including the conduct and immigration history of the child's parents.
- a finding that it was in the best interests of a child to remain in the United Kingdom did not necessarily entail that it would not be “reasonable” to expect that child to leave the United Kingdom, albeit the best interests of the child must be a primary consideration.
- Endorsed “unduly harsh” test in ***KO (Nigeria)*** at [45]

Hesham Ali v SSHD



Hesham Ali v Secretary of State for the Home Department [2016] 1 W.L.R. 4799

Lord Reed at [53]:

“... the Rules are not law ... and therefore do not govern the determination of appeals, other than appeals brought on the ground that the decision is not in accordance with the Rules ... The policies adopted by the Secretary of State, and given effect by the Rules, are nevertheless a relevant and important consideration for tribunals determining appeals brought on Convention grounds, because they reflect the assessment of the general public interest made by the responsible minister and endorsed by Parliament. ...



“... In particular, tribunals should accord respect to the Secretary of State's assessment of the strength of the general public interest in the deportation of foreign offenders, and also consider all factors relevant to the specific case before them It remains for them to judge whether, on the facts as they have found them, and giving due weight to the strength of the public interest in deportation in the case before them, the factors brought into account on the other side lead to the conclusion that deportation would be disproportionate.”

The “balance sheet” approach – Lord Thomas LCJ in Hesham Ali at [82]-[83]

“82. ... Judges should, after making their factual determinations, set out in clear and succinct terms their reasoning for the conclusion arrived at through balancing the necessary considerations in the light of the matters set out by Lord Reed JSC at paras 37–38, 46 and 50. It should generally not be necessary to refer to any further authority in cases involving the deportation of foreign offenders.

83. One way of structuring such a judgment would be to follow what has become known as the “balance sheet” approach. After the judge has found the facts, the judge would set out each of the “pros” and “cons” in what has been described as a “balance sheet” and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders.”

Other recent cases

- ***Secretary of State for the Home Department v MR (Pakistan)*** [2018] EWCA 1598 (Civ) (FTT didn't consider the relevant paragraphs of the Immigration Rules or sections 117A-D at all, or apply the test of "unduly harsh")
- ***AK (Kosovo) v Secretary of State for the Home Department*** [2018] EWCA Civ 2038 (failure to properly apply "unduly harsh" test as interpreted in ***KO (Nigeria)*** and failure to properly conduct an evaluative judgement to determine whether there are "significant obstacles to integration", confining it solely to the length of time in the UK and the extent of ties in the country of origin)
- ***Secretary of State for the Home Department v Barry*** [2018] EWCA Civ 790 (SSHD's appeal dismissed concerning application of paras 398-399A)