

The Development of Article 8 of the European Convention on Human Rights (1950) in Immigration Law

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The European Convention on Human Rights (1950)

- Preamble – “[c]onsidering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared”
- Article 1 – “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”

Article 8 – Qualified Right

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.

What approach must the Tribunal take when applying Article 8(1)?

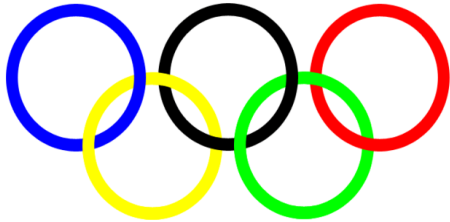
Huang v Secretary of State for the Home Department [2007] UKHL 11:

“the task of the appellate immigration authority, on an appeal on a Convention ground against a decision of the primary official decision-maker refusing leave to enter or remain in this country, is to decide whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it” (paragraphs 11 & 13)

What approach must the Tribunal take when applying Article 8(1)?

The Tribunal must apply the five-stage test as set out in the speech of Lord Bingham in *Regina (Razgar) v Secretary of State for the Home Department* [2004] 2 A.C. 368, paragraph [17].





Five – Stage Test

1. Does the [refusal] amount to an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
2. If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
3. If so, is such interference in accordance with the law?
4. If so, is such interference 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?
5. If so, is such interference proportionate to the legitimate public end sought to be achieved?

Stage 1 – is family life engaged?

The concept of “family life” is not confined to the nuclear family but incorporates other forms of relationships. Whether or not family life exists outside the nuclear family depends on the nature of the relationship and not the legal status. Each case is fact-specific and must be assessed individually.





The Nuclear Family

Husband and Wife

- Whatever else the word "family" may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage.... marriages must be considered sufficient to attract such respect as may be due under Article 8": Abdulaziz, Cables and Balkandali v UK (1985) 7 EHRR 471, para 62
- Note UKBA's guidance as to what constitutes a genuine, subsisting marriage: Annex FM, 2.0 <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/chp8-annex/>



The Nuclear Family

- Family life may also encompass *de facto* family ties where the parties are living together outside marriage and the relationship is sufficiently stable: *Johnston v Ireland* (1986) 9 EHRR 203 (para 56); *Keegan v Ireland* (1994) 18 EHRR 342 (para 44)
- Exceptionally even if a couple does not live together, there may be sufficient ties to constitute family life: *Kroon v Netherlands* (1994) 19 EHRR 263 (para 30)

Parent and Minor Child



From the moment of a child's birth, there exists between him and his parents a bond amounting to family life, which subsequent events cannot break save in the most exceptional circumstances: *Berrehab v Netherlands* (1988) 11 E.H.R.R. 322 (para 21); *Hokkanen v Finland* (1994) 19 E.H.R.R. 139 (para 54)

Adopted child and adoptive parent

Khan v UK (1995) 21 EHRR CD67

In *Pawandeep Singh v ECO, New Delhi [2004] EWCA Civ 1075* the Court of Appeal considered whether family life within the meaning of article 8(1) could exist between an adopted child and his adopted parents where the adoption was not recognised in the UK (Indian Adoption). Dyson LJ delivering the lead Judgment held that when considering whether family life exists, an adjudicator was entitled to consider a valid adoption in another state as a “factor of some weight in the circumstances of the case” (paragraph [41], [44] – [45])

Adopted child and adoptive parent

Singh (Pawandeep) v ECO considered:

- O v Coventry City Council [2012] 1 FLR 302; [2011] Fam. Law 1325; CC (Coventry)
- Lambeth LBC v S [2005] EWHC 766 (Fam); [2005] 2 F.L.R. 1171





Other family relationships

- Grandparents and grandchildren – *Marckx v Belgium* (1979) 2 EHRR 330
- Aunt / uncle and nephew / niece: *Boyle v UK* (1994) 19 E.H.R.R. 179; *R (on the application of Klodjain Lekstake) v Immigration Appeal Tribunal* [2005] EWHC 745 (Admin)



Adult child and parent

- *Kugathas v Immigration Appeal Tribunal* [2003] EWCA Civ 31
- *RP (Zimbabwe) & RP (Zimbabwe) v Home Secretary* [2008] EWCA Civ 825
- *JB (India) & Ors v Entry Clearance Officer* [2009] EWCA Civ 234
- *Secretary of State for the Home Department v HK(Turkey)* [2010] EWCA Civ 583

Adult child and parent

- *RG v Secretary of State for the Home Department*
[2010] UKUT 273 (IAC)
- *KG (Gurkhas – overage dependants – policy)*
Nepal [2011] UKUT 00117 (IAC)
- *Pun & Ors (Gurkhas – policy – article 8) Nepal*
[2011] UKUT 00377 (IAC)
- *Ghising (family life – adults – Gurkha policy)*
[2012] UKUT 00160 (IAC)

Prospective Family Life

The State must have regard to potential family life and how this will develop: *R. (on the application of Ahmadi) v Secretary of State for the Home Department* [2005] EWCA Civ 1721 at paragraph [18]:

“There is ample authority for the proposition that the obligations under Article 8 require a state not only to refrain from interference with existing life, but also from inhibiting the development of a real family life in the future”

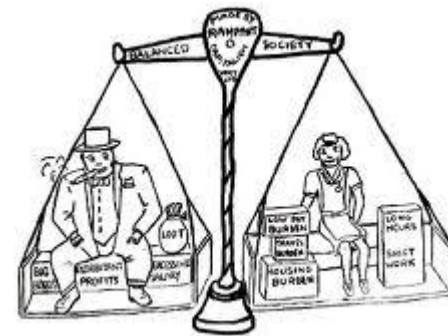
Stage 2 – consequences of such gravity to engage article 8(1)?

AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801, Sedley L.J held

“It follows, in our judgment, that while an interference with private or family life must be real if it is to engage art. 8(1), the threshold of engagement (the "minimum level") is not a specially high one. Once the article is engaged, the focus moves, as Lord Bingham's remaining questions indicate, to the process of justification under art. 8(2). It is this which, in all cases which engage article 8(1), will determine whether there has been a breach of the article” (para. [32])

Stage 2 – consequences of such gravity to engage article 8(1)?

It still has to be more than a technical or inconsequential interference, *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5, paragraph [22].



Stage 3 – in accordance with the law?

- *“If question (3) is reached, it is likely to permit of an affirmative answer only”* (paragraph [18] Razgar)
- Unlawful extra-statutory policy?
- Immigration rules satisfied?
- Breach of other statutory provision?



Stage 4 – Necessary in a democratic society?

*“Where removal is proposed in pursuance of a lawful immigration policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens is recognised in the Strasbourg jurisprudence (see Ullah [2004] 2 AC 323 , 339, para 6) and implementation of a firm and orderly immigration policy is an important function of *390 government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator answering this question other than affirmatively” per Lord Bingham in Razgar (paragraph [19])*

Stage 5 - Proportionality

The assessment of proportionately involves striking of a fair balance between the rights of the individual and the interests of the community, which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage.

Stage 5 – Proportionality

- Consequences for the Appellant and his family
- Family life enjoyed elsewhere?
- British Citizens
- Historic injustice
- Best interests of the child
- Delay
- *Chikwamba*



Consequences for the Appellant and his family

Beouk-Betts v Secretary of State for the Home Department [2008] UKHL 39 (paragraph [43])

In determining whether the Appellant's human rights have been breached, the Tribunal must take into account the effect of the decision on all the members of his family unit.

Family life enjoyed elsewhere

VW (Uganda) v Secretary of State for the Home Department [2009] EWCA Civ 5, applying EB Kosovo (FC) v Secretary of State for the Home Department [2008] UKHL 41:

“While it is of course possible that the facts of any one case may disclose an insurmountable obstacle to removal, the inquiry into proportionality is not a search for such an obstacle and does not end with its elimination. It is a balanced judgment of what can reasonably be expected in the light of all the material facts” (para 19)

VM (Uganda) applied

Applied

R.(on the application of Chiwondo) v Secretary of State for the Home Department, Unreported, June 22, 2012; QBD (Admin)

R. (on the application of HM (Malawi)) v Secretary of State for the Home Department [2010] EWHC 1407 (Admin)

TF (Angola) v Secretary of State for the Home Department [2009] EWCA Civ 905

Followed

Batista v Secretary of State for the Home Department [2010] EWCA Civ 896



British Citizens

AB (Jamaica) v State for the Home Department
[2007] EWCA Civ 1302:

“It cannot be permissible to give less than detailed and anxious consideration to the situation of a British citizen who has lived here all his life before it is held reasonable and proportionate to expect him to emigrate to a foreign country in order to keep his marriage intact” (paragraph 20)

British Citizens



AB (Jamaica) applied:

- LD (Zimbabwe) v Secretary of State for the Home Department [2010] UKUT 278 (IAC)
- SS (India) v Secretary of State for the Home Department [2010] EWCA Civ 388



Historic Injustice

- *Entry Clearance Officer, Mumbai v NH (India) [2007] EWCA Civ 1330*
- *JB (India) & Ors v Entry Clearance Officer [2009] EWCA Civ 234*
- *Patel, Modha & Odedra v Entry Clearance Officer [2010] EWCA Civ 17*
- *KG (Gurkhas- overage dependants - policy) Nepal [2011] UKUT 00117 (IAC)*
- *Pun & Ors (Gurkhas - policy - article 8) Nepal [2011] UKUT 00377 (IAC)*
- *Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC)*



Best interests of the child

- Borders, Citizenship and Immigration Act 2009 (c.11) s.55
- Convention on the Rights of the Child
- ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC
- <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/chp8-annex/>

ZT (Tanzania) applied

- H v Lord Advocate [2012] UKSC 24
- Peart v Secretary of State for the Home Department [2012] EWCA Civ 568;
- R. (on the application of MP) v Secretary of State for Justice [2012] EWHC 214 (Admin)
- R. (on the application of C (A Child) (Afghanistan)) v Secretary of State for the Home Department [2011] EWHC 2937 (Admin)
- Sanade (British children - Zambrano Dereci), Re [2012] UKUT 48 (IAC)
- T (s.55 BCIA 2009: Entry Clearance: Jamaica), Re [2011] UKUT 483 (IAC)



Delay – three consequences

EB Kosovo (FC) v Secretary of State for the Home Department [2008] UKHL 41

“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. It is unnecessary to elaborate this point since the respondent accepts it” (paragraph 14)



Delay – three consequences

(ii) “...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” (paragraph 15)

(iii) “...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...” (paragraph [16])

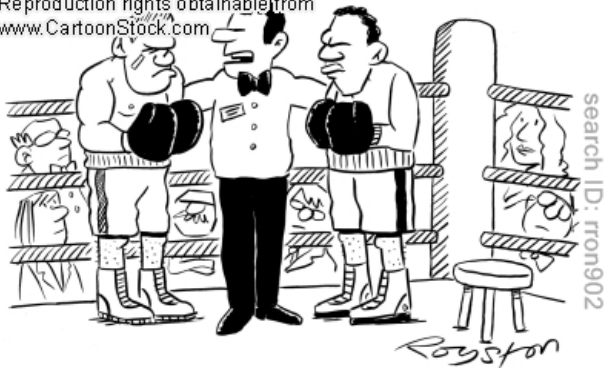


Chikwamba

R (on the application of Chikwamba) v Secretary of State for the Home Department [2008] UKHL 40

“..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” (para 44)

Secretary of State for the Home Department v Hayat [2012] EWCA Civ 1054 – Chikwamba explained



New Rules and Article 8

- Are the new rules compatible with article 8?
- Statement of compatibility issued by the Home Office dated 13 June 2012 -
- www.ukba.homeoffice.gov.uk/sitecontent/.../news/echr-fam-mig.pdf

