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Family Migration - Article 8 (3)

21 December 2012

This information sheet provides supplementary updating information to the information given in the "Article 8- No. 2 26 July 2012" information sheet [http://www.ilpa.org.uk/data/resources/15109/12.07-Article-8-No.-2.pdf]

General Background

The new immigration rules that came into force on 9 July 2012 were intended by the Government to govern the assessment of Article 8 of the European Convention on Human Rights, the right to respect for family and private life, in immigration cases. The Government's view was that Article 8 was incorporated into the new rules on family and private life and therefore no further assessment was necessary. As set out in the Article 8- No. 2 information sheet (above) there are many flaws in this reasoning. We now have the first decision from the Upper Tribunal dealing expressly with this issue, although the Tribunal acknowledges that these issues will still need to be grappled with by the higher courts in due course *(Paragraph 2 of the determination).*

MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC)

Issues before the Tribunal

Mr MF was a Nigerian national who arrived in the United Kingdom in 1998 as an illegal entrant. In November 2009 Mr MF was convicted of handling stolen goods, possession and/or use of a false instrument for which he was sentenced to 18 months. His offences were committed in late 2005. On several occasions Mr MF made applications to the Secretary of State to regularise his stay on the basis of his family life but these were refused. On 28 October 2012 the Secretary of State made a deportation order under s.32 (5) of the UK Borders Act 2007. Mr MF appealed on the grounds of Article 8. He won his appeal.

The issue before the Tribunal was, therefore, an assessment of whether the new immigration rules provided a complete code for assessing Article 8 claims.

Tribunal Findings

The Tribunal held that there is, as there was before, a two- previous 2 stage process. Firstly, an examination of whether the case succeeds under the immigration rules. This will in some cases necessitate an assessment of whether discretion has been exercised properly. Secondly, if a case fails under the immigration rules, the tribunal judge is still required to consider whether a decision to refuse is contrary to the appellant's rights under the "real" Article 8 of the European Convention on Human Rights.

The Tribunal is clear that the new rules cannot provide an exhaustive code for an assessment of a person's rights under Article 8 of the Human Rights Act (*paragraph 23 of the determination*). The Tribunal said "The rules do not and cannot replace the law that is binding upon us."
The reasoning behind this is that the new rules which relate specifically or partially to Article 8, do not cover applications under large parts of the immigration rules such as applications for dependants of students or entrepreneurs or visitors in the UK for medical reasons. Further, case law established over the last 10 years holds that it is necessary to look at the cumulative effect of the elements of family and private life. The new rules do not allow this to be done. Further, with particular importance in deportation cases, tests such as

"insurmountable obstacles" and "exceptional circumstances" do not reflect the principles set out by the Grand Chamber of the European Court on Human Rights in *Maslov v Austria* 1683/03. These describe "the real Article 8. The Maslov principles that need to be taken into account are:

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- *the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;*
- *whether the spouse knew about the offence at the time when he or she entered into a family relationship;*
- *whether there are children of the marriage, and if so, their age; and*
- *the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.*
- *58. The Court would wish to make explicit two criteria which may already be implicit in those identified in the Boultif judgment:*
- *the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and*
- *the solidity of social, cultural and family ties with the host country and with the country of destination.*

In conclusion the Tribunal states at paragraph 41

> *Our conclusion is that the need for a two-stage approach in most Article 8 cases remains imperative because the new rules do not fully reflect Strasbourg jurisprudence as interpreted by our higher courts and in particular they do not encapsulate the Maslov criteria.*

Public Interest

However, the Tribunal has inserted a caveat into the decision. The Tribunal holds that deference should be given to the view of the Secretary of State about the 'public interest' and the balance between a person right to respect for family and private life and the public interest in removing that person.

> *'..greater specificity is given in the new rules as to what circumstances are seen to attract the greatest weight in respect of the public interest; the Secretary of State has now herself told us what factors she considers relevant and what weight at the general level she attaches to them. '(paragraph 62)*

> *"Whereas previously it has been open to judges, within certain limits, to reach their own view of what the public interest is and the weight to be attached to it, the scope for doing so is now more limited." (*paragraph 43).

Whether this is correct, and whether deference should be given to the Secretary of State is likely to be the subject of litigation in due course.

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