

## **Briefing: HOL Debate 19/7/12 'The role and performance of the UK Border Agency'**

On 11<sup>th</sup> June 2012, the Home Office published the document 'Statement of Intent: Family Migration' and on 13<sup>th</sup> June a 'Statement of Changes in Immigration Rules' (HC 194) was laid before parliament; the new Rules came into effect on 9<sup>th</sup> July.

We are extremely concerned that the very short time period which was allowed for parliamentarians to consider the changes to the Immigration Rules (HC 194), which run to some 44 pages, and the matter of Article 8 of the European Convention on Human Rights was entirely inadequate. The UK Border Agency has acknowledged that the new Rules contain serious errors in drafting, and yet have no plans to correct the Rules in the near future.

### **The best interests of children**

The UK Border Agency (UKBA) mailing on this subject pithily outlined one of the aims behind the changes to the Immigration Rules:

'We are introducing clear criteria to protect the public from foreign criminals who try to hide behind family life as a reason to stay here.'<sup>1</sup>

At BID, we have worked with large numbers of families where children are separated from parents who are held in immigration detention for long periods. In many of these cases, parents have committed offences and are held in detention following the completion of their criminal sentences. Our experience is that living with the prospect of their parents being deported following a criminal conviction has an extremely harmful effect on children. Furthermore, we are aware of cases where the UKBA has forcibly removed parents from the UK without making any proper checks as to the whereabouts and care arrangements of children who are left behind. We are gravely concerned that the new Immigration Rules do not properly take into account the need to consider children's best interests when making decisions which affect them.

It is beyond doubt that the right to private and family life is a qualified right. When considering appeals against deportation, the courts will always take into account the seriousness of the parent's criminal offences, and in the majority of cases find that deportation is lawful. The majority of deportation appeals are unsuccessful, and according to Home Office figures only 185 appeals succeeded on Article 8 grounds in the last year.<sup>2</sup> Many of these will be cases where the courts have found that grave harm would be caused to a child by deporting their parent. The Government is now seeking to prevent the courts from upholding the laws that protect these children.

The new Immigration Rules suggest that in a very wide range of circumstances, where parents have committed criminal offences, the best interests of their children should be subordinated to considerations of immigration control as a matter of routine. In our view, this is at odds with the need to properly consider children's individual circumstances in order to ascertain what their best

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<sup>1</sup> Email from the UK Border Agency 12/06/12 'Family Migration Announcement'

<sup>2</sup> *Hansard* HC Deb, 11 June 2012, c50

interests are, and the provision in Article 3(1) of the UN Convention on the Rights of the Child that the best interests of children should be a primary consideration.

The 'Explanatory Memorandum' attached to the 'Statement of changes in Immigration Rules' states at paragraph 7.5:

'In assessing the best interests of the child, the question in immigration cases where a child would have to leave the UK as a consequence of the decision to remove their parent, is whether it is reasonable to expect the child to live in another country... The best interests of the child will normally be met by remaining with their parents and returning with them to the country of origin, subject to considerations such as long residence in the UK and any exceptional factors.'

It gravely concerns us to see this kind of flawed reasoning being used to determine children's best interests. The small number of deportation appeals which currently succeed on Article 8 grounds will by their nature be complex cases. Often, children will have been separated for periods of years from parents serving prison sentences followed by long periods in immigration detention. There may be particular difficulties which would be faced by the child on removal to their country of origin. They may have formed strong bonds with their foster carers, and being separated from these carers could be very harmful to them. BID has worked with single fathers whose children were small babies when they went to prison. In such cases, the involvement of their parent in their daily care is likely to be of vital importance to the child's well-being. However, it is unlikely that their best interests will be served by being reunited with this parent while boarding a plane to a country which they have never been to as part of a forcible removal from the UK. In these and other situations, what is most likely to be in children's best interests is to have the opportunity to re-establish their relationship with their parent in the UK.

Paragraph 7.11 of the Explanatory Memorandum sets out the limited circumstances in which the Government deems that deportation will not be proportionate where a parent has received a custodial sentence of at least 12 months and less than four years, or where the parent has received a sentence of less than 12 months but the Secretary of State believes their offending has caused serious harm or that 'they are a persistent offender who shows a particular disregard for the law':

'Deportation will not be proportionate where:....

They have a genuine and subsisting parental relationship with a British citizen child, or a foreign national child who has lived in the UK continuously for at least the last seven years, and it would be unreasonable 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;'

Paragraph 7.11 of the Explanatory Memorandum further outlines that:

'Only in exceptional circumstances will private or family life, including a child's best interests, outweigh criminality and the public interest in seeing the foreign national criminal deported where they have been sentenced to a custodial sentence of at least four years.'

Paragraphs 39 to 40 of the Statement of Intent on Family Migration state that:

'Where the rules have explicitly taken into account proportionality, the role of the Courts should shift from reviewing the proportionality of individual administrative decisions to reviewing the proportionality of the rules... If proportionality has already been demonstrated at a general level, it need not, and should not, be re-determined in every individual case.'

In our view, these measures do not allow for adequate consideration of the child's best interests. For example, the fact that there is a family member in the UK who is able to care for a child does not demonstrate that it is in the child's best interests to be brought up by this family member and split permanently from their parents. As they are currently drafted, the rules do not allow for a proper consideration of children's best interests in cases where, for example, the child was born in

the UK and has lived here for the past six (rather than seven) years, and there are serious problems with removing them or their parent for example for the types of reasons set out above.

Furthermore, we note that the Government is citing the fact that Article 8 allows for interference with the right to private and family where it is in accordance with the law and necessary in the interests of public safety as one justification for the changes to the Immigration Rules. However, it is important to recognise that large numbers of foreign nationals who receive prison sentences of twelve months or more will not pose a threat to public safety. They may, for example, have been convicted of working using false documents, and have been assessed by the National Offender Management Service as posing a low risk of reoffending.

### **Routes to settlement for Article 8 cases**

The 'Family life as a parent' section in Appendix FM of the new Immigration Rules sets out how the Government will grant leave to remain in the UK where it is found that it would breach Article 8 to remove the applicant. Such applicants will enter a 10 year route to settlement:

'D-LTRPT.1.2. If the applicant meets the requirements in paragraph LTRPT.1.1. (a), (b) and (d) for limited leave to remain as a parent they will be granted leave to remain for a period not exceeding 30 months, and will be eligible to apply for settlement after 120 months with such leave.'

In other words, parents will need to apply for four periods of 30 months' leave, before making an application for indefinite leave to remain.

The 'Family life as a parent' section of Appendix FM goes on to explain at E-ILRPT.1.4 that in order to qualify for leave to remain after 10 years, an applicant must have no unspent convictions. This means that even where it is consistently found that removing a parent who has received a criminal sentence of four years or more would breach Article 8, there will be no route to settlement for this parent, and they will only ever be able to apply for periods of 30 months leave. Paragraph 53 of the 'Statement of Intent' which was published before the Rules explained that migrants on the 10 year route will not have automatic access to public funds.

We fail to see how it can be in a child's best interests for their parent to be granted such short periods of leave in cases where it has been recognised that it would breach Article 8 to remove the parent. The continuing possibility of forcible removal from the UK will inevitably cause significant uncertainty and distress for parents and children. Short periods of leave will make it very difficult for parents to secure and maintain employment, and will increase their vulnerability to exploitation by employers. In cases where parents have received criminal sentences of four years or more, there will be no route to settlement and so no end to the uncertainty and distress experienced by families.

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## Case Study

This case is an example of the extremely poor practice which we have seen by the UK Border Agency in assessing children's best interests when making decisions to deport parents without their children. The situation will be seriously exacerbated by the new Immigration Rules, which allow for parents who have committed criminal offences to be deported without their children where there is any other family member in the UK who would be able to care for the children.

Rita is a single mother with two children, who were aged eight and fourteen when the Home Office made a decision to deport her from the UK and leave her children here in foster care. Rita's children were born and grew up in the UK. The Home Office decided to deport Rita following her conviction for possession of Class A drugs with intent to supply. Rita pleaded guilty to the offence, and said that she committed it because she needed money to pay for her son's school meals. At the time she had been waiting for seven years for the Home Office to respond to an application for leave to remain, and did not have recourse to public funds or the right to work. Rita originally came to the UK as a child herself; when she arrived she was pregnant with her first child as a result of being raped and lived here undocumented for six years before applying for leave to remain. Probation assessed her risk of reoffending as low.

The Home Office decided to deport Rita without her children on the basis that Rita's stepmother had a Residence Order for the older child, and they had an unsigned statement from Children's Services which said that Rita had neglected her younger child. The Home Office argued that following her deportation Rita 'would be able to maintain a relationship with any family members she may have here using modern methods of communication.'

A support worker from The Children's Society who visited Rita's younger child, Matthew, during her detention reported that: 'Matthew said he misses his mum very much. He likes talking to her on the phone and he said he does this almost every day. Matthew said when he visited Rita they had a nice time. He said he felt very sad when he had to go. He said, "Mum was crying and I was crying". Matthew told me he wanted his Mum back and wants her to come and live with them all the time. [Matthew's cousin and temporary foster carer] said he is clearly holding onto the hope that he will be reunited with his mum soon and his expectations are very high.'

During her detention, Rita appealed the Home Office's decision to deport her. The judge dismissed her appeal, but commented that: 'We have heard no evidence of the likely effect on [Matthew] of either being returned to his mother or her being removed from the United Kingdom.'

While awaiting the outcome of her second appeal, Rita was released from immigration detention on bail after being held there for nineteen months. By this point, it had become clear that Children's Services did not in fact have any objection to Rita being reunited with her younger child and they were reunited shortly after her release. Rita's older child disclosed to Children's Services that she had experienced emotional and physical abuse at the hands of her foster carer, and she wished to be reunited with her mother, who resumed care of her shortly after her release. Rita's second deportation appeal was successful and she has now been granted leave to remain in the UK.