

Briefing: HOL Debate 23/10/12: Motion to Regret Statement of Changes in Immigration Rules HC 194

On 23rd October, the House of Lords will debate the following motion:

‘Baroness Smith of Basildon to move that this House regrets that notwithstanding welcome but limited measures to ensure the deportation of foreign criminals and tackle sham marriages, and notwithstanding the importance of greater protection for the taxpayer, the Government have not demonstrated that the specific minimum annual income requirement which has been introduced through the Statement of Changes in Immigration Rules (HC 194) is the most effective way to protect taxpayers and deliver fairness for UK citizens who wish their spouse or partner to settle in the United Kingdom.’

At BID, we cannot agree with the statement that HC 194 contains ‘welcome but limited measures to ensure the deportation of foreign criminals.’ Wide powers already exist for the state to deport foreign national ex-offenders. When considering appeals against deportation, the courts will always take into account the seriousness of the individual’s criminal offences, and in the majority of cases find that deportation is lawful. Two thirds of deportation appeals are unsuccessful, and according to Home Office figures only 185 appeals succeeded on Article 8 (right to private and family life) grounds in the last year.¹ 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 families.

Children’s best interests

BID works with large numbers of families where children are separated from parents who have served criminal sentences and are being held in immigration removal centres. Our experience is that living with the prospect of their parents being deported often has an extremely harmful effect on children. Children and carers report to us that during their parent’s detention children lose weight, have nightmares, suffer from insomnia, cry frequently, and become deeply unhappy, socially isolated and withdrawn. In some cases, the care arrangements which children are left in give rise to serious child safeguarding concerns.

Furthermore, we are aware of cases where the UK Border Agency 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. Recently, one of BID’s clients was deported. Her husband and two children (who were born here) remain in the UK; she was three months pregnant with her husband’s child. In an interview before his mother’s deportation, her nine year old son was asked about his hopes for the future. He replied:

‘Well, that I’m always with my Mom. And we have a nice big house, and stuff like that, and um like I would never imagine her being away and stuff, so she’ll always be with me so I don’t need to worry.’

¹*Hansard* HC Deb, 11 June 2012, c50

The new Immigration Rules

HC 194 suggests 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 where their best interests lie, 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. As Lord Bingham stated in *EB (Kosovo)* [2008] UKHL 41, [2009] 1 A.C. 1159 para 12:

'the search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires'

Paragraph 7.11 of the Explanatory Memorandum sets out the circumstances in which the Government deems that deportation will not be proportionate when a parent has received a sentence of four years or less:

'Deportation will not be proportionate where... They have a genuine and subsisting parental relationship with a British citizenchild, or a foreign national child who has lived in the UK continuously for at leastthe last seven years, and it would be unreasonable to expect the child to leave theUK, and there is no other family member who is able to care for the child in theUK'

Paragraph 7.11 of the Explanatory Memorandum further outlines that:

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

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. In addition, 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.

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

'Where a childwould have to leave the UK as a consequence of the decision to remove their parent... 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. In many of the deportation appeals which currently succeed on Article 8 grounds, children will have been separated for periods of years from parents serving prison sentences. They may have formed strong bonds with their foster carers, and being suddenly separated from these carers could be very harmful to them. 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 deportation. 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.

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Case Studies

These cases are examples 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.

Paul

Paul, a single father, was deported from the UK without his two sons, aged twelve and nine, who were left in the care of his ex-girlfriend. The UK Border Agency did not investigate the children's care arrangement before deporting their father.

Paul arrived in the UK nine years ago and claimed asylum. His children remained in his country of origin with their mother, who subsequently abandoned the children. Paul arranged for his children to travel to the UK with a people smuggler to join him. After living in the UK for seven years without the right to work legally, Paul was convicted of a cannabis production related offence. The judge described Paul as being part of a criminal organisation where "the people who make most of the profit use people like you to do the work and take the punishment when caught."

After completing his criminal sentence, Paul was held in immigration detention for over a year before being deported. The Border Agency were aware of Paul's children, who were living with his then girlfriend. The children's welfare is not mentioned in Paul's deportation order, or any of the monthly progress reports or bail summaries which are in his BID file, and the Border Agency never made any enquiries to the children's carer about them. Paul was deported from the UK without taking any effective steps to investigate the children's care arrangement or the impact which his removal would have on their welfare.

Rita

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. One of Rita's children later disclosed that she was being abused by her foster carer.

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.

A support worker who visited Rita's younger child, Matthew, during her detention reported that: 'Matthew said he misses his mum very much, he wants 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.'

After nineteen months, Rita was released from immigration detention on bail. It had become clear that Children's Services did not have any objection to Rita being reunited with her younger child, and her older child disclosed to Children's Services that she was being abused by her foster carer. Both children were reunited with their mother shortly after her release. Rita's second deportation appeal was successful and she has now been granted leave to remain in the UK.