



**House of Commons Motion for Debate on Article 8 ECHR
19 June 2012**

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Summary

JUSTICE urges members of the House of Commons to exercise caution when debating the following motion:

That this House supports the Government in recognising that the right to respect for family or private life in Article 8 of the European Convention on Human Rights is a qualified right and agrees that the conditions for migrants to enter or remain in the UK on the basis of their family or private life should be those contained in the Immigration Rules.

- **Parliamentarians have been asked to vote on this motion less than 7 days after the publication of the Rules in question. In our view, the proper time to consider the content of delegated legislation is on Parliamentary approval. A motion to ask one House of Parliament to approve an instrument which is of their making appears a tautologous and highly unusual use of Parliamentary procedure.**
- **In any event, we are concerned that Parliamentarians should not overestimate the significance of this vote. It is unlikely that domestic courts' will rely significantly on the outcome of a motion of one House to show the intention of Parliament when interpreting ambiguity in delegated or primary legislation (*Pepper v Hart*).**
- **We think that the proposal in the new rules to predetermine the proportionality of immigration decisions will either be unworkable or could lead to the violation of the UK's international human rights obligations in practice.**
- **The responsibility of the UK to comply with Article 8 ECHR requires a fact sensitive interpretation on a case by case basis. In any case where the new rules would lead to a disproportionate result, the domestic courts will be required to disapply the rules, or read them in a way which will allow for a proportionate result (ss. 3, 6 HRA 1998).**
- **The Secretary of State's suggestion that limited judicial review of the application of the rules without taking an individual decision on the proportionality in individual cases is not supported by Convention case-law.**

- **If the court applies the rules in a way which leads to a disproportionate result, the individual in question will have the right to apply to the European Court of Human Rights for a remedy. The UK will be required to give effect to any decision of the Strasbourg Court (Article 46 ECHR).**

Introduction

1. JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. Its mission is to advance access to justice, human rights and the rule of law. It is the UK section of the International Commission of Jurists.
2. JUSTICE has for many years produced briefings and consultation responses on proposed asylum and immigration laws and policies and their interaction with domestic and international human rights law. Most recently, we have briefed Parliament on the Bills that became the Borders, Immigration and Citizenship Act 2009 and the Criminal Justice and Immigration Act 2008. JUSTICE responded to the UK Borders Agency (UKBA) consultation on Family Migration.¹
3. JUSTICE will produce a more detailed briefing on the Statement of Changes in Immigration Rules presented to Parliament on 13 June 2012 shortly. We produce this short brief in advance of the House of Commons debate on the following motion, for debate not before 2.30pm on 19 June 2012:

That this House supports the Government in recognising that the right to respect for family or private life in Article 8 of the European Convention on Human Rights is a qualified right and agrees that the conditions for migrants to enter or remain in the UK on the basis of their family or private life should be those contained in the Immigration Rules.

4. The debate on this motion has been brought forward without opportunity for members – or the wider public - to consider the rules that they will vote to approve in the abstract. The proposal that Parliament should use a parliamentary motion to our courts appears unprecedented and inconsistent with the wider constitutional picture. In any event, as we outlined in our response to the UKBA consultation, this approach is unnecessary and patently unworkable.²

¹ <http://www.justice.org.uk/data/files/resources/302/JUSTICE-response-to-UKBA-Family-Migration-consultation.pdf>

² Justice Press Release, *Immigration changes "unworkable"*, 4 October 2012

5. The Government consulted on these measures in 2011. The Home Secretary made an announcement on her intention to act on the Andrew Marr Show on 11 June 2012. Following a statement to Parliament on 12 June 2012, the statement of changes to the immigration rules was laid before Parliament on 13 June 2012. The motion for debate on 19 June 2012 was scheduled between 13 June 2012 and 15 June 2012, allowing Parliamentarians less than 7 days notice. The relevant rules are themselves lengthy and complex. They are accompanied by a lengthy statement of the Government's view that they are compatible with Article 8 ECHR.

6. **The Government has chosen to table this motion without adequate time for members of the House of Commons to consider the Rules in question; the terms of the motion proposed or the accompanying materials produced by the Government.**

Parliament and the judiciary: the constitutional conversation

7. Introducing this motion, the Secretary of State made clear that if the judiciary does not alter its interpretation of Article 8 ECHR significantly, the Government intends to ask Parliament to consider primary legislation which will amend s. 32 of the UK Borders Act 2007. While it is proper and constitutionally appropriate for Parliament to engage in a constitutional dialogue with our courts on the proper scope of legislation; the ordinary format for that conversation is through the passing and application of legislation.

8. It appears tautologous for one House to be asked to debate and vote on a motion to approve delegated legislation made by Parliament. As a political exercise, this unnecessary step suggests that the motion is being used as an exercise in media or expectation management. We consider the necessarily limited impact of the measures, below.

9. **The constitutional implications of such a motion must necessarily be limited.** The limits on the courts' access to Parliamentary proceedings during the passage of a Bill for the purposes of determining the will of Parliament is well-known. Courts interpret legislation as produced; only rarely resorting to evidence of its passage for

assistance.³ Urging Courts to resort to parliamentary proceedings as evidence of parliamentary intent over the passage of time – beyond Ministerial statements on the Act’s passing – opens the door to new and untold possibilities for legal uncertainty and should not be encouraged. Parliamentary sentiments may change and the intent of the members who passed a Bill may be very different to those who make up the House when the Act comes to be applied. Opening the door to new judicial scrutiny of the relevance of Parliamentary debate and formal motions (or the absence thereof) may fundamentally change the recognised relationship between the executive and judicial branches.

“Unworkable”

10. This motion is both mischievous and misconceived. Article 8 expressly includes the potential for lawful qualifications of the rights to private and family life provided that they serve one of the broad range of legitimate aims listed in Article 8(2) – including the economic well-being of the UK, national security and the prevention of disorder or crime - and are proportionate to that aim. The case-law in this area has emphasised that ‘[t]he search for a hard-edged or bright-line rule to be applied in the generality of case is incompatible with the difficult evaluative exercise which article 8 requires’.⁴ Any dilution or removal of Article 8 rights in the Rules would be unlawful and would result in their being struck down or read so as to be compatible with Article 8 under s3 HRA.

11. The domestic and ECtHR case-law establishes that Article 8 does not impose a general obligation to respect an immigrant’s choice of the country of matrimonial residence or to authorise family reunion. The appropriate question is whether the family can reasonably be expected to enjoy their family life elsewhere.⁵ In cases where a child is involved the best interests of the child must be a primary consideration.⁶

³ *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 established the limited rule by which a court or tribunal may consider a clear statement made in Parliament by a promoting Minister to clarify an ambiguity on the face of the Act or more generally to clarify the meaning and effects of the new law.

⁴ *EB (Kosovo)* [2008] UKHL 41, para 12.

⁵ *Huang* [2007] UKHL 11, the leading case on proportionality under Article 8 (at para 20); *Gul v Switzerland* (1996) 22 EHRR 93 (para 38)

⁶ See *ZH (Tanzania) v SSHD* [2011] UKSC 4 and see further the duty to safeguard and promote the welfare of children under s55 Borders, Immigration and Citizenship Act 2009.

12. The ECtHR has further dealt with the point of family rights obtained whilst a person does not have lawful status in the country of residence.
13. The law already provides for the power to deport a foreign national who has been recommended for deportation by a court following conviction for an imprisonable offence, or whose presence the Home Secretary has determined is not conducive to the public good. Further, s32 of the UK Borders Act 2007 provides for the automatic deportation of offenders jailed for one of a series of offences punishable by imprisonment for over 12 months. All these powers are, however, subject to obligations under the ECHR and the Refugee Convention.
14. The intended effect of the Immigration Rules appears to be that they should provide for the watering down or removal of rights to family life under Article 8 ECHR for certain categories of foreign national offender. However, as the Rules will be secondary legislation, any attempt to compromise or remove incorporated ECHR rights in the Rules will have no effect upon the legal duties of the UK Border Agency, the Home Secretary, the immigration tribunals and the courts to act compatibly with the Human Rights Act 1998 as public authorities subject to section 6 of the Act. Any decision-maker failing to afford a person his Article 8 rights will, therefore, be acting unlawfully.
15. In relation to the interpretation of Article 8 to determine the content and extent of those rights, decision-makers will be bound by the decisions of the higher courts in the UK. The courts are obliged under s2 HRA to take into account the jurisprudence of the European Court of Human Rights. In relation to foreign offenders, the law is as stated in *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10, which applied the criteria laid down by decisions of the Strasbourg Court and emphasised that the cases were highly fact-sensitive.
16. In the recent ECtHR decision of *AA v UK* the Court summarised the Strasbourg case-law thus:⁷

⁷ App No, 8000/08, 20 September 2011, Fourth Chamber), paras 56-58.

The assessment of whether the impugned measure was necessary in a democratic society is to be made with regard to the fundamental principles established in the Court's case-law and in particular the factors summarised in Üner, cited above, §§ 57-85, namely:

- *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 which has 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 any 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;*
- *the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;*
- *the best interests and well-being of any 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.*

...the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Further, not all the criteria will be relevant in a particular case....

It should also be borne in mind that where, as in the present case, the interference with the applicant's rights under Article 8 pursues the legitimate aim of "prevention of disorder or crime", the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities...

17. The Strasbourg and domestic case-law therefore allows the deportation of individuals where this is in the public interest; in a serious case where deportation is not ordered this is likely to be because, as in *AA*, factors exist demonstrating that the individual does not present a substantial risk to the public. The approach of the new rules is misconceived; no further change to the law is necessary and any change which dilutes or purports to remove Article 8 rights would be unlawful unless made in primary legislation, in which case a s19 HRA declaration of compatibility would not be possible.
18. We are concerned that the rules as produced would in effect impose a series of tests which would seek to predetermine that deportation would be proportionate in set categories of case.⁸ These suggest that the courts replace a series of nuanced, fact-sensitive decisions with the generally blanket application of a set of “tick-box” rules deemed proportionate by delegated legislation. In short, it seeks to displace the courts’ decision making power in individual cases with the broad determinations based on the Executive’s assessment of proportionality. In our view, these were precisely the type of blanket rules which the Convention was designed to avoid. The Secretary of State’s Statement of Intent explains the Government’s view that this approach is entirely in keeping with the case law of the Strasbourg Court since the domestic courts will retain a limited review role in considering the application of the general measures specified in the Rules:

The starting point of such a review will be that Parliament has decided how the balance will be struck. Although Parliament’s view is subject to review by the Courts, it should be accorded the deference due to a democratic legislature. If proportionality has been demonstrated at a general level, it need not, and should not be re-determined in very individual case.⁹

19. We disagree with the Secretary of State’s analysis. The Secretary of State suggests that this kind of general approach to proportionality has been accepted in, for example, housing law. We are unaware of the case-law to which the Statement of Intent refers, but note that in *Kay v UK*, the Grand Chamber of the European Court of Human Rights rejected precisely this kind of argument, which had been adduced in a

⁸ Statement of Intent, para 68.

⁹ Statement of Intent, paras 38 – 40.

number of earlier cases. The UK argued that the detailed system of possession in UK housing law – in itself was proportionate and protected individual rights protected by Article 8 ECHR – and thus, no right to argue Article 8 ECHR in individual possession hearings was necessary.¹⁰ The Strasbourg Court rejected this argument, and this analysis was subsequently accepted by the Supreme Court in the case of *Pinnock*.¹¹ **We consider that, if these rules are adopted, domestic courts will be bound to disapply any specific rule which they consider would lead to a disproportionate result when applied to the circumstances of any individual case.**

20. If primary legislation were produced; domestic courts would be bound by the new statutory language (subject to s.3 HRA 1998). However, the UK would retain an obligation to give effect to Convention rights in international law. If an applicant were to take an Article 8 ECHR claim to Strasbourg and succeed, the UK would have an obligation to give effect to this judgment (Article 46 ECHR). In effect, by changing the law, the Secretary of State could ultimately be placing the burden on the European Court of Human Rights to secure an effective remedy for any individual with a valid Article 8 ECHR claim; an approach entirely out of step with the Government's proposals in the recent Brighton Declaration.

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¹⁰ App. No. 37341/06, September 21, 2010

¹¹ [2010] UKSC 45