



Casework Instruction

Subject Article 8 ECHR
Valid from 7 August 2008
Expires Ongoing

INSTRUCTION – THIS IS FOR USE BY CASEWORK STAFF ACROSS THE UK BORDER AGENCY

1. Introduction

Three recent judgments handed down from the House of Lords have had an impact on the way the UK Border Agency must consider human rights claims under Article 8 of the European Convention on Human Rights (ECHR).

This instruction sets out the background to these cases and the revised consideration process for all staff in the UK Border Agency considering Article 8 claims. This instruction should be read as a supplement to existing instructions and provides the most up-to-date advice. There are aspects of the existing policies that cannot be applied in their current form. These will be updated to reflect the information contained in this instruction in due course.

2. Summary of the cases

In the case of *Chikwamba v The Secretary of State for the Home Department [2008]* the House of Lords considered the lawfulness of arguing that a person relying on Article 8 should leave the UK in order to apply for entry clearance. The House of Lords found that only in a small number of cases involving family life, and particularly those involving children, will returning the applicant to make an entry clearance application be proportionate.

In the case of *Beoku-Betts v The Secretary of State for the Home Department [2008]*. The House of Lords considered the extent to which the Article 8 rights of family members who are not party to proceedings should be considered and found that the AIT should now expressly consider these rights. This does not significantly alter the current casework consideration process because UKBA's policy was already to consider the rights of family members at the initial decision-making stage.

Finally in the case of *EB Kosovo v The Secretary of State for the Home Department [2008]* the House of Lords considered what bearing delay in decision making has on a person's rights under Article 8. The judgment clarifies the way in which the effect of delay in consideration of an individual's application will affect the proportionality of a decision to remove and identified three ways in which delay might be relevant. Decision makers in the

UK Border Agency will now have to consider the impact of delay in these three ways outlined in the judgment (see section 6 below).

3. Impact on the UK Border Agency

The findings of the three cases are binding on the UK Border Agency. Therefore the policy in relation to the consideration of Article 8 claims is being revised. All those dealing with Article 8 applications and issues should now follow the revised consideration process set out in the following paragraphs.

4. Consideration Process

When deciding claims under Article 8 it is still necessary for an individual to make out his or her claim before a decision is made that their removal would breach Article 8. All staff should still complete the standard five stage consideration process.

Stage 1: Does the claimant have a family or private life in the UK?

Stage 2: If family life exists will refusal/removal interfere with that family life?

Stage 3: If there is interference with family life, is it in accordance with the law?

Stage 4: Is the interference in pursuit of one of the permissible aims set out under Article 8(2)?

Stage 5: Is the interference proportionate to the permissible aim?

Stages 1 – 4 must be considered broadly in line with existing guidance. If a case can be refused on the basis that there is no family or private life, or on the basis that there is no interference with that family or private life (for example because all the members of the family are to be removed together), then the recent cases do not make a difference to that refusal.

The recent cases primarily affect Stage 5 of the consideration process. The task for decision-makers in assessing whether any interference in family life would be proportionate is to:

- Consider all the relevant factors, weigh up relevant considerations and decide whether refusal or removal will result in a disproportionate interference with Article 8 rights.
- If refused, explain fully the consideration of these factors in the refusal letter

In addition to existing guidance on the factors to consider when assessing proportionality caseworkers must also consider the following:

- Whether it is proportionate to require the individual to leave the UK and apply for Entry Clearance, having regard to the factors set out by the House of Lords in *Chikwamba*; and
- What effect any delay in decision making has had on the proportionality test, having regard to the factors set out by the House of Lords in *EB Kosovo*.

5. Is it proportionate to require the individual to leave the UK and apply for Entry Clearance?

Until recently the UK Border Agency's policy has been that if there was a procedural requirement requiring a person to leave the UK and make an application for entry clearance then such a person should do so. In such cases interference with Article 8 would have been considered to be temporary and therefore likely to be proportionate and many cases have been refused on that basis. However, the policy position has changed in light of the judgment

in the case of *Chikwamba v The Secretary of State for the Home Department [2008]*. The House of Lords held that although the policy had a legitimate objective, the way it had been applied (i.e. in a fairly universal manner) was essentially wrong and that it is only comparatively rarely that it will be lawful to require someone with family here to return home and apply for entry clearance, particularly where children are involved.

The House of Lords emphasised that cases should, where possible, be considered fully at the earliest stage, ie in-country. Applicants making Article 8 claims still need to demonstrate on the balance of probabilities that they enjoy private and/or family life in the UK and that there would be an interference with that private and/or family life if they were not allowed to remain in the UK. The UKBA, if minded to reject the claim, then has to show that the interference is proportionate, having regard to all the facts of the case.

Returning an applicant to his/her home country in order to make an entry clearance application may still be proportionate in a small number of cases. All cases must therefore be considered on their own merits and a decision made about whether it is appropriate to expect the individual to go abroad and apply for entry clearance.

For the process of assessing whether it is appropriate, the House of Lords considered that the prospective length and degree of family disruption involved would always be highly relevant, but accepted that it could well be proportionate to enforce removal in a case, for example, where there was an appalling immigration history or an abusive asylum claim, providing the practicalities of going abroad to obtain entry clearance did not entail a serious disruption to family life.

The Lords considered it would also be relevant to take into account any delay in considering the claim for which the applicant was not responsible (see section 6 below). They also accepted that there would also be some cases where the Entry Clearance Officer (ECO) would be better placed to investigate the claim than the UK authorities, although this would have to be balanced against the disadvantage to the applicant in being unable to give evidence at the appeal hearing of a refusal to grant entry clearance.

Examples of where the ECO may be better placed to assess an application could be where knowledge of local laws and customs are highly relevant or where the ECO, rather than the UK authorities, is better placed to assess the genuineness of a marriage or a claimed relationship between family members. This might include, for example, cases where it is not clear whether the applicant is legally divorced from a previous spouse.

6. What effect does a delay in consideration have on the proportionality test?

In the case of *EB Kosovo v The Secretary of State for the Home Department [2008]* the House of Lords considered what bearing delay in decision making has on a person's rights under Article 8. The Lords identified three ways in which delay would work in the applicant's favour;

1. By allowing the individual to develop closer ties to the UK in terms of family and private life;

2. Where the individual entered into a relationship or established private life after arrival in the UK, by reducing the significance of the fact that the individual and any partner knew the individual had no right to remain; and
3. By reducing the force of the argument that removal is necessary in the interests of upholding immigration control if the delay is shown to be a result of an inconsistency in outcomes which will have a bearing on the proportionality of removal or requiring an applicant to apply out of country. This point, on consistency of treatment between one applicant and another, is one of fairness. The House of Lords saw it as particularly significant that EB's cousin, with whom he had arrived in the UK and who claimed asylum at the same time on the basis of the same facts, had his claim dealt with without delay and was granted ELR (under the policy then in force) (and later ILR) as a result. Delay in decision making may therefore make removal disproportionate if the applicant:
 - can demonstrate that as a result they were treated inconsistently with other applicants in similar circumstances or
 - had an expectation that their case would have been handled differently had it been considered earlier (e.g. that they would have benefited from policies in place at that time).