Briefing Paper 8.39

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Deportation and Human Rights

I have to apologise in advance for the inordinate length of this briefing paper. Its purpose is to draw attention to :-

- certain recent cases in which convicted criminals have defeated attempts to deport them by reliance on the European Convention on Human Rights (ECHR);
- a case in which an Ethiopian in the UK with indefinite leave to remain and subject to a control order under the Prevention of Terrorism Act 2005 was able successfully to contest the provisions of the control order on human rights grounds;
- a lecture on the subject of the ECHR and its application by the President of the Supreme Court;
- the fact that the ECHR, by contrast with the 1951 Convention on the Status of Refugees (the Asylum Convention) does not debar convicted criminals and others who present dangers to national security from enjoying its protection; and
- our general conclusions on the subject.

Following to the end of paragraph 7 is the text of our original Legal Briefing Paper MW 187, issued in April 2010.

1 The decision handed down by the Court of Appeal on 15 April 2010 in the case of Sukdarshan Singh v. The Secretary of State for the Home Department 2010 [EWCA] Civ. 3 has attracted a certain amount of adverse comment in the media. The appellant was appealing against a decision of the Secretary of State to make a deportation order against him and to refuse him indefinite leave to remain in the United Kingdom.

2 The appellant is an Indian national born in 1954 who entered the UK unlawfully in 1984 and has remained here since then without leave. In 1988 he committed the offence of rape against a 59 year old woman. The offence was reported at the time and a DNA sample of the appellant was taken, but he was not prosecuted for the offence until 2006, when he was arrested in connection with driving with excess alcohol and other motoring offences. A DNA sample taken was matched with the earlier sample and the appellant was charged with rape. Initially he pleaded not guilty but changed his plea to guilty in the course of the trial. He was sentenced to 4 years 6 months imprisonment and required to register as a sex offender for life. In 1991 he had married a woman who was an Indian national but who became a British citizen in 1993. There are two children of the marriage who are now aged 18 and 16 and are both British citizens.

3 The appellant's application for indefinite leave to remain was refused on the grounds of his conviction for rape and the decision to deport him was taken under section 3(5)(a) of the Immigration Act 1971, on the ground that his deportation was conducive to the public

good. He appealed against this decision under paragraph 364 of the Immigration Rules and Article 8 of ECHR which confers a right to respect for private and family life. Paragraph 364 sets out the general considerations to be taken into account in deciding whether a person liable to deportation should in fact be deported. It states that "the presumption shall be that the public interest requires deportation" and goes on to say "it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and protocol relating to the Status of Refugees to deport".

4 The main issue which fell to be decided by the Asylum and Immigration Tribunal [AIT] was whether deportation would be a disproportionate interference with the right to family life under Article 8. That Article in paragraph 2 states :

> ***There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public order or the economic well being of the country, for the prevention of disorder or crime...***

In considering Article 8 the AIT noted that it had to strike a fair balance between the rights of the individual and the interests of the community at large. The argument on behalf of the appellant was that the family needed to stay together in the interests of family life. If the appellant were to be deported this would only be possible if the whole family went to India. The evidence was that only the younger child had visited India in company with his mother and an attempt to place him in an Indian school had been an unhappy experience for him. The AIT concluded that although there were compassionate circumstances to be weighed against the deportation of the appellant, these did not tilt the balance in favour of the appellant. The AIT dismissed the appeal and upheld the decision of the Secretary of State.

5 An appeal lay from the AIT to the Court of Appeal on a point of law. The Court of Appeal found that the AIT had failed to take into account a Home Office policy circular, DP5/96, setting out in specific terms factors which are to be taken into account by case workers when considering the deportation of individuals who had children who were either born in the UK and are now aged 7 years or more or who were born elsewhere but have spent more than 7 years in the UK. These factors include the length of the parents' residence in the UK without leave, criminal record of the parents, ages of the children and whether return to the patents' country of origin would cause extreme hardship to the children or put their health seriously at risk. The circular was revoked in December 2008 but was in force when the original decision was taken and when the appeal was decided. The Court of Appeal allowed the appeal mainly because of this omission on the part of the AIT. The case was remitted to the Upper Tribunal (successor to the AIT as of 15 February 2010) for further consideration in the light of the requirements of the circular. It is possible that the Upper Tribunal may reach the same conclusion as the AIT. That remains to be seen.

6 Factors which were not mentioned by the Court of Appeal but which ought reasonably to count in favour of the AIT's decision are:

- ***The appellant had just finished a jail sentence when he made the application for indefinite leave to remain, which would hardly have been conducive to settled family life.***
- ***The ages of the children. The elder is 18, an adult, and the younger 16. At those ages the argument for keeping the family together is less than compelling.***
- ***The appellant was arrested in 2006 on suspicion of drink driving and other motoring offences. He was not prosecuted for those offences, but the available evidence might well have been relevant to the justification of a decision to deport on the grounds of the prevention of disorder or crime, as allowed by paragraph 2 of Article 8.***

7 This is the kind of decision which often brings opprobrium on the judges. This is not the first case in which a decision taken on the application of ECHR appears to favour a convicted criminal or other undeserving person. In the last few days there have been reports in the press of a similar case in which a convicted Pakistani criminal who had completed a jail sentence for rape appealed successfully against a UK Border Agency decision to deport him on the ground that that would be an interference with his right to a family life under Article 8. The decision was taken by an immigration judge and it is likely that there will be an appeal against it by the UKBA. However, it must be borne in mind that the task of the judges is to interpret the law, in this case the provisions of the Human Rights Act 1998 which made ECHR directly justiciable in the UK courts. Before 2000, when the Act came into force, a person who wished to raise an issue under ECHR had to take his case to the Court of Human Rights in Strasbourg. The judges cannot ignore the will of Parliament as expressed in the 1998 Act and in some cases their decisions may anger the public and some politicians. At least in this case the decision of the Court of Appeal does not free the appellant from the threat of deportation, but it does lead to more delay before there is any possibility that the appellant may actually be deported.

DEVELOPMENTS AFTER APRIL 2010

A case before the Special Immigration Appeals Commission

8 A much more glaring decision on similar lines was taken in May 2010 by an immigration judge sitting as a member of the Special Immigration Appeals Commission (SIAC). SIAC was established by the Special Immigration Appeals Commission Act 1997 for the purpose of dealing with asylum and immigration appeals which involve consideration of national security. Part V of the Nationality, Immigration and Asylum Act 2002 sets out the main rules for the conduct of asylum and immigration appeals. Section 97 of that Act debars appeals under Part V if the Home Secretary certifies that it is in the interests of national security or in the interests of the relationship between the United Kingdom and another country that the person who wishes to appeal should be excluded or removed from the United Kingdom. In such a case the person may instead appeal to SIAC in accordance with section 2 of the 1997 Act. By section 5 of the 1997 Act the Lord Chancellor is given power to make rules 9(a) enabling proceedings to take place before SIAC without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal and (b) enabling SIAC to hold proceedings in the absence of any person, including the appellant and any representative appointed by him. Section 6 provides that the relevant law officer may appoint a person to represent the interests of an appellant in any proceedings from which the appellant and his legal representative are excluded. The relevant law

officers are the Attorney General for England and Wales, the Lord Advocate for Scotland and the Attorney General for Northern Ireland. These are extraordinary provisions which are contrary to the rules of natural justice but are justified because of the nature of the evidence which has to be considered and the need to protect sources of such evidence. Section 1(3) of the 1997 Act gives SIAC the status of a superior court of record, making it in effect equivalent to a division of the High Court.

9 The case mentioned at the beginning of paragraph 8 above concerned two young Pakistani men, Abid Nasser and Ahmad Faraz Khan. They were arrested in 2009 in the course of counter-terrorism raids but were never charged with any offence. The first of these was described by the judge, Mr Justice Mitting, as "an al Qaeda operative who posed and still poses a serious threat to the security of the UK" and added that it was conducive to the public good that he should be deported. The judge found also that Faraz Khan could safely be assumed to have been willing to been willing to take part in Nasser's plans and should also be deported. The judge was satisfied on the evidence that these two men were parties to a plot to carry out a plot in North West England in April 2009 which would have resulted in mass casualties. Unfortunately, the judge went on to rule that the pair could not be deported to Pakistan because of risks to their personal safety on return that country. Evidence was accepted that both would be at risk of torture or inhuman treatment at the hands of the authorities, which would be an infringement of their rights under Article 3 of ECHR.

A case before the Supreme Court

AP V Secretary of State for the Home Department [2010] UKSC 24

10 This was a case decided in June 2010. The appellant was an Ethiopian male born in 1978. He and other members of his family came to the UK in 1992 and in 1999 all were granted indefinite leave to remain. In May 2005 he travelled first to Somalia and then to Ethiopia. He was detained by the authorities in Ethiopia but was able to return to the UK in December 2006. As a result of this he was suspected of being involved in terrorism and was therefore refused leave to enter the UK. The decision to exclude was withdrawn later when the Home Secretary was given leave by the court under the Prevention of Terrorism Act 2005 to make a control order against AP.. This subjected him to a number of restrictions, including a 16 hour curfew, electronic tagging and, most importantly, a requirement (the residence requirement) that he move to the Midlands, some 150 miles away from London where his family lived. The reason for this was that it made it more difficult if not impossible for the appellant to have contact with other persons involved in terrorism.

11 The appellant contested the residence requirement on the basis of two Articles of ECHR. Article 5 is the right to liberty and security of persons, subject to exceptions such as lawful imprisonment after a criminal conviction. Article 8, quoted in paragraph 4 above, provides that everyone has the right to his private and family life, but permits a public authority to interfere with that right on lawful grounds inter alia of national security or public safety.

12 The High Court found that the residence requirement was proportionate and compatible with Article 5 but that it was not compatible with Article 8. The Court of Appeal reversed the decision on Article 8, but the Supreme Court, which has the final say, reinstated the decision of the High Court. The grounds were that the appellant was isolated from his mother and brother, living in a town where he knew no one. His family members were allowed to visit him, but in practice this was difficult because of the cost of travel and because his mother was looking after his sister's three young children. The Supreme Court found that the control order and the need to prevent

contact with terrorist associates were justified, but that the residence requirement was disproportionate and therefore wrong.

13 This is a truly astonishing decision. The appellant is a man of 32, presumably unmarried, and still living with his mother. The evidence is that for a period of almost two years he was away from his family travelling to Somalia and Ethiopia, though this is not mentioned in the Supreme Court judgements as a factor which might cast any doubt on the importance to him of contacts with his immediate family members. No doubt following the imposition of the residence requirement he missed his family and there were problems in seeing them, but they were all still living in the UK. There is nothing unusual for a man of that age to be living alone in a strange community, possibly having difficulties making friends. He attended the local mosque and though he complained that the other Muslims there were mostly of other nationalities, there were one or two other Ethiopians with whom he might have made contact.

A lecture by the President of the Supreme Court

14 The problems raised by cases such as these were the main subject of a recent public lecture at Gresham College by Lord Phillips, president of the Supreme Court, one of the judges who concurred in the judgement of the court discussed in paragraphs 10 - 13. Lord Phillips dealt at length with recent problems about anti-terrorism legislation, the control orders which were introduced by the Prevention of Terrorism Act 2005 and the conflict between the judiciary and the executive arm of government arising out of cases in which control orders were found to infringe the rights under ECHR of people made subject to them. I do not propose to consider this part of Lord Phillips's analysis in detail, as Migration Watch is concerned with terrorism only to the extent that legislative measures relating to terrorism impinge on questions of asylum or immigration. However, the following passages from his lecture are worth quoting. At one point he quotes the following remarks made by Charles Clarke, then Home Secretary, to a parliamentary committee:

> The judiciary bears not the slightest responsibility for protecting the public and sometimes seems utterly unaware of the implications of their decisions for our society.

On this Lord Phillips comments:

> Charles Clarke failed to appreciate that it is the duty of the judiciary to apply the laws that have been enacted by Parliament. It was Parliament that decreed that judges should apply the Human Rights Convention...

Later he says:

> The lesson of history is that depriving people of [the protection of the rule of law] because of their beliefs or behaviour, however obnoxious, leads to the disintegration of society. It was to eradicate this evil that the European Convention on Human Rights.....was prepared for the governments of European countries to enter into.
>
> The rights and fundamental freedoms that the Convention guarantees are not just for some people. They are for everyone. No one, however dangerous, however disgusting, however despicable, is excluded. Those who have no respect for the rule of law -even those who would seek to destroy it - are in the

same position as everyone else.

15 The frustration felt by politicians and many other people as expressed in the remarks by Charles Clarke quoted above is fully understandable. However, regard must be had to the fact that the judges are required to interpret the law as passed by Parliament. But it is worth while considering what the situation was before the Human Rights Act was passed and the ECHR became justiciable in courts in the United Kingdom. The United Kingdom was a party to the ECHR but anyone who wished to invoke it in litigation had to go to the European Court of Human Rights in Strasbourg. This was particularly relevant in asylum appeals. Any attempt by appellants' representatives to invoke ECHR were answered by saying that ECHR was not part of the laws of the UK as administered by domestic courts. Asylum applications and appeals were conducted in accordance with the provisions of the Asylum Convention. The Convention specifically excludes from its protection certain classes of person. The key provision of the Convention is Article 33.1 which prohibits contracting states from expelling refugees to any state where their lives or liberty would be threatened on account of race, religion, membership of a particular social group or political opinion. However, Article 33.2 excludes from the benefit of Article 33.1 any refugee (to be interpreted as "asylum seeker") (1) whom there are reasonable grounds for regarding as a danger to the security of the country in which he is or (2) who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

16 The two cases referred to in paragraphs 1 to 7 both concerned convicted rapists and would therefore be excluded by the second limb of Article 33.2. The case discussed in paragraphs 8-11 concerns two men who were not charged with, still less convicted of any crime, but the immigration judge sitting as a member of SIAC found it to have been proved beyond reasonable doubt that they had been plotting acts of terrorism and ought to be deported. As asylum applicants they would therefore have been excluded by the first limb of Article 33.2. But in all three cases the men were able successfully to invoke ECHR which thus negates the effect of the exclusion provisions of the Asylum Convention. The case discussed in paragraphs 10-13 is different in that the appellant was not, so far as the evidence shows, an asylum seeker, but was able to invoke Article 8 of ECHR in contesting a control order. In this he succeeded because of an extraordinarily indulgent judgment of the Supreme Court.

17 I would respectfully disagree with Lord Philips in appearing to suggest that any form of protection which falls short of the absolute requirements of Article 3 of ECHR threatens the disintegration of our democratic society. The provisions of Article 33 of the Asylum Convention quoted in the preceding paragraph governed exclusively the consideration of asylum applications and appeals until October 2000, when the Human Rights Act 1998 came into effect. During that period persons who might otherwise qualify for sanctuary as refugees in the United Kingdom could be denied that protection and deported if it could be shown that they were a menace to national security or were guilty of serious crimes. That exclusion was perfectly proper and in no way contravened the rule of law. However, once ECHR became justiciable in the United Kingdom courts the effect of Article 33.2 was effectively negated, since asylum applicants and appellants would invariably rely on Article 3 of ECHR. In Legal Briefing Paper MW 76 on Revision of the Human Rights Act, published in April 2007, Migration Watch put forward the case for substantial amendments to the Act which would preserve human rights generally but remove present barriers to the deportation of convicted terrorists or others shown to threaten national security. The legal barriers to withdrawal from ECHR are discussed in MW 76 and are formidable. However, we feel that the need to protect the country's citizens against terrorist attacks and to be able to deport

persons who seek to undermine national security is a paramount consideration. The government has announced its intention of setting up a commission to review the working of the Human Rights Act 1998, the statute which made the ECHR justiciable in the UK courts. Migration Watch intends to put in appropriate submissions to the Commission when it begins to function.

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