Deportation of Foreign Criminals

Legal: MW 388

Article 8 of ECHR as interpreted in a recent deportation appeal with reference to paragraphs 398, 399 and 399A of the Immigration Rules and Part 5A of the Nationality, Immigration and Asylum Act 2002

The case of *Secretary of State for the Home Department v.CT (Vietnam)* [2016] EWCA Civ. 488, was decided in the Court of Appeal in May 2016. The respondent Vietnamese national has an appalling criminal record. He arrived in the UK in 1991 and was granted refugee status, but this was later revoked. In 1997 he was convicted in the Central Criminal Court of attempted murder and of possession of a firearm with intent to endanger life. He was sentenced to imprisonment for 7 and 4 years for these offences, the sentences to run concurrently. After release from prison he entered into a relationship with a woman by whom he had two children, now aged 13 and 10 and both British citizens. In 2009 he was convicted of conspiracies to cultivate and supply cannabis, for which he was sentenced to imprisonment for 4 years and of firearms offences, for which he was sentenced to imprisonment for 7 years 6 months, the sentences to run concurrently.

The Home Secretary made a deportation order against the respondent in September 2010. His appeal to the Tribunal's first tier failed in January 2011. A further appeal to the upper tier of the tribunal succeeded and the Home Secretary was granted leave to appeal against this to the Court of Appeal.

The legal provisions considered by the Court of Appeal were:

1. Section 32 of the UK Borders Act 2007 which provides for automatic deportation of foreign criminals as defined in the section, i.e. a person who has been sentenced to a term of imprisonment of at least 12 months for commission of an offence falling within a category defined by the Home Secretary in accordance with section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002. Section 3(5)(a) of the Immigration Act 1971 states that a person who is not a British citizen is liable to deportation if the Secretary of States deems that his deportation is conducive to the public good. Section 32(4) of the 1997 Act states that for the purposes of section 3(5)(a) of the 1971 Act the deportation of a foreign criminal is conducive to the public good. The respondent's liability to deportation on grounds that deportation is conducive to the public good was not disputed at the hearing of the appeal. However, section 33 of the 2007 Act provides for exceptions to section 32's automatic deportation, notably cases in which deportation

would breach the rights of the foreign criminal under the ECHR, in this case the right to family life under Article 8. The case turned on the applicability of Article 8.

2. Section 55 of the Borders, Citizenship and Immigration Act 2009, which imposes on the Home Secretary an obligation to safeguard and promote the welfare of children in the United Kingdom in relation to the discharge of her functions relating to immigration, asylum and nationality.
3. Paragraphs 398, 399 and 399A of the Immigration Rules. These paragraphs were introduced into the Rules in 2012 by the Home Secretary in an attempt to meet concerns about the readiness of immigration judges to allow appeals against deportation by convicted foreign criminals. Paragraph 398(a) applies in this case because the respondent was sentenced to a term of imprisonment of more than 4 years and as mentioned in paragraph 1 above, by the operation of section 32(4) of the 1997 Act his deportation is conducive to the public good.

The judgment of the Court of Appeal is mainly concerned with interpretation and application of the Rules referred to in 3 above. These rules emphasise the public interest in deportation and have the effect that only in exceptional circumstances will consideration of children or other factors override that interest.

The Court quoted with approval the following passage from one of its own earlier judgments as particularly apposite:

> *" The starting point….is the recognition that the public interest in deporting foreign criminals is so great that only in exceptional circumstances will it be outweighed by other factors, including the effect of deportation on any children….where the person to be deported has been sentenced to a term of 4 years' imprisonment or more…the weight to be attached to the public interest in deportation remains very great despite the factors to which paragraph 399 refers. It follows that neither the fact that the appellant's children enjoy British nationality nor the fact that they may be separated from their father for a long time will be sufficient to constitute exceptional circumstances of a kind which outweigh public interest in his deportation."*

The Court of Appeal accepted that on the basis of his criminal record and conduct the respondent was a danger to the community. It did not accept the view taken by the Tribunal that this was mitigated by the fact that the respondent had committed his offences mainly within his own Vietnamese community in the UK and was therefore a danger only to the members of that community. The Court considered that the Vietnamese community was entitled to the same degree of safety from criminal activity as the rest of the population.

So far as the children were concerned, the Court accepted that the children would be unhappy at being separated from their father. But they would still have their mother with them in the UK and the separation would not tip the balance against the public interest in deportation.

The appeal of the Home Secretary was allowed.

Part 5A of the Nationality, Immigration and Asylum Act 2002

Comment

The Immigration Rules referred to above are now strongly reinforced and possibly made redundant by the new provisions introduced by section 119 of the Immigration Act 2014. That section amended the Nationality, Immigration and Asylum Act 2002 by adding a new Part 5A entitled "Article 8 of the ECHR: public interest considerations" comprising four new sections 117A to 117D. These sections spell out the matters to which a court or tribunal must have regard when considering whether any decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8 and as a result would be unlawful under section 6 of the Human Rights Act 1998. Section 117B states that the maintenance of effective immigration control is in the public interest and goes on to list the following factors relating to persons seeking to enter or remain in the UK as also in the public interest:

(i) ability to speak English;
(ii) financial independence so as not to be a burden on taxpayers and to be better capable of integrating into society.

Section 117C of the 2002 Act sets out additional considerations to be taken into account in cases involving foreign criminals. It begins by stating that the deportation of foreign criminals is in the public interest and that the more serious the offence committed by a foreign criminal the greater is the public interest in his deportation. Subsection (6) covers the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years and would now be relevant to the respondent's case in this appeal. This subsection states that the public interest requires the deportation of such a foreign criminal unless there are very compelling circumstances going beyond the exceptions listed in the section.

Section 19 of the 2014 Act, giving effect to these new sections in the 2002 Act, was brought into operation on 14 July 2014. The appeal discussed above was brought by the Home Secretary against a decision of the Upper Tier of the Tribunal in September 2011, before July 2014, and its scope was therefore limited to consideration of the Immigration Rules dating from 2012. There is no reason to doubt that the decision of the Court of Appeal would have been the same if it had been considering the new sections rather than the Immigration Rules. The scope of the new sections is clearly much stronger and more detailed in giving effect to the primacy of effective immigration control and of deportation. They are intentionally draconian but have been carefully drafted to avoid any possibility of a conflict with the protection to private and family life afforded by article 8. Article 8.2 permits interference with that right in accordance with the law and as necessary in a democratic society in the interests of national security, the prevention of disorder or crime and similar reasons of public benefit. Regrettably in the past the provisions of Article 8.2 appear to have been ignored by immigration judges and consequently appeals against deportation have been wrongly allowed. This judgment by the Court of Appeal, coupled with the coming into force two years ago of the new Part 5 of the Nationality, Immigration and Asylum Act 2002 should redress the balance in favour of more effective immigration control and deportation.

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