



LawWorks Introduction to Immigration Law

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A. Background

-Public international law incl:

-Universal Declaration of Human Rights 1948 (non-binding)

-1951 Convention relating to the Status of Refugees (and 1967 Protocol)
-art 1A(2) refugee definition- a person who

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out-side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Art 1C cessation of status

Art 1D-F exclusion/nonapplication

-art 32 limitation on expulsion of lawfully present refugee

-art 33 protection from refoulement – but by art 33(2) not for refugee

‘whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’

- 1954 Convention relating to the Status of Stateless Persons
 - art 1(1) definition-

‘For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.’

-international human rights law instruments including:

- International Covenant on Civil and Political Rights 1966
 - Art 6- right to life
 - Art 7 - prohibition of torture or cruel, inhuman or degrading treatment or punishment
- Convention for the Elimination of All Forms of Racial Discrimination 1969
- Convention on the Elimination of All Forms of Discrimination against Women 1979
- Convention against Torture & Other Cruel Inhuman or degrading Treatment or Punishment 1984
- Convention on the Rights of the Child 1989
- Convention on the Rights of Persons with Disabilities 2006

-Council of Europe instruments including:

- European Convention on Human Rights and Fundamental Freedoms 1950;

- Art 2- right to life
- Art 3 - prohibition of torture or cruel, inhuman or degrading treatment or punishment
- Art 8- private and family life

- Council of Europe Convention on Action against Trafficking in Human Beings 2005

-EU law including:

- EU Charter of Fundamental Rights
- EU Council Directive 2004/38/EC of 29th April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No

1612/1968 [etc.] ('the Citizens' Directive) [nb mostly transposed into Immigration (European Economic Area) regulations 2016- see below.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ('the Qualification Directive')

Refugee status

Art 13

Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.

Qualification for subsidiary protection

Art 15- serious harm

Serious harm consists of:

- (a) death penalty or execution; or*
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or*
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.*

-Domestic law

Statute- esp

Immigration Act 1971 (IA 1971)

Nationality Immigration and Asylum Act 2002 (NIAA 2002)

UK Borders Act 2007 (UKBA 2007)

Borders Citizenship and Immigration Act 2009 (BCIA 2009)

Immigration Act 2014 (IA 2014)

Statutory instrument

Other- ie Immigration Rules under section 3(2) IA 1971

B. Legal Framework

Sources of Immigration Law

Primary Legislation:

- Immigration Act 1971
 - Provides, amongst other things, statutory power to SSHD to set '*Immigration Rules*' and the power to detain.
 - s1- 'General principles'- effect of having 'right of abode'
 - s2- Who has right of abode (British citizens, certain Commonwealth citizens (relevant- Windrush))
 - s3(1) provision for control- requirement for leave to enter or remain, if not possessed of right of abode
 - s3(2) requirement for written rules (the Immigration Rules) laid before Parliament from time to time
 - s3C continuation of leave to remain pending decision or appeal
 - ss3(5) and 5(1) deportation
 - Sch2- examination and detention
- European Communities Act 1972
 - Provided for the incorporation into UK law of the whole of European Community law and its '*acquis communautaire*': its Treaties, Regulations and Directives, together with judgments of the European Court of Justice- EU law given supremacy over other UK law by statute. EU law separate from, and superior to, UK domestic immigration laws (UK laws may transpose EU law for domestic application, or EU law may be directly effective)
- Human Rights Act 1998
 - Incorporates into UK law the rights contained in the European Convention on Human Rights
 - S 3 is a particularly wide provision that requires courts to interpret both primary and subordinate legislation so that their provisions are compatible with the articles of the European Convention on Human Rights which are also part of the Human Rights Act.
 - Ss 4 and 10 allows courts to issue a declaration of incompatibility where

it is impossible to use s 3 to interpret primary or subordinate legislation to be compatible with the articles of the European Convention on Human Rights, which are also part of the Human Rights Act.

- S 10 gives a government minister the power to make a ‘*remedial order*’ in response to either: a declaration of incompatibility, from which there is no possibility of appeal, or a ruling of the European Court of Human Rights.
- Per s 6(1) provides, ‘*It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*’
- *R (Razgar) v SSHD* [2004] 2 AC 368 (per Bingham L at [17]). It is submitted that each of the following steps must be considered in turn:
 - *Stage 1 - Will the decision be an interference by a public authority with the exercise of the applicant’s right to respect for his private or (as the case may be) family life?*
 - *Stage 2 - If so, will the decision have consequences of such gravity as potentially to engage the operation of article 8?*
 - *Stage 3 - If so, is such interference in accordance with the law?*
 - *Stage 4 - If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*
 - *Stage 5 - If so, is such interference proportionate to the legitimate public end sought to be achieved?*
- Nationality, Immigration and Asylum Act 2002:
 - Defines, amongst other things, which ‘Immigration decisions’ are appealable before the tribunal; provides power to ‘certify’ decisions so that they are not appealable before the Tribunal; prescribes the appeal grounds upon which an appellant can rely.

Appeals- part 5- essentially appeal on basis of inconsistency with Refugee Convention or humanitarian protection or ECHR (ss 82, 84), certification to prevent appeal ss94, 96;

- UK Borders Act 2007
 - Ss32-37 'automatic deportation'
- Borders Citizenship and Immigration Act 2009
 - s55- duty re best interests of child as 'primary consideration'
- Immigration Act 2014
 - Introduced '*deport first, appeal later*' certification provisions;
 - S. 19, brought into force as from 14.07.14, amended the Nationality, Immigration and Asylum Act 2002 to include a new Part 5A entitled '*Article 8 of the ECHR: public interest considerations*' comprising four new sections, 117A, 117B, 117C and 117D.
 - S. 117A states that Part 5A applies where a court or tribunal has to determine whether a Home Office immigration decision breaches a person's right to respect for private and family life under Art. 8 and as a result would be unlawful under s. 6 of the Human Rights Act 1998.
 - In such a case the court or tribunal must have regard to the '*public interest question*' which means the question whether an interference with a person's right to respect for private and family life is justified under Art. 8(2) (ECHR).

Secondary Legislation

Statute may create in the responsible Minister a power to make secondary legislation (delegated legislation)- for example

Immigration (European Economic Area) Regulations 2016 (SI 2016/2052)

Part 1- Preliminary (including critical definitions)

Part 2- Rights

Part 3- Documentation

Part 4- refusal of admission and removal etc

Part 6- appeals

Immigration Rules HC 395

Most frequently encountered Parts of the Immigration Rules

1 – General

2 - Visitors

6A – Points-based system (entrepreneurs, investors, skilled workers, students...)

7- Other

-esp para 276A-D (long residence, in general indefinite leave after continuous lawful residence of 10 years)

-para

8 – Family members

9 – General grounds for refusal

11 – Asylum

-esp para 334 grant of asylum (person in the UK, qualifying as a refugee, no reasonable grounds to regard as danger to security of UK, refusal would require him/her to go to a country in which life or freedom would be threatened on account of race, religion, nationality, political opinion, or membership of a particular social group)

para 352A-D (refugee family reunion)

13 – Deportation

14 – Stateless persons

Appendix FM (family members)

Appendix FM-SE (family members- specified evidence)

- Available online.
- Byzantine labyrinth of voluminous, frequently mind-boggling and ever changing rules governing the relationship between the state and those without the right of abode (and a EEA right to reside).
- Part 6A regulates Points Based Migration; Appendix FM regulates Family Migration (partners and parents); Part 9 provides the general grounds of refusal; Part 13 sets out the rules governing deportation of foreign national criminals.
- No longer a grounds of appeal that the decision was not in accordance with the immigration rules. However, this would be relevant to stage 3 (the lawfulness of the decision) and stage 5 (the proportionality of the decision) of the *Razgar* test
- Four changes this year so far, ten changes last year and six the year before.

Policies and Concessions

- Subject to frequent change.
- For example, *'Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes Version 3.0'*

Changes to the Immigration Rules HC 395 brought about by the Statement of Changes HC 194

Various measures were incorporated into the Immigration Rules HC 395 as from 9 July 2012 setting how SSHD will interpret article 8 ECHR obligations, which have since attracted further amendment. They include the requirements for leave to remain as a partner, which presently provide as follows:

Private life- para 276ADE Immigration Rules HC 395:

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

Judicial interpretation- in *Kamara v. SSHD* [2016] EWCA Civ 813; [2016] 4 WLR 152, the Court of Appeal held that the question of whether a person would face ‘*very significant obstacles*’ to reintegration was a broad one including other factors though also extending to whether that person is still ‘*enough of an insider*’ to renew effective participation in local life:

14. *In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.*

Family life- Appendix FM to Immigration Rules HC 395 covers family life with a partner or child. Adult dependent relatives also covered but may only apply out of country.

Partner= spouse, civil partners, fiancé or proposed civil partner, cohabitee in relationship akin to marriage or civil partnership for 2 years

It has been established by decisions of the Upper Tribunal (Immigration and Asylum Chamber) and of the Administrative Court and Court of Appeal that the effect of the new provisions in HC 395 is not that SSHD’s approach to article 8 ECHR under the Immigration Rules wholly displaces the established approach, but that where the Immigration Rules do not point to a grant of leave the tribunal must then consider the established approach to article 8 ECHR. In *R (Nagre) v SSHD* [2013] EWHC 720 (Admin), Sales J rejected a challenge to the whole of the new Rules as unlawful, concluding *inter alia* that:

27. *There is, in my judgment, nothing untoward in the fact that the new rules do not necessarily track absolutely precisely and provide in detail in advance for every nuance in the application of Article 8 in individual cases. I do not think it would be feasible, or even possible, to produce simple Immigration Rules capable of providing clear guidance to all the officials who have to operate them that did that...*

33. *The Secretary of State does not contend that the new rules completely cover every conceivable case in which a foreign national may have a good claim for leave to remain under Article 8. In relation to both Section EX.1 (family life) and paragraph 276ADE (private life) it is possible to envisage cases where they would not:*

i) *In relation to Section EX.1(b), for example, there may be individual cases in which, for some reason, there are particularly compelling reasons arising from the specific circumstances why leave to remain should be granted under Article 8, even though there may not be insurmountable barriers to family life continuing outside the United Kingdom, in the applicant's country of origin; and*

...

34. *In cases where consideration of the new rules does not fully dispose of a claim based on Article 8, the Secretary of State will be obliged to consider granting leave to remain outside the Rules. If she does not, where there is an appeal the First-Tier Tribunal will be obliged to consider allowing the appeal, and where there is no appeal, judicial review will lie.*

35. *The important points for present purposes are that there is full coverage of an individual's rights under Article 8 in all cases by a combination of the new rules and (so far as may be necessary) under the Secretary of State's residual discretion to grant leave to remain outside the Rules and that, consequent upon this feature of the overall legal framework, there is no legal requirement that the new rules themselves provide for leave to remain to be granted under the Rules in every case where Article 8 gives rise to a good claim for an individual to be allowed to remain. This had always been the position in relation to the operation of the regime of immigration control prior to the introduction of the new rules, and the introduction of the new rules has not changed these basic features of the regime.*

The applicable law has since been surveyed, and the approach in the Nagre case in general supported, by the Supreme Court in *R (MM (Lebanon) v SSHD etc*; *SS*

(Congo) v ECO Nairobi [2017] UKSC 10; [2017] 1 WLR 771 and *R (Agyarko) v SSHD*; *R (Ikuga) v SSHD* [2017] UKSC 11; [2017] 1 WLR 823. In *R (Agyarko)*, Lord Reed, with whom a majority of the panel agreed, stated that:

41. *As the European court has noted, the boundary between cases best analysed in terms of positive obligations, and those best analysed in terms of negative obligations, can be difficult to draw. As this court explained in its judgment in Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799, para 32, the mode of analysis is unlikely to be of substantial importance in the present context. Ultimately, whether the case is considered to concern a positive or a negative obligation, the question for the European court is whether a fair balance has been struck. As was explained in *Hesham Ali* at paras 47-49, that question is determined under our domestic law by applying the structured approach to proportionality which has been followed since *Huang*.

C. Some useful basic resources:

British and Irish legal Information Institute (www.bailii.org)- caselaw
Free Movement website/blog
<http://www.legislation.gov.uk/>
Home Office updated Immigration Rules online
(<https://www.gov.uk/guidance/immigration-rules>)

Books and other:

- Macdonald's Immigration Law and Practice, Macdonald and Toal 9th edn 2014
- The Law and Practice of Expulsion and Exclusion from the UK*, Fripp, Moffatt, Wilford (2015)
- Immigration Law Handbook*, Phelan and Gillespie (10th edn 2018- materials only)
- Halsbury's Laws

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