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Last Chance Saloon to obtain legal aid for foreign nationals facing deportation

By Jenna McKinney, from **insidetime** issue April 2013

Solicitor Jenna McKinney on an urgent change legal aid for foreign national prisoners

From 1st April 2013 the Legal Aid Sentencing and Punishment of Offenders Act will end legal aid for foreign national prisoner (FNP) deportation appeals unless they seek to argue deportation would be contrary to the refugee convention or be a breach of article 3 ECHR.

Given the majority of deportation appeals argue deportation is a disproportionate interference with the FNP's right to a private and family life under article 8 ECHR the Courts should expect to see a large number of unrepresented Appellants before them. Legal aid will also be denied for European nationals facing deportation.

The Government for years have been pursuing a politically motivated course of action to attempt to deport all FNP's from the U.K. It all started in 2006 when the then Home Secretary; Charles Clarke was forced to resign when it emerged in the media that over 1000 FNP's were released at the end of their sentences without being considered for deportation. Following this revelation the Government hastily introduced legislation making it mandatory for the Secretary of State to issue a deportation order to a FNP sentenced to a term of imprisonment of 12 months or more. Previously SSHD's policy was to only consider for deportation those whose presence in the U.K was not conducive to public good and those recommended for deportation by the criminal sentencing Judge.

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The rationale behind the change was that the Government could then proclaim following their FNP scandal "we are issuing deportation orders; it is the Judges who are allowing the FNP's to stay in the U.K".

And the Judges did allow many FNP's to stay in the U.K. In 2010 a third of FNP appeals against deportation succeeded, mostly argued on article 8 ECHR. From 2011-2012, 177 FNP's won their deportation appeals by arguing to deport them would be a disproportionate interference with their rights under article 8. Many of these appeals were allowed because FNP's had either spent many years (in some cases most of their lives) in the U.K or had strong family life in the U.K; i.e. British children.

In October 2011 the Home Secretary Theresa May made her infamous speech at the Conservative Party conference where she claimed an illegal immigrant could not be deported because (and she said she was not making this up) "he had a pet cat". It later transpired however that she was effectively "making it up" and her statements were factually inaccurate; the matter in question was not even a deportation matter. In that speech she also informed us all that article 8 is not an absolute right; talk about stating the obvious; everyone is aware article 8 is a qualified right and I doubt any Judge has ever allowed an appeal on article 8 believing it to be absolute.

Following this there was the tragic case involving Amy Houston who was left to die on the street after being hit by failed asylum seeker Aso Ibrahim who was driving whilst disqualified. He won his appeal against removal from the U.K on article 8 grounds because he was an active father to two British children. Whilst Judges were held out to be the ones to blame for misinterpreting the law relating to article 8 it is important to note that this was not the case; nor were the magistrates at fault for only imposing what was described as a "soft sentence" of 4 month imprisonment for driving whilst disqualified and failing to stop following an accident. The truth is the magistrates imposed the maximum penalty they had the power to under their sentencing powers (6 months imprisonment maximum minus the obligatory 1/3 discount of a early guilty plea). The real questions need to be asked of the CPS as to why they charged the matter as they did and of the Home Office as to how Mr Ibrahim was able to remain in the U.K for so long after he lost his asylum appeal and why they did not commence deportation proceedings due to his criminal convictions rather than simply attempting to remove him from the U.K.

In June 2012 the Government tightened the immigration rules again following a highly charged debate in parliament when some MP's proclaimed they did not even understand what the point of the debate was; Pete Wishart MP (Perth and North Perthshire) (SNP) said "I am

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looking at a motion that says nothing about Parliament's view on article 8; all it seems to be is a restatement of the bleeding obvious. We all know that article 8 is a qualified right, so why are we here debating a nothing motion?"

More recently in February 2013 Theresa May again attacking the Judges on allowing deportation appeals on article 8 stated "one judge had justified his decision on the basis that the new guidance had been subject only to "a weak form of Parliamentary scrutiny"; hardly surprising given some MP's comments in the debate.

Not content with attacking the judiciary in general for allowing deportation appeals on the grounds of article 8 the media then began a witch-hunt naming and shaming Judges who allowed the most appeals based on article 8 ECHR irrespective of the circumstances and reasons why the appeals were allowed.

The removal of legal aid for not only article 8 but also European deport appeals is the penultimate nail in the coffin (the final nail being the repeal of the human rights act and the withdrawal from the convention) for FNP's arguing deportation would breach their rights under these conventions and the government may well succeed in their agenda of deporting all FNP's by the backdoor.

Jenna McKinney is a Solicitor and Director at Duncan Lewis Solicitors and is IAAS level 3 advanced accredited in immigration. She also sits part time as a Magistrate.



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