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Ref: MPC/LC
Date: 27 September 2013

Dear Mr Hennessy

Human Rights Judgments

I refer to the Committee's Call for Evidence on this topic and have the following comments to make on the following cases:-

The right to a review for "whole life tariff" prisoners (*Vinter v UK*)

There is no 'whole life' sentence available in Scot's Law though the parole system might operate in such a way as to make a sentence 'de facto' whole life. Before a life prisoner, mandatory or discretionary, can be released he would firstly have to have completed whatever determinate tariff was fixed and then satisfy the Parole Board following a tribunal hearing that he no longer represents a risk to the public. There are many prisoners who have been in prison a long time, 35 or more years in at least one case, and have not been released. In one instance an individual was told by the sentencing Judge that he would never be released but, following the Human Rights Act 1998, the Court fixed a tariff of 25 years. The prisoner will have to satisfy the Parole Board that the risk is at an acceptable level for him to be released and if he cannot he will remain in prison for his whole life.

In dealing with mandatory life cases the current system works and the public are protected. A fixed tariff gives a prisoner something to work towards, an incentive to co-operate with the system and allows rehabilitation and other programs to be structured.

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A 'whole life' tariff would not have a practical bearing on release if the Scottish Ministers allowed the Parole Board to review the continued detention of any prisoner. Any one imprisoned should be entitled to release if an appropriate assessment concludes that the risk to the public is reasonable and manageable. The door should not be closed.

Indeterminate sentences

'IPP' prisoners

The equivalent of 'IPP' prisoners in Scotland is those sentenced to an Order for Lifelong Restriction (OLR) in terms of Section 210 of the Criminal Procedure (Scotland) Act 1995.

The test is set out in Section 210 E.

'For the purposes of sections 195(1), 210B(2), 210D(1) and 210F(1) and (3) of this Act, the risk criteria are that the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large.'

In these cases a punishment part is fixed and once again the Parole Board is obliged to hold a hearing as soon as the fixed period is completed to consider whether the level of continued risk allows for release. The advantage of an OLR is that there is a risk management plan created when the sentence begins. That plan has considerable input from the accredited assessors who carry out the assessment to form the basis of the Order. Programming is put in place to allow for training, counselling etc. from the beginning of the sentence. The purpose of the programme is to address the risk issues which prompted the Court to make the order. As in mandatory life sentences the fixed tariff gives a prisoner something to work towards, an incentive to co-operate with the system and allows rehabilitation and other programs to be structured in accordance with the management plan.

This class of prisoner is entitled to a Parole Hearing immediately after the expiry of the punishment part and issues of a 'speedy review' should not arise.

The Parole Board exercise their powers cautiously and there is a perception that very few of the prisoners who received OLR's have been released even some time after the expiry of their tariff.

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- The system in Scotland is one which takes great care in ensuring that anyone released from custody does not present an unacceptable risk to the public. As the Parole Board exercises these powers with caution, whether or not a prisoner should be released and when, are questions which will probably have the same answer as if a 'whole life' sentence had been imposed.

Deportation and the right to a family life

A.A. v. UK – 8000/08 [2011] ECHR 1345

This case arises from Government policy in relation to Article 6(2) ECHR.

The general thrust of this policy is the repeated enactment of changes to 'Statement of changes in immigration rules' (HC395) (as amended) which in the Society's view are not compliant with Article 8 of the European Convention on Human Rights.

The operative provision under scrutiny in this judgment is Rule 364 of the Immigration Rules (HC395) prescribed by the Secretary of State under section 3(2) of the Immigration Act 1971. The relevant section provides as follows:-

"… *while each case will have to be considered on its merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Secretary of State will consider all relevant factors in considering whether the presumption is outweighed in any particular case, although 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. The aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects …"*

In this case the applicant had not established a 'family' life as defined in Art 8 jurisprudence (nuclear family, i.e. partner and dependants) but had remained in the UK from the tender age of 13, and had parents holding indefinite leave to remain in the UK. The applicant had been convicted of rape, but had demonstrated remorse with exemplary conduct in prison and full engagement with rehabilitation and a strong desire to get his life back on track.

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Strasbourg held that deportation was disproportionate to the UK's legitimate aim in deportation, which was 'the prevention of disorder or crime'. The applicant's private life, his remorse and exemplary behaviour post-conviction, his length of time in the UK and the fact that he came to the UK as a child (Maslov principle), outweighed the stated legitimate aim.

This judgment resulted in the Government's approach to 'codify' Article 8 application in terms which it deemed favourable. However the further changes to the Immigration Rules and Article 8 that followed make clear Government policy. If the European Court of Human Rights or the domestic Courts for that matter holds that a provision in the Rules is unlawful, the Government's response is to change the rules. The provisions concerning deportation and Article 8 were changed as part of a sweeping change to the Rules, implemented on 9th July 2012. These changes resulted in considerable litigation in the Upper Tribunal:-

a) MF (Article 8 – new rules) Nigeria [2012] UKUT 00393(IAC):-

"*Whenever the new rules have application judges are obliged to consider whether an appellant can show he meets the relevant requirements (s.86(3)(a) of the Nationality, Immigration and Asylum Act 2002). Where the new rules afford some related discretion, judges are obliged to consider whether that discretion should have been exercised differently (s. 86(3)(6)). However, what judges are doing when they are conducting this exercise is simply applying the rules: the rules are the rules: see paragraph 10 Mahad [2009] UKSC 16. The fact that these rules in part refer expressly to Article 8 or to certain Article 8 concepts is incidental. The fact that as a result of these changes the rules are longer and incorporate some of the vocabulary of Article 8 makes no difference.*

iv. *Because for most purposes the immigration rules must be given legal effect (see Odelola [2009] UKHL 25),their requirements for applicants making an Article 8 claim to show "exceptional circumstances" or "insurmountable obstacles" are to be understood as legal requirements in the same way as any other mandatory requirements of the rules.*

v. *However, the new rules only cover Article 8 claims brought under some, not all, Parts of the Rules and only accommodate certain types of Article 8 claims.*

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vi. *Even if a decision to refuse an Article 8 claim under the new rules is found to be correct, judges must still consider whether the decision is in compliance with a person's human rights under s.6 of the Human Rights Act (see s.84(1)(c), (g) and (e) and s.86(2) and (3) of the 2002 Act) and, in automatic deportation cases, whether removal would breach a person's Convention rights (s.33(2) UK Borders Act 2007). Thus in the context of deportation and removal cases the need for a 2 stage approach in most Article 8 cases remains imperative because the new rules do not encapsulate the guidance given in Maslov v Austria App no.1683/03[2008] ECHR 546, which has been endorsed by the higher courts.*

vii. *When considering Article 8 in the context of an appellant who fails under the new rules, it will remain the case, as before, that "exceptional circumstances" is not to be regarded as a legal test and "insurmountable obstacles" is to be regarded as an incorrect criterion.*

b) Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC):-

The introduction of the new Immigration Rules (HC 194) does not affect the circumstance that when considering Article 8 of the Human Rights Convention "for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in [this] country very serious reasons are required to justify expulsion." The principles derived from Maslov v Austria [2008] ECHR 546 are still being applied.

3. *Paragraph 399(a) of the Immigration Rules conflicts with the Secretary of State's duties under Article 3 of the UN Convention on the Rights of the Child 1989 and section 55 of the Borders, Citizenship and Immigration Act 2009. Little weight should be attached to this Rule when consideration is being given to the assessment of proportionality under Article 8 of the Human Rights Convention.*

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4. *The natural and ordinary meaning of the word 'ties' in paragraph 399A of the Immigration Rules imports a concept involving something more than merely remote or abstract links to the country of proposed deportation or removal. It involves there being a connection to life in that country. Consideration of whether a person has 'no ties' to such a country must involve a rounded assessment of all of the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances.*

c) Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC)

In cases to which the new Immigration Rules introduced as from 9 July 2012 by HC 194 apply, judges should proceed by first considering whether a claimant is able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims. Where the claimant does not meet the requirements of the rules it will be necessary to go on to make an assessment of Article 8 applying the criteria established by law. The Upper Tribunal observation in MF (Article 8-new rules) Nigeria [2012] [2012] UKUT 00393 (IAC) to the same effect is endorsed.

2. *The procedure adopted in relation to the introduction of the new Rules provided a weak form of Parliamentary scrutiny; Parliament has not altered the legal duty of the judge determining appeals to decide on proportionality for him or herself.*

3. *There can be no presumption that the Rules will normally be conclusive of the Article 8 assessment or that a fact-sensitive inquiry is normally not needed. The more the new Rules restrict otherwise relevant and weighty considerations from being taken into account, the less regard will be had to them in the assessment of proportionality.*

4. *When considering whether a decision is in accordance with the law, it has been authoritatively established by the higher courts that the test to be applied is not exceptional circumstances or insurmountable obstacles.*

The Government's attempts to 'codify' Article 8 have been repeatedly dismissed by the domestic courts as unlawful, particularly in relation to deportation.

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Lawful detention

ECtHR Abdi v. the United Kingdom (no. 27770/08)

This judgment is another example of the Government's approach in the pursuit of stated policy objectives. Individuals are frequently detained whose removal from the UK cannot be implemented. This can be owing to a breakdown in diplomatic relations with the result that the receiving state will refuse the individual entry or it can be the case, as it was here, that the destination state has no functioning state apparatus to receive the individual. Endless detention with no prospect of removal is unacceptable as the European Court of Human Rights has recognised, holding a breach of Article 5(1) and a modest award of compensation appropriate.

This costly litigation could have been avoided if a policy in compliance with the Convention and its jurisprudence had been adopted.

I hope that these comments are helpful. If you have any questions, please do not hesitate to contact me.

Yours sincerely

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