

# Points Based System and Article 8 ECHR

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The points based system is well known for its inflexibility and rigidity. Under the points based system, if you are unable to obtain the requisite points under a specific category, you will not qualify for leave to enter or further leave to remain in the UK. It becomes more difficult to argue your case in court especially when you do not meet some specific criteria or you do not have the evidence to prove that you satisfy the rules.

This has caused a lot of inconvenience for some immigrants who have lived in the UK for a considerable period of time and have formed a private or family life in the UK. It is important when making an initial application or when submitting an appeal notice to briefly add a statement in relation to your private or/and family life if a private or family life has been formed in the UK.

The European Convention on Human Rights (ECHR) deals with private and family life. Article 8 ECHR specifically provides that;

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. 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 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"

In applying Article 8 ECHR, a five stage test set out by Lord Bingham of Cornhill, in the case of *R (Razgar) V SSHD* [2004] UKHL 27 is used. A decision making body has to consider the following when applying Article 8;

- Whether the removal of an applicant from the UK would amount to interference with the exercise of an applicant's right to respect for his private or family life;
- Whether such interference has such gravity to engage the operation of Article 8;
- Whether the proposed interference will be in accordance with the law;
- Whether the interference complies with the legitimate aim of a democratic society; and
- Whether such interference would be proportionate to the legitimate public end sought to be achieved by the public authority.

The courts normally consider each individual's circumstances when applying Article 8.

In the case of *OA (Nigeria) V SSHD* [2008] EWCA Civ. 82, the Court of Appeal held that the Tribunal had been correct to conclude that a Nigerian college student had established a breach of her Article 8 right to respect for her private life if she were to be removed to Nigeria in the middle of an academic year.

In *SZ (Zimbabwe) V SSHD* [2009] EWCA Civ 590, the Court of Appeal accepted that a Zimbabwean student had established a private life in the UK but her removal would be

proportionate to the legitimate public end sought to be achieved by the UK Border Agency. She had lived in the UK for 6 years during which time she had formed some social ties and had studied for 4 out of the six years. By the time her appeal was heard she had been enrolled on a diploma course in psychology. Although she argued that her removal would interfere with her studies as she would be unable to pursue her education in Zimbabwe, the Court of Appeal concluded that, on the facts of her case, the only proper conclusion open to the Tribunal was that her removal was proportionate and her Article 8 rights will not be breached.

In the case of *KBO V SSHD* {2009} ScotCS CSIH, in the opinion of the Court delivered by Lord Reid, the Court ordered that the original determination of the appeal should stand. KBO, a Ghanaian, had spent his formative years in the UK. He lived in UK from age 1-6, 12-17 and 22 years onwards. He was following a music career and was in a relationship with a lady with settled status in the UK. He expressed the fear that he would lose his home, his opportunity to pursue a career in the music industry and his relationship with the woman he wishes to marry, if he was forced to leave the United Kingdom. The Tribunal ruled that his Article 8 rights will be breached if forced to return to Ghana. The Court above agreed with the Tribunal's determination.

The courts have reached different conclusions in relation to private and family life claims under Article 8 ECHR. It can be noted from the above that the Courts make a decision based on a person's individual circumstances. Invariably it is important to put together relevant evidence to support the assertion that your Article 8 right will be breached.

#### *Case Scenario:*

A, a Ghanaian, entered the UK as a student in October 2001. A has successfully completed his studies. He has been living in the UK with his wife and two kids who were all born in the UK. A's first child is 7 years old and his second child is 5 years old. Before A married he had a child with a lady settled in the UK. A has a close relationship with that child and the child spends time with A, his wife and two children. A's two children mentioned above are both in school and have lived in UK since their birth. A applied for further leave to remain under the points based system and was refused on maintenance grounds as he did not have the requisite funds at the time of application. He has been notified that he either has to appeal the decision or leave the UK.

#### *Probable Solution to case scenario:*

On appeal, A can rely on Article 8 and assert that his removal will breach his Article 8 rights. His reasons can include the following;

- He has lived in the UK since 2001 and has formed some social ties with the UK;
- His children have lived in UK through out their formative years; and
- He has another child who can not reasonably be expected to live with him in Ghana.

A has to provide all the requisite evidence to support his case. In arguing A's case in court, A should draw the Court's attention to a decision makers duty to safeguard and promote the welfare of children as stated in Section 55 of the Borders, Citizenship and Immigration Act 2009.

Initial applications made under the points based system and appeals in relation to the above can be complex. It is important to seek appropriate legal advice before you make an initial application and especially when your initial application has been refused

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