

Detention Update

Joe Middleton, Doughty Street Chambers, 16 February 2011

Automatic deportation

The temporal scope of the automatic deportation regime

1. The automatic deportation regime imposes a duty on the Secretary of State to make a deportation order against a “foreign criminal” unless any of the statutory exceptions apply (s.32(5) UK Borders Act 2007). The principal exceptions are where removal would breach the UK’s obligations under the Refugee Convention or the Human Rights Act 1998. A “foreign criminal” includes a person “who is not a British citizen, who is convicted in the United Kingdom of an offence, and ... is sentenced to a period of imprisonment of at least 12 months”.
2. In **R (Hussein) v SSHD** [2009] EWHC 2492 (Admin), [2010] Imm AR 320 (21 October 2009), the claimant raised several issues. The first was a matter of statutory interpretation. It was argued that the Act did not have retroactive effect to apply to those convicted before the Act entered into force, save for the specific category of prisoners caught by the commencement provisions (see p.10-11 below). The claimant had been convicted and sentenced after the Act was enacted but before it entered into force. Subject to the transitional provisions, which did not encompass the claimant, the Act did not purport to have retroactive effect and did not purport to include those who *had* been previously convicted of an offence when the Act entered into force. The Secretary of State accordingly had no lawful basis for detaining the claimant under the Act.
3. The court rejected this argument. Nicol J’s reasoning included the following observations:

“20. The statute does use the present tense in the sections to which Mr Husain drew attention, but in my judgment this will not bear the significance which he attributes to it. Section 59(4)(d) uses the past tense - ‘persons convicted before the passing of this Act.’ I infer from this that the drafter contemplated that s.32 embraced those who had been convicted at the time of the passing of the Act. Section 59(4)(d) expressly allowed the Secretary of State to make a transitional provision in their case so as to confine the application of s.32 to those who were also in custody on the date of commencement, but section 59 is dealing with the mechanics of commencement. It empowered (but did not oblige) the Secretary of State to make certain transitional provisions. It did not itself set the parameters of automatic deportation. That was done by s.32. Thus section 32, read in the light of s.59(4)(d),

must have been intended to cover those who had in the past been convicted as well as those who were convicted after commencement”.

4. Before the claimant could appeal, the Court of Appeal rejected the temporal scope argument in another case (**AT (Pakistan) v SSHD** [2010] EWCA Civ 567 (26 May 2010)). The Court agreed with Nicol J’s reasoning in Hussein and concluded that Parliament had not intended that persons in this category (convicted after the Act was adopted but before it entered into force) should be in a better position than those convicted before it was adopted.
5. Although AT binds the Court of Appeal in Mr Hussein’s appeal, he will be seeking leave to appeal on the temporal scope argument to the Supreme Court.

The continuing scope for recommendations for deportation

6. In **R v Kluxen, R v Roastas** [2010] EWCA Civ 1081 (14 May 2010) the Court of Appeal confirmed that where the automatic deportation provisions apply, it is not appropriate for a criminal court, having convicted a defendant, to make a recommendation for deportation. In cases where the automatic deportation provisions did not apply, because the sentence was less than 12 months’ imprisonment, it would rarely be appropriate to recommend the deportation of the offender concerned, whether or not s/he is a citizen of the EU (on the EU issues, see further below).

Double jeopardy

7. In **QJ (Algeria) v SSHD** [2010] EWCA Civ 1478 (21 December 2010), the appellant was sentenced to 11 years’ imprisonment for facilitation terrorism. On his release, he pursued an asylum claim. This was dismissed and the Secretary of State decided to deport under the automatic deportation provisions instead. He had an Algerian-born wife in the UK with LTR and two young sons who had lived their lives here, one with a serious medical condition. On his appeal, SIAC accepted that there was a risk he would be tried for offences partly based on allegations which formed part of his conviction in the UK. This meant that if Algeria had sought his extradition, the request would have been refused. That, however, was irrelevant. The CA dismissed Q’s appeal. There was no rule against double jeopardy in the UK Borders Act and none could properly be imported:

“...Mr Husain accepts that the decision to deport the Appellant is a bona fide deportation decision under the 2007 Act, and is not a disguised form of extradition. Under UK domestic law the very detailed statutory regimes governing deportation and extradition, while they may well have similar consequences from the

deportee/extraditee's point of view, are wholly separate, and they serve different purposes. The Respondent must make a deportation order in respect of foreign criminals because Parliament has decided that it is in the public interest that such persons should be removed from the UK. Whether the individual may, or will be tried for an alleged criminal offence on return is irrelevant for the purposes of this statutory function, save only to the extent that such a trial might breach the individual's rights under the ECHR. In those extradition cases where the individual is alleged to have committed an offence, a foreign government will be seeking the removal of that individual to the foreign country for the purpose of putting him on trial for that offence. It is unsurprising that, in those circumstances the statutory bars to extradition in section 11 of the Extradition Act 2003 are concerned with the appropriateness of the individual being tried for that particular offence in the foreign country.

Mr Husain invoked the common-law rule against double jeopardy, but the statutory scheme in the 2007 Act is both detailed and highly prescriptive. There is no basis for the addition, by implication, of a further exception to those set out in section 33..." (§§21-22).

Tribunal cases

8. In **BK (Deportation – s 33 “exception” UKBA 2007 – public interest) Ghana** [2010] UKUT 328 (IAC) (11 August 2010) (Sedley LJ et al) the Tribunal rejected the Secretary of State's assertion that the IJ had failed to give proper weight to the CA's guidance in N (Kenya) [2004] EWCA Civ 104, to the effect that the adjudicator/IJ must give proper weight to the Secretary of State's assessment of the public interest in deportation. In that case, Judge LJ had said:

“Public good’ and the ‘public interest’ are wide-ranging but undefined concepts. In my judgment (whether expressly referred to in any decision letter or not) broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged. They include an element of deterrence, to non-British citizens who are already here, even if they are genuine refugees and to those minded to come, so as to ensure that they clearly understand that, whatever the circumstances, one of the consequences of serious crime may well be deportation. The Secretary of State has a primary responsibility for this system. His decisions have a public importance beyond the personal impact on the individual or individuals who would be directly affected by them. The adjudicator must form his own independent judgment. Provided he is satisfied that he would exercise the discretion "differently" to the Secretary of State, he must say so. Nevertheless, in every case, he should at least address the Secretary of State's prime responsibility for the public interest and the public good, and the impact that these matters will properly have had on the exercise of his discretion. The adjudicator cannot decide that the discretion of the Secretary of State ‘should have been exercised differently’ without understanding

and giving weight to matters which the Secretary of State was entitled or required to take into account when considering the public good” (§83).

9. Sedley LJ, who dissented in N (Kenya), made the following observations which suggest that N (Kenya) case has less relevance in automatic deportation cases:

“24. We note, as an aside, that N (Kenya) was decided at a time when there was no legislative guideline or policy in place to determine which offenders ought to be deported, subject always to human rights considerations, and which need not be. Hence the weight required by the Court of Appeal to be given to the Home Secretary’s view of the public interest in arriving at the adjudicator’s or immigration judge’s own conclusion. It is possible that this always difficult exercise – that is to say, giving weight but not primacy to the opinion of another authority in arriving at an independent judgment – has been superseded by the enactment of section 32 of the UKBA 2007. This section draws a bright line, calling for no further judgment, where its terms are met: a “foreign criminal” faces “automatic deportation”. Other foreign offenders do not – they may be deported, but there is no legislative presumption that they will be. Both classes may resist deportation on human rights grounds; but in the case of a “foreign criminal” the Act places in the proportionality scales a markedly greater weight than in other cases. In this situation it is not easy to see what separate or additional weight is to be given to the Home Secretary’s own judgment beyond the fact that it is known to be in favour of deportation. Arguably the executive’s view of policy and its immediate requirements has been superseded by the legislature’s. However, we do not need to decide this point in this appeal because, although touched upon, it was not directly relevant because Mr Kofi comes within one of the exceptions in section 33 of the UKBA 2007”.

10. This Tribunal expressed more conclusive views in **MK (deportation foreign criminal public interest) Gambia** [2010] UKUT 281 (IAC) (10 August 2010, Sedley LJ et al). In that case it held:

- (i) In automatic deportation cases, the respondent’s executive responsibility for the public interest in determining whether deportation is conducive to the public good has been superseded by Parliament’s assessment of where the public interest lies in relation to those deemed to be foreign criminals within s.32(1)-(3) of the 2007 Act. In consequence the respondent’s view of the public interest has no relevance to an automatic deportation.
- (ii) Equally, however, by virtue of s.32(4) it is not open to an appellant to argue that his deportation is not conducive to the public good nor is it necessary for the respondent to argue that it is.
- (iii) The seriousness of an offence and the public interest are factors of considerable importance when carrying out the balancing exercise in article 8. As Parliament has now determined where the public interest lies

in cases of automatic deportation, that factor must be taken into account together with the Tribunal's own assessment of the seriousness of the offence. The gravity of criminal offending will normally be clear from the facts and nature of the offence, the views expressed by the sentencing judge and, importantly, the actual sentence.

EEA nationals

Recommendations for deportation

11. In **R v Kluxen, R v Roastas** [2010] EWCA Civ 1081 (14 May 2010) (see above), the CA held that when a judge was considering whether to recommend deportation, there would be no difference in approach simply because the offender was an EEA national:

"If in a case to which the 2007 Act does not apply a court is, exceptionally, considering recommending the deportation of the offender concerned, it should apply the Nazari test [whether an offender's continued presence in the United Kingdom was to the state's 'detriment'] in tandem with the Bouchereau test [whether the offender's conduct (including the instant offence and any earlier ones) constituted 'a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'], there being no practical difference between the two. This is so whether the offender is or is not a citizen of the EU. However, the court should not take into account the Convention rights of the offender; the political situation in the country to which the offender may be deported; the effect that a recommendation might have on innocent persons not before the court; the provisions of article 28 of Directive 2004/38 ; or the 2006 Regulations [these being matters for the Secretary of State, not the court]".

"Serious grounds of public policy or public security"

12. EEA nationals with a right of permanent residence must not be expelled from a Member State except on serious grounds of public policy or public security (art. 28(2) of the Citizens Directive). In **Batista v SSHD** [2010] EWCA Civ 896 (29 July 2010) the offender had spent 14 years in the UK but half of that had been in custody. He therefore failed to qualify under the 10 year residence rule. He was sentenced to 8 years' imprisonment for burglary and GBH. The AIT dismissed his appeal on the basis that he represented a sufficiently serious threat to the public that society deserved to be protected from him. He appealed on the grounds, inter alia, that the AIT had failed to determine whether he had a right of permanent residence and if so, whether his deportation was justified on serious grounds of public policy or public security. The CA allowed his appeal. The implication of the Tribunal's comments was that he had acquired a right of

permanent residence. They therefore should have applied the more stringent test. Their failure to do so, however, was not sufficient to set aside its decision, because it had adopted a “suitably stringent approach”:

“16. It is unfortunate that the tribunal did not address in terms the statutory test for the second level of protection. There is also some force in Mr Bedford's complaint as to confusion in their reasoning on this point. Although at two points in the decision they expressed the view that there was a “very high risk” of reoffending, it is not entirely clear how this is related to various strands of evidence (see para 5 above). However, taken on their own, I would not have regarded these criticisms as justifying setting aside the decision.

17. Looking at the decision overall, it can be said that the tribunal adopted a suitably stringent approach, even allowing for the uncertainties in some of their reasoning. In finding that the conduct was “sufficiently” serious one can fairly understand them as having had in mind not only the general test, but also the degree of seriousness required under the second level of protection, which they had mentioned in terms. On any view, the tribunal were entitled to conclude that the appellant's record, taken with the more recent evidence, showed a propensity to renewed violence such as to satisfy this test”.

The appeal was allowed, however, on art. 8 grounds, because the Tribunal had failed to take proper account of the appellant’s girlfriend and child, and the case was remitted.¹

“Imperative grounds of public security”

13. EEA nationals who have resided in a Member State for the previous 10 years cannot be expelled unless the decision “is based on imperative grounds of public security, as defined by Member States” (art. 28(3)(a) of 2004/38/EC, p.12 below). **VP (Italy) v SSHD** [2010] EWCA Civ 806 (17 June 2010) was an example of a case where this issue arose. VP had lived in the UK for 16 years when he was convicted of attempted murder. Carnwath LJ recognised the special considerations that apply to EEA nationals:

¹See para. 27: “I would add a further possible consideration, although it was not an aspect explored in any detail before us. Even in respect of those deemed sufficiently dangerous to justify deportation under the EEA rules, common sense would suggest a degree of shared interest between the EEA countries in helping progress towards a better form of life. The prospects offered by the relationship with Miss Deane in this country may have been fragile, as the tribunal thought, but in Portugal they would be practically non-existent. Although he has siblings in that country, there seems to have been no evidence that they would be able or willing to offer the support needed to prevent what the tribunal saw as his likely drift back to crime. There may be room for argument as to the relevance of such points under the Directive, but as at present advised I see no reason in principle why they may not be taken into account in the overall balance of proportionality. It will be a matter for tribunal to consider whether they have any materiality in the present case”.

“7. It is important to note at this stage that what we are talking about here is expulsion of citizens of EU states from one state to another state. One can see, therefore, why even at the lowest category the threshold is set reasonably high and there needs to be a sufficiently serious threat affecting one of the fundamental interests of society. That no doubt reflects the view that in a case like the present, where the respondent has lived in this country very many years and there is no remaining link with his country of birth (in this case, Italy), there is no obvious reason for exporting the problem from one European country to another unless there is some very serious issue”.

14. The appellant’s offence in this case was particularly unpleasant. He had attacked the victim with a knife while she was asleep in “a most determined and ferocious manner”, inflicting no less than 32 knife wounds, the deepest of which penetrated to 10cms . He also pulled her head back and twice tried to cut her throat, inflicting serious wounds to that part of her body. Yet the IJ had concluded that the high threshold was not met:

“Our conclusion is that imperative means that it is either essential or vital to public security that the person concerned should be removed. Even if this particular threshold were designed not only to capture those who represent a threat at the terrorist level, our conclusion is that the threat must be so great and compelling that there is no option but for the Appellant to be removed.”

15. The Court of Appeal indicated that the IJ’s use of words like “essential” or “vital” was unhelpful, but that the IJ’s conclusions could not be faulted. Applying what he had earlier held in LG (Italy) [2008] EWCA Civ 190, Carnwath LJ noted that “imperative grounds of public security” involved not simply a serious matter of public policy, but an actual risk to public security, so compelling that it justifies the exceptional course of removing someone who has become integrated by many years residence in the host state. That test was not met on these facts.

Miscellaneous cases

16. In R (V) (Columbia) v AIT [2010] EWCA Civ 491 (26 March 2010), the appellant was tried for murder but acquitted. The Secretary of State made a deportation order in reliance in part on the assertion that he was guilty of that offence. V appealed to the AIT, arguing *res judicata*. The Tribunal dismissed his appeal, holding that *res judicata* had no place in relation to a verdict in criminal proceedings. V’s application for judicial review of the AIT’s decision was refused. In the CA, he argued that he was entitled to the presumption of innocence and that it would amount to a collateral attack on the acquittal to show that he was in fact guilty of the crime of which he had been acquitted. Refusing to grant permission to appeal, the CA rejected his application. There is no absolute

prohibition arising from the presumption of innocence that the criminal proceedings should not be referred to and relied on in separate civil proceedings.

17. **MJ (Angola) v SSHD** [2010] EWCA Civ 557 (20 May 2010) concerned the deportation of a mentally ill person. Following the commission of numerous offences the appellant was subject to orders under the Mental Health Act 1983, ss.37 (admission and detention) and 41 (restriction order). Whilst he was still under those orders and conditionally discharged in a hostel under treatment, the Secretary of State made a decision to deport him. On appeal he argued that such decision could only be made when he had been absolutely discharged or when it was clear that he would be absolutely discharged within a reasonable time. The CA dismissed that argument but allowed the appeal on art. 8 grounds. There was nothing to indicate in the Tribunal's decision that it had appreciated the fact that very serious reasons were required to justify deportation, given that he had lived here since he was 12, most of his offending had been committed when he was under 21 and he had no links with Angola.

Automatic Deportation: Statutory Provisions

UK Borders Act 2007

32 Automatic deportation

- (1) In this section "foreign criminal" means a person—
- (a) who is not a British citizen,
 - (b) who is convicted in the United Kingdom of an offence, and
 - (c) to whom Condition 1 or 2 applies.
- (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

....

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).

33 Exceptions

(1) Section 32(4) and (5)—

- (a) do not apply where an exception in this section applies (subject to subsection (7) below), and

- (b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

- (a) a person's Convention rights, or
- (b) the United Kingdom's obligations under the Refugee Convention.

.....

(7) The application of an exception—

- (a) does not prevent the making of a deportation order;
 - (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;
- but section 32(4) applies despite the application of Exception 1 or 4.

36 Detention

(1) A person who has served a period of imprisonment may be detained under the authority of the Secretary of State— .

(a) while the Secretary of State considers whether section 32(5) applies, and .

(b) where the Secretary of State thinks that section 32(5) applies, pending the making of the deportation order.

(2) Where a deportation order is made in accordance with section 32(5) the Secretary of State shall exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 (c. 77) (detention pending removal) unless in the circumstances the Secretary of State thinks it inappropriate.

(3) A court determining an appeal against conviction or sentence may direct release from detention under subsection (1) or (2).

(4) Provisions of the Immigration Act 1971 which apply to detention under paragraph 2(3) of Schedule 3 to that Act shall apply to detention under subsection (1) (including provisions about bail).

59 Commencement

(1) Section 17 comes into force on the day on which this Act is passed.

(2) The other preceding provisions of this Act shall come into force in accordance with provision made by the Secretary of State by order.

(3) An order –

- (a) may make provision generally or only for specified purposes,
- (b) may make different provision for different purposes, and
- (c) may include incidental, consequential or transitional provision.

(4) In particular, transitional provision –

.....

(d) in the case of an order commencing section 32 –

(i) may provide for the section to apply to persons convicted before the passing of this Act who are in custody at the time of commencement or whose sentences are suspended at the time of commencement;...

Commencement provisions in SI 2008/1818

2. The following provisions of the UK Borders Act 2007 shall come into force on 1st August 2008--

(a) the provisions set out in the Schedule to this Order [ss.32-38] in respect of a person to whom Condition 1 (within the meaning of section 32 of that Act) applies; and

(b) section 39 (consequential amendments).

3 Transitional provisions

(1) Subject to paragraph (2), section 32 applies, to the extent to which it is commenced in article 2(a), to persons convicted before the passing of that Act who are in custody at the time of commencement or whose sentences are suspended at the time of commencement.

(2) Paragraph (1) does not apply to a person who has been served with a notice of a decision to make a deportation order under section 5 of the Immigration Act 1971 before 1st August 2008.

Expulsion of EEA Nationals: Citizens Directive, 2004/38/EC

Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health

Article 27

General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.

Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

Article 28

Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Expulsion of EEA Nationals: EEA Regs 2006, reg. 21

21.— Decisions taken on public policy, public security and public health grounds

(1) In this regulation a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

DEPORTATION UPDATE: ARTICLE 8 ECHR

**Alison Pickup
Doughty Street Chambers
16th February 2011**

1. This paper addresses the domestic and European caselaw on the application of Article 8, ECHR to deportation cases since January 2010.
2. The judgment of the Court of Appeal in *JO (Uganda); JT (Ivory Coast)* [2010] EWCA Civ 10, [2010] 1 WLR 1607 is now the starting point for consideration of the principles to be applied in assessing the proportionality of deportation under Article 8 ECHR. The two appeals were listed together in order for the Court to give guidance on the correct approach to Article 8 in cases concerning the deportation of young adults who had come to the UK at a formative age, but many of the principles will be equally relevant in other Article 8 deportation cases.
3. JO, born in 1982, had arrived in the UK at the age of 4 and had had indefinite leave to remain since he was 13. He was convicted of serious offences committed as a young adult. JT had arrived in the UK aged 5 and began his criminal career at the age of 15. When he was 18 he was arrested as an illegal entrant and a decision taken to remove him from the UK. Neither had formed a family of their own.
4. The Court referred extensively to the Strasbourg caselaw, notably the Grand Chamber decisions in *Uner v the Netherlands* (2006) 45 EHRR 421 and *Maslov v Austria* [2009] INLR 47, which set out the principles to be applied in cases of deportation of long-term residents. The key passages of *Maslov* (which cites extensively from *Uner*) are set out here for ease of reference:

63 ...not all settled migrants... necessarily enjoy "family life" there within the meaning of Article 8. However, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life.

...

70 The court would stress that while the criteria which emerge from its case-law and are spelled out in the *Boultif* and *Üner* judgments are meant to facilitate the application of Art 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Moreover, it has to be borne in mind that where, as in the present case, the interference with the Applicant's rights under Art 8 pursues, as a legitimate aim, the 'prevention of disorder or crime' . . . , the above criteria ultimately are designed to help evaluate the extent to which the Applicant can be expected to cause disorder or to engage in criminal activities.

71 In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family life of his own, the relevant criteria are:

- the nature and seriousness of the offence committed by the Applicant;
- the length of the Applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the Applicant's conduct during that period;
- the solidity of social, cultural and family ties with the host country and with the country of destination.

72 The court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an Applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult

73 In turn, when assessing the length of the Applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec(2001)15 and Rec(2002)4

74 Although Art 8 provides no absolute protection against expulsion for any category of aliens (see *Üner* para 55), including those who were born in the host country or moved there in their early childhood, the court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there (see *Üner* para 58 in fine).

75 In short, the court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

5. In *JO*, the Court also referred to four recent decisions of the Strasbourg Court against the United Kingdom: *Grant* (App no 10606/07, judgment 8

January 2009), *Onur* (2009) 49 EHRR 1057, *Omojudi* (App no 1820/08) and *Khan* (App no 47486/06, 12 January 2010). In *Grant* and *Onur*, the European Court had held deportation to be proportionate; in *Omojudi* and *Khan*, it was held to be disproportionate (see below). In none of these four cases had the Court purported to lay down any new principles or to adopt an approach different to that laid down by the Grand Chamber in *Üner* and *Maslov*.

6. Richards LJ made a number of general observations, which are worth setting out in full (my emphasis):

18 First, the cases to which I have referred are all concerned with the deportation, on grounds of criminal offending, of aliens who were otherwise lawfully present in the host country. *Maslov v Austria* [2009] INLR 47 makes express reference to lawful presence: see para 75 of the judgment. In the other cases, it is either implicit or appears from the statement of facts.

19 The cases make clear that in considering whether deportation of such persons is proportionate to the legitimate aim of the prevention of disorder or crime, it is necessary to examine both family life and private life. The so-called *Boultif* criteria, as spelled out in the *Üner* judgment 45 EHRR 421, are applicable in principle in all cases, but only some of them will be relevant in practice where the person to be deported has not established family life in the host country.

20 As to private life, it is emphasised at para 56 of the *Üner* judgment that settled immigrants will have ties with the community that constitute part of the concept of private life, which must therefore be considered even if the applicant has no family life in the host country. The importance of this can be seen from the discussion, at para 52 of the same judgment, of the assembly's recommendation and the legislation enacted in some states to the effect that long-term immigrants cannot be expelled on the basis of their criminal record. The Strasbourg court rejected the concept of absolute protection, recognising that there is a balance to be struck under article 8; but the court has emphasised that it is a balance to be struck with a proper appreciation of the special situation of those who have been in the host country since childhood.

21 Where the person to be deported is a young adult who has not yet founded a family life of his own, the subset of criteria identified in para 71 of the *Maslov* judgment [2009] INLR 47 will be the relevant ones. Further, paras 72–75 of that judgment underline the importance of age in the analysis, including the age at which the offending occurred and the age at which the person came to the host country. This is pulled together in para 75: for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion; and this is all the more so where the person concerned committed the relevant offences as a juvenile.

22 There is only limited value in drawing comparisons with the outcome in other cases. All such cases are highly fact-sensitive. The particular facts determine not only the conclusion but also the features picked out in the reasoning given in support of that conclusion. For example, the court said in *Maslov's* case that the decisive feature was the young age at which the

applicant committed the offences, but it does not follow that the same feature will be decisive in all other cases where it exists.

23 It is also important to distinguish between the criteria themselves and phrases used in the course of applying them to particular facts. For example, I have already expressed the view that the court in *Onur v United Kingdom* 49 EHRR 1057, in stating that it would not be “impossible or exceptionally difficult” for the applicant or his partner to relocate to Turkey, was not laying down a general test but was simply considering the application of the relevant criteria to the particular facts: see paras 14–15 above.

24 That point ties in with recent judgments of the Court of Appeal which have stressed that in considering the position of family members in deportation cases as well as in removal cases the material question is not whether there is an “insuperable obstacle” to their following the applicant to the country of removal but whether they “cannot reasonably be expected” to follow him there. Thus, in *VW (Uganda) v Secretary of State for the Home Department* [2009] Imm AR 436, Sedley LJ, at paras 19 and 24, said (referring to *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159):

“19. ... But for the present, at least, the last word on the subject has now been said in *EB (Kosovo)*. While it is of course possible that the facts of any one case may disclose an insurmountable obstacle to removal, the inquiry into proportionality is not a search for such an obstacle and does not end with its elimination. It is a balanced judgment of what can reasonably be expected in the light of all the material facts ...

“24. *EB (Kosovo)* now confirms that the material question in gauging the proportionality of a removal or deportation which will or may break up a family unless the family itself decamps is not whether there is an insuperable obstacle to this happening but whether it is reasonable to expect the family to leave with the appellant.”

25 At the end of his judgment in *AF (Jamaica) v Secretary of State for the Home Department* [2009] EWCA Civ 240, itself a deportation case, Rix LJ, having referred to the *EB (Kosovo)* and *VW (Uganda)* cases, continued, at para 42:

“Albeit those cases all arose in the context of removals rather than deportations and did not raise the issue of proportionality against the background of the commission of a serious criminal offence, they each in their own way dethrone the significance of the test of ‘insurmountable obstacles’ or emphasise the importance of the test of whether it is reasonable to expect a spouse or child to depart with the family member being removed. The ultimate test remains that of proportionality.”

The relevant passages in the *VW (Uganda)* and *AF (Jamaica)* cases were also referred to with apparent approval in *DS (India) v Secretary of State for the Home Department* [2010] Imm AR 81.

26 Concentration on whether family members can reasonably be expected to relocate with the applicant ensures that the seriousness of the difficulties which they are likely to encounter in the country to which the applicant is to be deported (the relevant criterion in the Strasbourg case law) is properly assessed as a whole and is taken duly into account, together with all other relevant matters, in determining the proportionality of deportation. One must not limit the inquiry to whether there are “insurmountable obstacles” or whether (in the language of *Onur's* case 49 EHRR 1057) it is “impossible or exceptionally difficult” for the family to join the applicant: a broader assessment of the difficulties is called for. As it seems to me, however, the actual language used is not critical (and the Strasbourg court itself has used various expressions in describing the seriousness of the difficulties of relocation in individual cases), provided that it is clear that the matter has been looked at as a whole and that no limiting test has been applied.

27 It must also be borne in mind, of course, that even if the difficulties do make it unreasonable to expect family members to join the applicant in the country to which he is to be deported, that will not necessarily be a decisive feature in the overall assessment of proportionality. It is plainly an important consideration but it may not be determinative, since it is possible in a case of sufficiently serious offending that the factors in favour of deportation will be strong enough to render deportation proportionate even if does have the effect of severing established family relationships.

28 I have concentrated so far on deportation. Cases of ordinary administrative removal of persons unlawfully present in the country operate within the same legal framework and in my view require essentially the same approach. There, too, the essential question is whether, if expulsion would interfere with rights protected by article 8(1), such interference is proportionate to the legitimate aim pursued; and the answer to that question generally requires a judgment to be made on the basis of a careful and informed evaluation of the facts of the particular case.

29 There is, however, one material difference between the two types of case, in that they generally involve the pursuit of different legitimate aims: in deportation cases it is the prevention of disorder or crime, in ordinary removal cases it is the maintenance of effective immigration control. The difference in aim is potentially important because the factors in favour of expulsion are in my view capable of carrying greater weight in a deportation case than in a case of ordinary removal. The maintenance of effective immigration control is an important matter, but the protection of society against serious crime is even more important and can properly be given correspondingly greater weight in the balancing exercise. Thus I think it perfectly possible in principle for a given set of considerations of family life and/or private life to be sufficiently weighty to render expulsion disproportionate in an ordinary removal case, yet insufficient to render expulsion disproportionate in a deportation case because of the additional weight to be given to the criminal offending on which the deportation decision was based. I stress "in principle", because the actual weight to be placed on the criminal offending must of course depend on the seriousness of the offences and the other circumstances of the case.

30 Where the person to be removed is a person unlawfully present in this country who has also committed criminal offences, the decision to remove him may pursue a double aim, namely the prevention of disorder or crime as well as the maintenance of effective immigration control. If that is the case, it should be made clear in the reasons for the decision, since it affects the way in which the criminal offending is factored into the analysis. Where the prevention of disorder or crime is an aim, the person's criminal offending can weigh positively in favour of removal, in the same way as in a deportation case. But if reliance is placed only on effective immigration control, it is difficult to see how the person's criminal offending would relate to that aim or, therefore, count as a factor positively favouring removal. On the other hand, it might still have a significant effect on the proportionality balance by reducing the weight to be placed on the person's family or private life: to take an obvious example, where a person has spent long periods in detention, his family ties and social ties are likely to be fewer or weaker than if he has been in the community throughout. Criminal offending can therefore remain relevant even if the maintenance of effective immigration control is the only aim of the removal decision; but careful account must be taken of how it bears on that decision.

31 The criteria in *Üner v The Netherlands* 45 EHRR 421 are not directed in terms to an ordinary case of removal in pursuit of effective immigration control, but some of them have obvious relevance in that context too, both as regards family life and as regards private life. For example, what is said about ties arising from length of residence is obviously pertinent to an ordinary removal case: any difference in the extent or quality of ties established by a person present in this country unlawfully, as compared with those established by a lawfully settled

immigrant, goes simply to weight. Similarly, the emphasis given to the position of a person who has been in the host country since childhood is relevant in the context of ordinary removal too. The first sentence of para 75 of the *Maslov* judgment [2009] INLR 47 (“for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion”) does not apply in terms to the removal of a person who has spent his life in the host country unlawfully, but the fact that the person has been there since childhood is still a weighty consideration in the article 8 balancing exercise.

7. Having set out these principles, Richards LJ applied them to the facts of the two cases before him. In *JO*'s case, he concluded that the finding of the AIT that removal was proportionate given the seriousness of the offences committed by JO (possession of class A drugs with intent to supply and possession of a prohibited weapon; and offences of possession of a firearm and prohibited ammunition while on licence) was open to it.² In *JT*, the Court concluded that the appeal should be allowed and remitted to the Tribunal on the grounds that the AIT had (i) failed to adequately distinguish the legitimate aim under Article 8 which on the face of the SSHD's decision letter appeared to be immigration control rather than the prevention of crime; (ii) erred in refusing to apply *Maslov* solely on the basis that JT's presence in the UK had not been lawful; (iii) failed to give adequate weight to the fact his offences were committed when he was a juvenile; and (iv) given too much weight to his criminal offending without having adequate information before it about the nature of those offences.
8. On the same day as its judgment in *JO*, the Court of Appeal also gave judgment in *KB (Trinidad and Tobago)* [2010] EWCA Civ 11, [2010] 1 WLR 1630. KB had resided in the UK since entering in 1992 at the age of 22. Having spent several years as an overstayer, he was granted leave to remain as a spouse and in November 2000 indefinite leave to remain. He had a son born in January 1995 who was a British citizen; his wife was also British and the Tribunal accepted that she could not reasonably be

² He was refused permission to appeal to the Supreme Court on 25 May 2010.

expected to relocate to Trinidad and Tobago with him. He was convicted of drugs offences in August 2005 and sentenced to six years imprisonment. The Tribunal had allowed his appeal under Article 8 and the SSHD appealed on the grounds that the Tribunal had failed to distinguish between the approach to ordinary removal cases and criminal deportation cases. The Court of Appeal dismissed the appeal, holding that:

16. ... Deportation cases do not call for a materially different approach from that required in ordinary removal cases. The issues arise under the same legal framework and involve the same essential question as to whether, if expulsion would interfere with rights protected by article 8(1), such interference is proportionate to the legitimate aim pursued. What Lord Bingham said in the *EB (Kosovo)* case [2009] AC 1159 about the judgment that needs to be made, about the need to take note of the factors which have or have not weighed with the Strasbourg court, and about there being in general no alternative to making a careful and informed evaluation of the facts of the particular case, is equally applicable in the context of deportation as in the context of removal.

17 The two types of case do, however, generally involve a different legitimate aim: in deportation it is the prevention of disorder or crime, in removal it is the maintenance of effective immigration control. That difference in aim and therefore of relevant considerations has to be factored into the analysis. It does not call for a different approach, but the presence of additional factors and the weight to be given to them will affect the balancing exercise. Thus, in the context of deportation in pursuit of the aim of prevention of disorder or crime, a person's criminal offending will be a factor in favour of removal and may in a particular case be given great or even decisive weight, though the actual degree of weight to be attached to it, and whether it is sufficient to render deportation proportionate, will depend both on the seriousness of the offending and on all the other circumstances of the case: see, further, my judgment in *JO (Uganda) v Secretary of State for the Home Department* [2010] 1 WLR 1607, para 28. Lord Bingham's observation in the *EB (Kosovo)* case that "it will rarely be proportionate" to uphold an order for removal where it severs a genuine relationship with a spouse or child was directed specifically at removal and may need to be qualified in relation to deportation, but that is because of the effect that serious criminal offending can have on the overall balance rather than because of any difference of approach.

9. In *SS (India) v SSHD* [2010] EWCA Civ 388, the Court of Appeal developed this latter point emphasising that in a criminal deportation case, it may be that deportation is proportionate even if it would not be reasonable for the family to follow the deportee to his country of origin. However, the seriousness of the offending and all the other circumstances of the case would need to be carefully assessed in order to determine whether deportation was proportionate (paragraphs 52-54).

10. Similarly, in *QJ (Algeria)* [2010] EWCA Civ 1478, the Secretary of State conceded that SIAC had been wrong insofar as it held that the *Huang* approach to proportionality did not apply to deportation cases. However, in *RG (Automatic deport – Section 33(2)(a) exception) Nepal* [2010] UKUT 273 (IAC), the Tribunal pointed out that:

It is plain that the question for evaluation in a criminal deportation of someone lawfully resident here is not whether the case is “exceptional” or belongs to a “small minority”. The observations in *Huang* were directed to cases where despite failure to comply with the Immigration Rules admission may be required by Article 8. Here the appellant and his family were all lawfully admitted and no question of primary immigration policy arises. [41].

The existence of family life

11. The SSHD’s position will invariably be that once a person turns 18, he does not have “family life” for Article 8 purposes with his parents, siblings and other family members unless he can establish “more than the normal, emotional ties”. In the case of a young adult who has not yet founded a family of his own, the Strasbourg Court held in *Maslov* that family life was likely to exist. In *SSHD v HK (Turkey)* [2010] EWCA Civ 583, the Secretary of State appealed against a finding that HK, a 22 year old man who had lived in the UK with his parents since the age of 6, and had been convicted in December 2007 of an offence of wounding with intent, had a family life for Article 8 purposes with his parents and siblings. Sir Scott Baker rejected the Secretary of State’s submission that it had erred in failing to find something more than the normal emotional ties. He said:

...Normal emotional ties will exist between an adult child and his parent or other members of his family regardless of proximity and where they live. Scrutinising the relevant facts, as one is obliged to do, it is apparent that the respondent had lived in the same house as his parents since 1994. He reached his majority in September 2005 but continued to live at home. Undoubtedly he had family life while he was growing up and I would not regard it as suddenly cut off when he reached his majority. [16]

12. See also *RG (Nepal)* where the Tribunal followed *HK* in concluding that a young man who had lived with his family since arriving in the UK in 2005 and was 21 at the date of the hearing before the original panel still enjoyed

family life which was “not suddenly cut off when he reached the age of 18 and his personal circumstances had not otherwise materially changed” (para 24).

13. On the other hand, in *Khan v United Kingdom*, the Strasbourg court did not consider that there was “family life” between the 34-year-old applicant and his parents and brothers, despite the fact that he lived with them. It held that there was not a sufficient degree of dependence.

The existence of private life

14. In *JO (Uganda)*, the Court of Appeal emphasised the observations made by the Strasbourg court in *Uner* and *Maslov*, that for a settled migrant who has spent a significant period of time in a country, he will inevitably have established a private life there, with which deportation will interfere (see paragraphs 19 - 20, above). Thus in all cases in which the deportee has spent any significant period of time in the UK - whether or not lawfully (*per JO*, para 31) - the proportionality of the interference in private life must be assessed by reference to the factors set out in *Maslov*, *Uner* and *JO*.
15. In *HM (Iraq)* [2010] EWCA Civ 1322, the Court of Appeal held that the Tribunal had materially erred in law when it held that “It may be that it can be argued that the appellant has established private life in the United Kingdom, and that Article 8 is engaged. Even if that were the case... his entitlement to exercise his private life in the UK is a qualified right, and he does not have the right to choose the place where he can exercise his private life and we find that he will be able to exercise his private life in Iraq if he is returned there” (para 32 of the Court of Appeal’s judgment). The Tribunal should have accepted that the appellant *did* have a private life, having resided in the UK since he was 12, and that deportation would

necessarily interfere with it, and should have gone on to assess the proportionality of that interference (paras 32 – 34).

16. In *RG Nepal*, the Tribunal also pointed out that “even if family links after the age of eighteen between a child and his parents, who remains part of the same household, is still to be seen as an aspect of private life..., nevertheless this was an aspect of private life to which particular respect is due and carried particular weight” (para 25).

The assessment of the public interest

17. Cases such as *OP (Jamaica)* [2008] EWCA Civ 440, *OH (Serbia)* [2008] EWCA Civ 694 and *N (Kenya)* [2004] EWCA Civ 1094 make clear that “primary responsibility for the public interest... resides in the respondent” and that the Tribunal must give “proper weight” to her policy on deportation and her view of the offences. That principle remains good, although qualified to some extent by recent cases which show that the Tribunal is nonetheless bound to evaluate the seriousness of the offence in order to be able to assess proportionality.

18. In *HK Turkey*, Sir Scott Baker observed:

Among serious offences, there are of course degrees of seriousness. The best indication of the gravity of the particular offence will ordinarily, it seems to me, be found in the Judge's sentencing remarks and the sentence passed, the starting point of course being the actual offence itself, in this case one under section 18 of the Offences Against the Person Act 1861 . In my judgment tribunals, and indeed the Secretary of State, should be careful not to make findings or draw inferences that are inconsistent with anything said by the judge who presided over the trial. In this case the Asylum and Immigration Tribunal rightly directed itself at paragraph 43 in the passage I have set out that the Secretary of State has a duty to deter and to remove foreign nationals who commit serious criminal offences. He was, in my view acting fully in accordance with the law in deciding to deport the respondent. But, it seems to me, when it comes to the proportionality exercise it is necessary to form a view where on the scale of seriousness the respondent's conduct comes so that the Article 8 considerations can properly be balanced against the Rule 364 presumption. In some cases the seriousness of the offence is so overwhelming as to trump all else. This, however, was not a case, serious as it was, where the gravity was such that deportation was virtually inevitable albeit there would have to be compelling reasons to allow the respondent to remain here. [28]

19. Sedley LJ agreed at [34] observing that “It is not for either the Home Secretary or the Tribunal to reappraise the offending behaviour so as to either inflate or diminish the judicial evaluation of it”. *SB (Jamaica)* [2010] EWCA Civ 1569 was an appeal by the Secretary of State against a decision allowing the appeal against deportation of a man who had been convicted of possession of cocaine with intent to supply. The Court of Appeal agreed with the Secretary of State’s submission that the IJ’s finding that that offence was one which “engages society’s displeasure rather than society’s revulsion” was perverse, but Sullivan LJ emphasised that:

...this judgment is not to be treated as authority for the proposition that it is not the task of immigration judges to carefully consider the seriousness of the individual offence. While certain offences as a category may well be serious offences, it is of course necessary to look at the gravity of the particular offence within that category.[14]

20. He declined to determine whether the proposition in *OH (Serbia)* that the Tribunal was bound to have regard to the Secretary of State’s assessment of the public interest remained good in the light of the automatic deportation provisions in the UK Borders Act 2007 which established Parliament’s view that where a person is sentenced to more than 12 months’ imprisonment, his deportation is conducive to the public good.

21. In *RG (Nepal)* (29 July 2010), the Tribunal briefly addressed this issue pointing out that in an automatic deportation case “Neither the trial judge nor the respondent has decided that deportation is the appropriate course in the public interest in the light of the particular circumstances of this offence” [38] and continued:

There is a danger in equating the kind of seriousness of offence needed to justify deportation irrespective of any likelihood of re-offending and the criteria for automatic deportation subject to human rights claims under the Borders Act. Where automatic deportation arises in a case

where there is a family and private life to which respect is owed, the task of the Immigration Judge is carefully assess the factors that are identified in the case of *Maslov*...[34].

22. The Tribunal highlighted that in *Maslov*, the European Court had said that the *Uner/Boultif* criteria “ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities” [70].

23. The Tribunal returned to this question in *MK (deportation – foreign criminal – public interest) Gambia* [2010] UKUT 281 (IAC) holding that in automatic deportation cases, the respondent’s assessment of where the public interest lay had “no relevance to an automatic deportation prescribed by the 2007 Act... Correspondingly, as the decision of the Tribunal in the present case illustrates, there is no longer a need in such cases to carry out the always difficult task of according weight but not deference to the respondent’s policy judgment” [25].

Factors which are relevant to the assessment of proportionality

24. *Nature of the offending.* As noted above, the Tribunal should assess the seriousness of the offending in order to be able to make an assessment of proportionality. In *AR (Pakistan)* [2010] EWCA Civ 816, the appellant had been convicted of 17 offences over a period of 20 months. Most were relatively trivial and the longest period of imprisonment imposed was 4 months. The Court of Appeal held that it was open to the Tribunal to conclude that his deportation was proportionate notwithstanding that it would sever his family ties with his children, one of whom had learning difficulties which meant he would not be able to maintain contact by telephone or e-mail. It observed of the appellant’s offending behaviour:

...It should not be forgotten that persistent offending of that kind imposes burdens not only on the victims but also on the state in the form of providing resources for the prosecution and

conviction of offenders, their punishment and rehabilitation. The requirement on two occasions to undergo drug rehabilitation treatment suggests that the appellant was stealing, mainly from shops, in order to fund an addiction. That of itself is not uncommon and such offences on their own might not in many cases justify deportation, but in the present case the appellant had received two written warnings of the risk he was running by continuing to offend. He received the first letter in September 2007 when he was in prison, but it did not cause him to change his ways because he continued to offend and was convicted again in December 2007 and April 2008. He received a second warning in May 2008 but went on to commit further offences of which he was convicted in July, August and December of that year. That and his failure to respond to drug treatment programmes suggests that he was unwilling or unable to change his behaviour. [21]

25. *The interests of children.* In *AR (Pakistan)*, the Court of Appeal emphasised the point that had earlier been made in *DS (India)* [2009] EWCA Civ 544, namely that while the interests of children are “a primary consideration” they are not *the* primary consideration and nor are they paramount. Thus “It would be contrary to principle to hold that the child’s interests must always take precedence over the wider public interest where the two are in conflict” [18]. See also *QJ (Algeria)*, in which the Court emphasised the importance of maintaining the distinction between the interests of children as a primary consideration but not *the* primary consideration [11].

26. These observations are strengthened both by the obligation under s. 55 Borders, Citizenship and Immigration Act 2009 to “have regard to the need to safeguard and promote the welfare of children” in the exercise of immigration functions, and by the seminal decision of the Supreme Court in *ZH (Tanzania)* [2011] UKSC 4 which considers, albeit from the perspective of a decision to remove rather than deport the mother, the role which the best interests of children, particularly British citizen children, plays in the Article 8 proportionality exercise. Lady Hale observed that:

it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as “a primary consideration”. Of course, despite the looseness with which these terms are sometimes used, “a primary consideration” is not the same as “the primary consideration”, still less as “the paramount consideration”. [25]

27. She endorsed the approach taken by the Federal Court of Australia in *Wan v Minister of Immigration and Multi-cultural Affairs* [2001] FCA 568, para 32, which said:

[The Tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration.

28. Lady Hale observed of this decision:

This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. That seems, with respect, to be the correct approach to these decisions in this country as well as in Australia. [26]

29. She further observed that “an argument that the continued presence of a particular individual in the country poses a specific risk to others may more easily outweigh the best interests of that or any other child than an argument that this or her continued presence poses a more general threat to the economic well-being of the country” [28].

30. At paragraphs 30-32 she analysed the importance of the children’s British citizenship, holding that it was “not a “trump card” [but] it is of particular importance in assessing the best interests of any child” [30]. Inherent in that that was not only the ties which British citizen children born in the UK would have to the UK, but “the intrinsic importance of citizenship” [32].

31. *Impact of deportation on the health of the deportee and any family members who may be expected to travel with him.* In *R (HM (Malawi)) v SSHD* [2010] EWHC 1407, HHJ Gilbert QC, sitting as a Deputy High Court Judge, observed that:

...the test of the effect on family life includes asking whether it would be unreasonable for the spouse to decline to follow the deportee to the other country. ... The effect on the health of

the deportee and spouse cannot be excluded from that judgement – indeed one can be confident that it would be a potentially critical matter. [49]

32. *Length of the exclusion: Maslov*, para 95, makes clear that the duration of the exclusion from the country is relevant in the assessment of proportionality. In *NB (Jamaica)* [2010] EWCA Civ 824, the Court accepted that the SIJ had erred in law in failing to take into consideration that the appellant was likely to face permanent exclusion from the UK if expelled (in light of para 391 of the Immigration Rules). However, the Court found that the error was not material because the SIJ had assessed proportionality on the basis that deportation would bring to an end the appellant's family life with his fiancée and child, and that he would be excluded for a minimum of 10 years.

Recent Strasbourg cases

33. Notwithstanding the warning of Richards LJ in *JO (Uganda)* that it is not particularly helpful to compare the conclusions reached in different cases which all turn on their own facts, it will hopefully be helpful for the purposes of analysing Article 8 appeals to set out the most recent decisions of the Strasbourg court in Article 8 challenges to deportation. This is particularly so given the tendency of the Secretary of State to cite *Onur* and *Grant*, both unhelpful on their facts.

34. In *Omojudi v United Kingdom* (2010) 51 EHRR 10, the Strasbourg court found a violation of Article 8 in the deportation of a Nigerian national who arrived in the United Kingdom at the age of 22 in 1982. He had leave to enter as a student, subsequently extended until 1986. His partner joined him in the UK in 1983, and they were married in 1987. They had three children, born in 1986, 1991 and 1992. All three children resided with the applicant prior to his deportation and were financially dependent on him;

the eldest child had a daughter born in 2007, who in turn was cared for by O and his wife while her father studied. In March 1987, O was informed of his liability for deportation and served with a deportation order in July 1987, and again in December 1990. In 1995 he claimed asylum, but the application was refused in January 1998. In September 2000, he applied for leave to remain under the Overstayers regularisation scheme, and he and his wife were granted indefinite leave to remain on 18 April 2005. O had a number of convictions for theft and dishonesty in and prior to 1989. In November 2006 he was convicted of sexual assault and sentenced to fifteen months imprisonment. On 31 March 2007, the Secretary of State decided to deport O to Nigeria. His domestic appeals were dismissed and on 27 April 2008 he was deported to Nigeria. His wife and children remained in the UK.

35. In finding a violation of Article 8, the Court considered that the only relevant conviction was the serious sexual assault for which he was convicted in 2006. This was because in the period between his last offence in 1989 and the sexual assault, he had not engaged in any further offending and had indeed been granted indefinite leave to remain by the respondent. Although both the applicant and his wife had spent their youth and formative years in Nigeria, they had resided in the United Kingdom for nearly 30 years and had very strong ties to this country. The family life commenced before Mr Omojudi's first conviction, at a time when both had leave to remain, so that considerable weight was given to his family ties in the United Kingdom.

36. In *A W Khan v United Kingdom* (47486/06, 12 January 2010, unreported), Mr Khan had arrived in the UK in 1978, when he was three years old, as a dependent of his father. He was granted indefinite leave to remain and

was educated in the UK. In 1993 and 1998 he acquired convictions for offences of dishonesty. In January 2003 he was convicted of involvement in the importation of a class A drug and sentenced to 7 years' imprisonment. He was released on 3 April 2006 and on 2 May 2006 a decision was taken to deport him. By the time of the court's judgment, the applicant's girlfriend, with whom he had been in a relationship since August 2005, had given birth to a child by him, and although the couple did not cohabit, the court held that their relationship had "sufficient constancy to create *de facto* family ties" [35]. However, it noted that the relationship had been formed while he was in prison [46] and held that "no decisive weight can be attached to this family relationship [47]. However, in view of Mr Khan's length of residence in the UK and strength of ties to the UK, the lack of any ties to Pakistan, and the fact that he had not reoffended since being released from custody, the Court concluded that his deportation would breach Article 8.

37. In *Raza v Bulgaria* (App 31465/08, 11 February 2010), the applicant had fled Pakistan in 1998 and arrived in Bulgaria later that year. In February 2000 he married a Bulgarian national and in 2003 was granted a permanent residence permit on the basis of marriage. In December 2005, a decision was taken to expel him to Pakistan on grounds of national security. He was not given any factual reasons for this decision but it emerged it was based on a suspicion that he was involved in human trafficking. In the domestic courts, it appears that the government provided only a summary of the case against Mr Raza but not the full details or any evidence. The applicant was prohibited from copying any of the case papers and the government failed to respond to a request by the court that it provide a copy of the judgment. The Strasbourg Court held that the interference in Mr Raza's family life was not in accordance with the law because he had not had "the

minimum degree of protection against arbitrariness on the part of the authorities”.

38. In *Kamaliyevy v Russia* (52812/07, judgement 3 June 2010), the applicant was an Uzbek national who had arrived in Russia from Uzbekistan in 1997. In December 2000 he married a Russian national and obtained Russian identity papers. In November 2007, he was ordered to be expelled from Russia on grounds that he was guilty of violating the residence rules in Russia because he had failed to obtain Russian nationality by lawful means before obtaining identity papers. The expulsion order would have prevented his return to Russia for five years. Uzbekistan had also sought his extradition for “attempted subversion of the constitutional regime”. He was deported to Uzbekistan on 5 December 2007, despite a rule 39 indication from the Strasbourg court. His complaints under Articles 3 and 6 were rejected for non-exhaustion of domestic remedies.

39. The court rejected his complaint under Article 8 (by four votes to three) on the grounds that he had known for a long time that his stay in Russia was illegal and had done nothing to regularise his stay. It also took account of the fact that the domestic courts had reached their own conclusion that his marriage did not mean that he should not be deported, because his “family situation did not outweigh the interest of public order”. It concluded that “in striking a balance between achieving the legitimate aim and the applicants’ protected interests, the State did not exceed the margin of appreciation which it enjoys in the area of immigration matters”. The minority disagreed with this approach and considered that the majority should not have accorded such weight to the domestic decisions, particularly in view of the length of the applicant’s stay in Russia, his

genuine family relationship, the petty nature of the offence, and the risks which he faced in Uzbekistan.