Upper Tribunal
(Immigration and Asylum Chamber)

Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 00048(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 July 2011	

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Before

THE PRESIDENT, MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE JORDAN

Between

MILIND MANOHAR SANADE

DAMION HARRISON

CONROY MAURICE WALKER

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant Sanade: Mr A Adewoye of Sam Solicitors

Walker: Mr R Singer instructed by AA and Co

Harrison: Mr M Karnik instructed by Fadiga and Co

For the Respondent: Mr Walker Senior Home Office Presenting Officer

1. Section 32 of the UK Borders Act 2007 provides that where a person is sentenced to imprisonment of 12 months or more, he must be deported unless he falls within one of the statutory exceptions.

2. Article 8 provides one such exception but there is no justification for saying that it will only be in exceptional circumstances that removal will violate the family's protected Article 8 rights or that the claim itself must be exceptional: the issue is whether the State can justify the interference as necessary, that is say a proportionate and fair balance in pursuit of a legitimate aim.

3. The more serious the offending, the stronger is the case for deportation, but Parliament has not stated that every offence serious enough to merit a penalty of twelve months or more imprisonment makes interference with human rights proportionate.

4. ZH (Tanzania) v SSHD [2011] UKSC 4 considered in what circumstances it was permissible to remove or deport a non-citizen parent where the effect would be that a child who is a citizen of the United Kingdom would also have to leave. The fact the children are British was a strong pointer to the fact that their future lies in the United Kingdom.

5. Case C-34/09 Ruiz Zambrano now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so.

6. Where in the context of Article 8 one parent ("the remaining parent") of a British citizen child is also a British citizen (or cannot be removed as a family member or in their own right), the removal of the other parent does not mean that either the child or the remaining parent will be required to leave, thereby infringing the Zambrano principle, see C-256/11 Murat Dereci . The critical question is whether the child is dependent on the parent being removed for the exercise of his Union right of residence and whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union.

7. Where the claimant's conduct is persistent and/or serious the interference with family life may be justified even it involves the separation of the claimant from his family who reasonably wish to continue living in the United Kingdom, Lee v SSHD [2011] EWCA Civ 348.

8. The principles for evaluating Article 8 claims in criminal deportation cases are to be found in the Strasbourg jurisprudence of Boultif v Switzerland (no.54273/00) [2001] ECHR 479; Uner v Netherlands (no 46410/99) [2006] ECHR 873 and Maslov v Austria (no. 1638/03) [2008] ECHR 546.

9. In cases of the importation and supply of significant quantities of Class A drugs, Strasbourg has recognised why states show great severity to such foreign offenders but there is no special principle in cases of importation or supply of drugs. Deportation must always be proportionate.

DETERMINATION AND REASONS

1. Introduction

1.
This is a determination to which both members have contributed. These three appeals were heard consecutively on 7 July 2011. They each concern the father of a young child who is a British citizen where the father resists deportation on human rights grounds. They were listed together before a panel of the Upper Tribunal to consider the impact of the decision of the Supreme Court in ZH Tanzania [2011] UKSC 4 [2011] AC 166 and the decision of the Court of Justice of the European Union in Case C-34/09 Ruiz Zambrano [2011] ECR 1-0000 8 March 2011 (hereafter Zambrano).

2.
Directions had been issued asking that the representatives come prepared to examine these questions but in the event, Mr Walker for the respondent had not received sufficient instructions to enable him to address the Zambrano question. We therefore afforded him a short period in which to make supplementary submissions in writing and for the appellant to respond to them. Unfortunately, the respondent was not in a position to make such submissions until early October 2011 and twice sought extensions of time to do so. We reluctantly agreed to this course, given the potential importance of the issue and the need to have informed representations from the respondent. When a short statement of policy was received, we posed a number of supplementary questions to which, after a further extension of time, we received an answer on 24 November 2011. We issued directions for the appellants to file any response that they wished to by the end of 5 December 2011.

3.
The reason for this last extension was by then we had become aware that the Court of Justice itself had considered the scope of its earlier ruling in Zambrano in the case of C-256/11 Murat Dereci and others v Bundesministerum fur Inneres in a judgment delivered on 15 November 2011. This case has clarified the relevance of Zambrano to the present appeals. We have received and taken into account submissions from the appellant Harrison on the effect of this judgment. We have considered whether there was a need to reconvene a further oral hearing and we have concluded that there is no need to.

4.
We are now able to deliver our determination. We indicated at the hearing to the representatives that we were minded to issue a combined determination with respect to the relevant legal principles to be considered. We propose to adopt this course, before dealing with the merits of each individual appeal separately.

2. Summary of the factual foundation of the appeals :

Sanade

5.
Mr and Mrs Sanade both originate from India. They were granted leave to enter or remain in the United Kingdom for employment as nurses in the National Health Service. They met here, married in 2005 and were granted indefinite leave to remain in July 2009.

6.
They have two children born in the United Kingdom: in July 2007 and in February 2010. The latter is a British citizen by birth. Mrs Sanade and the elder child have become British citizens by registration.

7.
On 24 June 2010 Mr Sanade was sentenced to twelve months imprisonment on his plea of guilty for an offence of indecent assault on a patient committed in February 2010. His sentence rendered him liable to automatic deportation under the UK Borders Act 2007 s. 32(5). He was released on bail in December 2010. His appeal to the First tier Tribunal was dismissed in February 2011.

Harrison

8.
Mr Harrison is a Jamaican national born in 1975. He first came to the United Kingdom in 1999 as a visitor and his leave was extended first as a student and then as a spouse of a woman he married in October 2000. He was granted indefinite leave to remain on the basis of this marriage in January 2003.

9.
In November 2003 he was arrested and remanded in custody charged with an offence of conspiracy to supply a Class A drug, namely cocaine. He pleaded guilty to this offence on 23 June 2004 and an offence of being in possession of a taser stun gun firearm. On 23 July 2004 he was sentenced on all matters by the Kingston Crown Court to seven years imprisonment and recommended for deportation. In June 2007 whilst he was still serving his sentence he claimed asylum on the basis of gang-based persecution in Jamaica. This claim was rejected in November 2009 and his appeal against this part of the decision was dismissed without further challenge in November 2010.

10.

Mr Harrison resisted deportation on the basis of his Article 8 family and private life. It is this aspect that is in contention before us. His family life will be considered in greater detail below. At the time of these appeals he is the unmarried partner of a British citizen by whom he has three British citizen children born in May 2002, March 2010 and May 2011. He was released on bail in November 2007.

11.
A panel of the First tier Tribunal dismissed his appeal in June 2010. Permission to appeal against the panel's decision was granted on the basis of an arguable misdirection as to the burden and standard of proof in Article 8 cases. Deputy Upper Tribunal Judge Lewis found no material error of law when he heard the appeal on 9 November 2010. Grounds for permission to appeal to the Court of Appeal were lodged on 24 November 2010. By the time they came to be considered by SIJ Perkins on 4 April 2011, the Supreme Court had given its decision in ZH (Tanzania) . He accordingly reviewed Judge Lewis's decision on the basis of subsequent binding judicial decision that could have had an effect on the decision pursuant to rule 45 (1) (b) of the Tribunal Procedure (Upper Tribunal) Rules 2008. As a result he set aside the decision.

Walker

12.
The appellant is a citizen of Jamaica who was born on 12 May 1971. He entered the United Kingdom in December 1996 when he was aged 25. The appellant has four children now aged 20, 17, 13 and 4.

13.
He met his present wife, Julie-Ann Smith, who is the mother of his children, in Jamaica in 1989. Julie-Ann's mother was living (and continues to live) in the United Kingdom. The second child (X) joined his grandmother in the United Kingdom in December 1996 when he was just 2 years old leaving the rest of his family in Jamaica. The eldest child (W) joined her grandmother and sibling X in 1997 when she was 5 or 6 and their mother, Julie-Ann, joined them in December 1997.

14.
The appellant came to the United Kingdom at the same time as the second child in December 1996, now nearly some 15 years ago. He entered as a visitor but overstayed. He continued his relationship with Julie-Ann but married another woman in May 1997 on the basis of which he sought indefinite leave to remain as a spouse. The marriage took place four days before his leave expired. On the strength of it he was given 12 months leave to remain expiring on 30 June 1998. Enquiries, however, revealed he was apparently living with Julie-Ann and his application for further leave to remain was refused. Immigration Judge Wright found at an earlier hearing that this marriage was one of convenience. It was dissolved on 19 September 1999. The two youngest children were born in the United Kingdom in December 1998 (Y) and June 2007 (Z).

15.
The appellant married his wife on 29 March 2003 in the United Kingdom. At that time, he had no leave to remain. On the strength of his second marriage he applied for leave to remain as a spouse. The application was made on 17 May 2003 but it was not refused until 13 June 2007.

16.
He had committed theft and kindred offences in 1998; in possession of cannabis in 2002 and having a bladed or sharp-pointed object in a public place in 2005. These matters were dealt with by way of cautions or warnings.

17.
On 10 December 2007 he was convicted of possessing Class A drugs with intent to supply and was sentenced to a term of five years imprisonment. He became liable to automatic deportation under s.32 the UK Borders Act 2007 and was given notice to that effect on 9 November 2008. On 23 November 2009, the Secretary of State made a deportation order against him.

18.
The appellant's appeal came before a panel of the AIT (Judge Jhirad and Mrs Cross de Chavannes) who dismissed his appeal in a determination promulgated on 8 February 2010. Pursuant to leave granted on 26 February 2010, his appeal came before Senior Immigration Judge Martin who found that the Tribunal's determination did not involve the making of an error on a point of law. His renewed application for leave to appeal to the Court of Appeal came before Sir Richard Buxton who granted permission to appeal, when he said:

“There is no evidence of significant contacts with Jamaica. The reality is that if the mother decides to follow the applicant to Jamaica the two younger children, and possibly also X, will go with her. That would, for them, be a significant disruption of their private, if not their family, life. At least the spirit of Beoku-Betts indicates that the effect of the deportation on each family member should be considered separately. That may not have been fully done here.

There are two further points. First, I have no doubt that the Tribunals were entirely right in thinking that the applicant, taken on his own, was an obvious candidate for deportation. It does not follow, however, that his deportation cannot be stayed, however unmeritoriously, because of its impact on his family. Second, it is arguable that the Tribunal should have considered the practical impact of the deportation decision on the right of abode of the children as British citizens. It is one thing to say that an adult can decide whether or not to exercise that right when her spouse is deported; perhaps another to assume that a child must forfeit that right as a result of a family decision following from a deportation order."

19.
In the statement of reasons provided to the Court of Appeal following the grant of permission, the Secretary of State agreed that, in the particular factual circumstances of the case, there was a material error of law requiring the Upper Tribunal to consider the comments of Sir Richard Buxton. The appeal was subsequently allowed by consent by Sullivan LJ to enable the Tribunal to give further consideration to the Article 8 claim.

20.
Mr Walker was released on licence on 6 July 2010 and will remain on licence until December 2012, maintaining monthly contact with his supervising officer in the meantime.

21.
Both his wife and his children are now British citizens. Certificates of registration as British citizens under the British Nationality Act 1981 were issued in July 2009. There is evidence that some or all had previously been granted indefinite leave to remain in the United Kingdom. The appellant’s mother is resident in the United Kingdom and is a British citizen. The appellant also has a sister in the United Kingdom. She, too, is a British citizen. His wife’s mother lives with the family.

3. Error of Law

22.

In summary, therefore, each appellant is married to a woman who is a British citizen. They each have minor children who are British citizens who were either born here or have lived here from an early age.

23.
Mr Sanade lives in a household with his wife and children and was granted indefinite leave as a spouse before his offending put his immigration status in jeopardy.

24.
Mr Harrison had indefinite leave to remain on the basis of marriage to someone other than his present partner. The First tier Tribunal found that this leave was obtained by misrepresentation as to the nature of the relationship as he was in a pre-existing relationship with his present partner. The deportation order cancels all existing leave to remain granted to Mr Sanade and Mr Harrison.

25.
Mr Walker obtained previous leave to remain as a spouse by virtue of a marriage of convenience. He had no leave to remain in the United Kingdom at the time of his marriage to his present wife or the deportation decision.

26.
In Mr Walker's case it has been accepted before the Court of Appeal that there was an error of law by reason of the failure of the Tribunal to examine the interests of the British national children as a primary consideration the light of the guidance in ZH (Tanzania) .

27.
We conclude that there are similar errors in both of the other two cases. In each case we will set aside and re-make the decision in the light of the findings of primary fact below and the application of the principles that we set out in the next section of this determination.

28.
We will give further consideration to the offending and the judge's sentencing remarks when we consider each individual case below as well as other factors urged upon as relevant to the Article 8 balance between the interest of the family members and the public interest favouring deportation. Before we do so we will first consider some generic issues that arise in these appeals.

4. Automatic deportation:

29.
Section 32 of the UK Borders Act 2007 applies to all those who have received a sentence of imprisonment of at least 12 months after 1 August 2008 or is in custody pursuant to such a sentence on that date and had not been served with a notice of deportation before then. Such a person is defined as a foreign criminal and must be made the subject of a deportation order unless an exception applies under s.33. The three most common exceptions are:

Exception 1: removal would breach a person's Convention rights within the meaning of the Human Rights Act 1998 or the Refugee Convention 1951 (s.33(2)).

Exception 2: the person is under 18 (s.33((3)).

Exception 3: removal would breach the rights of the foreign criminal under the Community Treaties (s.33(4)).

30.
Mr Sanade and Mr Harrison come within the automatic deportation regime and rely on the Article 8 ECHR rights to respect for private and family life pursuant to the Schedule 1 to the Human Rights Act 1998. Mr Walker's deportation order was made before the automatic deportation provisions came into force. He appeals against the refusal to revoke that order by s.82(2)(k) the Nationality, Immigration and Asylum Act 2002. He has an in-country right of appeal under s.94(1) because he has made a human rights claim of a similar nature to the other two appellants.

31.
The 2007 Act means that a person who has received a sentence of at least twelve months for an offence is a person whose deportation is considered conducive to the public good within the meaning of s.3(5)(a) of the Immigration Act 1971 and is so considered even if an exception applies: see s.33(7).

32.
In July 2011 the Secretary of State issued a consultation document called Family Migration. In section 8 of that document the following appears:-

"8.11 As a starting point for discussion we suggest that, as a general rule, where a person is convicted of an offence that meets the automatic deportation threshold – where Parliament has imposed a duty on the Secretary of State to make a deportation order – then it is reasonable to presume that the public interest will warrant deportation and that only in exceptional circumstances will it be a breach of the right to respect for private and family life to remove the person from the UK.

8.12 We note that the courts in England and Wales have indicated that this is the right approach. In AP (Trinidad & Tobago) [2011] EWCA Civ 551,120 the Court of Appeal commented that where the automatic deportation criteria are met, it is at least arguable that the court should give greater weight to the public interest in deportation proceeding and it is likely to be rare that the public interest would be outweighed by Article 8 ."

(our emphasis)

33.
Although we have received no submissions to this effect from the Secretary of State in these appeals, we have examined whether this proposition is accurate and should be applied by us. We have reached the conclusion it should not for three reasons: i) the general scheme of the provision; ii) consideration of the relevance of a twelve month sentence to the other related exceptions; iii) previous authority binding on us.

34.
A person sentenced to 12 months or more must be deported unless he falls within the exceptions. It can therefore be said that Article 8 provides an exception to the presumption that deportation will be automatic. The Secretary of State's consultation document puts a gloss on this by saying that where the twelve month threshold is passed only in exceptional circumstances will deportation be a breach of the right to respect for private and family life. This is not what the statute says; it nowhere suggests that the Article 8 claim must itself be exceptional. Indeed it is difficult to see how it could do so. The exception is necessary to comply with the obligation of domestic law to ensure the Secretary of State acts compatibly with the duty to respect the claimant's Article 8 rights, reflecting the United Kingdom's international obligations.

35.

The task in Article 8 assessments is whether interference with established family or private life that is to be respected is necessary and proportionate, that is, strikes a right balance. If the factors in the balance are weighted by an ill-defined exceptionality test, the process ceases to reflect the task to be performed under the settled jurisprudence of the Strasbourg Courts as applied in the United Kingdom.

36.
We now turn to the Refugee and European Union exceptions to automatic deportation. In neither case could there be a presumption that the exception will not generally apply in the case of a sentence of twelve months or more. A refugee is entitled to the protection of Article 33 of the Refugee Convention and is not subject to the application of the exclusions clauses unless convicted of a serious (non-political) crime or guilty of similar conduct. Section 72 of the Nationality Immigration and Asylum Act applies a rebuttable presumption that this is the case where a person has been sentenced to two years imprisonment. In European Union law deportation cannot be based on the existence of a criminal conviction alone and it must be demonstrated that the person represents a personal threat to public policy before his or her rights of residence under Community law can be interfered with (see the principles now set out in Part VI of EP and Council Directive 2004/38/EC (the Citizens Directive). Indeed there is no scope for automatic deportation at all: see C-348/96 Calfa [1999] ECR 1-11; each case requires assessment of the circumstances to see whether the person is a threat C-145/09 Tsakouridis [2011] ECR 1-0000.

37.
We now turn to the case law. Exceptionality has been authoritatively held not to be the applicable principle in the related context of reliance on Article 8 in removal cases where a person is unable to comply with the provisions of the Immigration Rules: see Huang v SSHD [2007] UKHL 11 [2007] 2 AC 167 per Lord Bingham at [20]. Wherever removal would amount to an interference with private or family life that ought to be respected, the judge must decide whether removal is justified as a proportionate response to a legitimate aim identified in Article 8(2) of the ECHR. We conclude that there is no greater scope for exceptionality as a relevant principle in deportation cases than in removal cases.

38.
It is indeed conceptually difficult to apply an exceptionality principle in either removal or deportation cases where the circumstances of the claimant and the family members may be many and varied as to nationality and immigration status, circumstances of entry, length of residence, existence or age of children, degree of criminality revealed in the sentencing remarks of the judge and other relevant factors. Instead the learning of both the Strasbourg court and the courts of the United Kingdom reveal that attention should be given to factors of particular weight, including the seriousness of the offending, in the balance to be performed in the proportionality exercise.

39.
In AP (Trinidad) [2011] EWCA Civ 551 the Court of Appeal was concerned with a foreign criminal who was subject to automatic deportation having been sentenced to 18 months imprisonment for a drugs offence. A panel of the Asylum and Immigration Tribunal had allowed his appeal, reconsideration was ordered on the basis that sufficient weight had been given to the public interests in deportation as set out in the authorities of N (Kenya) [2004] EWCA Civ 1094 [2004] INLR 612 and OH (Serbia) [2008] EWCA Civ 1094 [2009] INLR 109. The Court of Appeal concluded that reconsideration should not have been ordered as the first panel had not misdirected itself and had reached a decision it was entitled to reach without misdirection. Concurring in the result, Carnwath LJ noted the decision of

Sedley LJ sitting in the Upper Tribunal in SSHD v BK [2010] UKUT 328 as to the potential effect of the legislative changes made by s.32 the UK Borders Act 2007.

40.
What Sedley LJ said both in that case and another case SSHD v MK [2010] UKUT 281 IAC heard in the Upper Tribunal at about the same time was that under the previous regime it was for the Secretary of State to establish that the immigrant had conducted him or herself in such a way as to make deportation conducive to the public good and in that context regard should be had to the Secretary of State's policy in maintaining respect for the law by seeking the deportation of serious foreign criminals such as the offenders in N (Kenya) and OH (Serbia) . Under the automatic deportation regime this stage in the process has been made the subject of a statutory assumption that it is in the public interest to deport a foreign offender subject to the application of the exemptions. Accordingly there is less room for giving weight to the Secretary of State's policy and it is the court's own assessment of the competing claims of respect to family life and the public interest in deportation that counts. A twelve month sentence will be a sufficient basis for deportation unless the exception applies.

41.
Nowhere in BK or MK did Sedley LJ indicate that in assessing the application of the human rights exemption to automatic deportation the court should also assume that deportation was a proportionate interference with family life by reason of such a sentence save in exceptional cases. Nor did Carnwath LJ in his concurring observations in AP Trinidad suggest this was the case. Rather in each of the three cases under consideration the judges concluded that the AIT or the First tier Tribunal was entitled to allow the appellant's appeal in automatic deportation appeals where sentences considerably longer than 12 months had been passed, because of the degree of interference with private and/or family life was not justified and disproportionate.

42.
In RU Bangladesh [2011] EWCA Civ 651, the Court of Appeal drew attention to the previous case law that has recognised that Parliament has decided that in a case of a sentence of 12 months or more deportation will be automatic unless a human right or other exception applies [1] .

43.
In each of the appeals, we recognise that deportation will be in the public interest and should result unless an evaluation of the human rights claim prevents it. In automatic deportation cases if there are no human rights claims that can be seriously advanced, deportation will follow. This may be why the threshold for deportation is comparatively low. Where there is family or private life that should be respected but is being interfered with by immigration action, the issue is whether the State can justify the interference as necessary, that is say a proportionate and fair balance in pursuit of a legitimate aim.

5. The Article 8 assessment

44.
Under Article 8 the legitimate aim to be promoted by deportation will be one or more of the following:

national security, pubic safety, or the economic well being of the country, for the prevention or disorder or crime, for the protection of health and morals or for the protection of the rights and freedoms of others.

45.

Where (as in these cases) past criminal conduct is the basis of the decision, the legitimate aim is normally the prevention of disorder or crime. Where a person poses a particular risk to the safety of others, the protection of the health or rights of others may also be of importance. If in addition the offender has no right or permission to be here in the first place, the economic well being of the country may well be engaged, as immigration control is a recognised means to promote this aim.

46.
Where family life is created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious that can be a strong factor in the balance in favour of removal. This proposition can apply to relations between adult partners or spouses, but not to the separate interest of children for reasons we consider below.

47.
Further those who have entered irregularly, and have used fraud to enter or remain undermine the integrity of immigration control and that of itself is a weighty reason to justify expulsion. Thus the Strasbourg Court has said recently in the case of Nunez v Norway (no. 55597/09) [2011] ECHR 1047 (28 June 2011) at [70] to [71]:

If serious or repeated violations of the immigration law were to be met with impunity, it would undermine the public's respect for that law. Since an application for a residence permit would be rejected in the event of failure to meet the conditions for residence, a refusal of such an application would not in itself constitute a sanction for the provision of false information. Therefore, the possibility for the authorities to react with expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act.

48.
It is long established that the legitimate aim of the prevention of disorder or crime does not depend on a person who has been convicted of a particularly serious offence being likely to further threaten the public interest by re-offending. As the decisions of the Court of Appeal in N (Kenya) and OH (Serbia) demonstrate, the maintenance of respect for the law, public indignation at past conduct, the deterrence of others by the adoption of the supplementary measure of deportation in addition to the criminal sentence may all contribute to the legitimate aim and justify deportation providing the interference is proportionate in all the circumstances of the case. The more serious the offending, the stronger is the case for deportation, but Parliament has not stated that every offence serious enough to merit a custodial penalty or a penalty of twelve months or more imprisonment, for that reason makes interference with human rights proportionate.

49.
Depending on the circumstances and particularly where the claimant's conduct is persistent and/or very serious the interference with family life may be justified even it involves the separation of the claimant from his family who reasonably wish to continue living in the United Kingdom. In Lee v SSHD [2011] EWCA Civ 348 the Court of Appeal was dealing with an appellant, 32 years old, who initially entered the United Kingdom as a visitor in 1996 but was granted a variation to enable him to remain as a student. When this leave expired at the end of October 1999 he overstayed, but at some point thereafter left the country, returning in April 2002 and absconded after securing temporary admission. He was however arrested within three months for having a forged insurance certificate. In January 2003, having been removed to Jamaica, he re-entered the United Kingdom on a false passport and within a few months had again been arrested, this time for possession of Class A drugs with intent

to supply. On pleas of guilty to ten counts he was sentenced on 3 October 2003 to 7 years' imprisonment. The Secretary of State had taken the view that it was reasonable to expect the appellant's wife and children to go and live with him in Jamaica. Having considered the evidence the Immigration Judge rightly rejected that. The question was whether it was proportionate to break the family up. The Immigration Judge concluded that it was. Sedley LJ said at [27]:

The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does. Sometimes the balance between its justification and its consequences falls the other way, but whether it does so is a question for an Immigration Judge.

50.
We shall return to this case later in this determination having considered the case of ZH (Tanzania) . We shall first examine the Strasbourg case law. We are obliged by s.2 the Human Rights Act 1998 to have regard to the case law of the ECHR and where the case law is a settled line of authority approved by the Grand Chamber we should follow it.

51.
There is now extensive case law exploring the developing application of Article 8 ECHR in cases of removal from a contracting state. This is an area of the law where the 'living instrument' principle has been hard at work since 1988, see for instance the observations of Lord Wilson in Quila [2011] UKSC 45 at [42]-[43]

52.
The core principles for evaluating Article 8 claims in deportation cases are to be found in the judgment of the Grand Chamber in Boultif v Switzerland (no.54273/00) [2001] ECHR 479. In this case an Algerian married to a Swiss national had committed a series of offences in his years of residence, culminating in an offence of robbery with a firearm. The court concluded that the obstacles to the couple moving to Algeria were sufficiently severe to make deportation disproportionate to the legitimate aim of preventing crime and disorder. There were no children of the family and the claimant was considered to have been sufficiently rehabilitated by his punishment as not to pose a current threat of re-offending.

53.
The Court set out a list of factors to be considered. Boultif criteria have been adopted and augmented in subsequent judgments in this field including the decisions of the Grand Chamber in Uner v Netherlands (no. 46410/99) [2006] ECHR 873 and Maslov v Austria (no. 1638/03) [2008] ECHR 546. We have set out the relevant passage in Maslov in the Appendix as judges making decisions in either Immigration Chamber must be familiar with this decision.

54.
Strasbourg has recognised that a propensity to re-offend is not always required to make deportation proportionate in the interests of prevention of crime. In Maslov the Court stated at [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 Article 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 Article 8 pursues, as a legitimate aim, the "prevention of disorder or crime" (see paragraph 67 above), 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. (our emphasis)

55. In cases of the importation and supply of significant quantities of Class A drugs, in particular, Strasbourg has recognised why states show great severity to such foreign offenders. This has long been the policy of the Secretary of State and recognised as such by the UK Courts: see Samaroo v SSHD [2001] EWCA Civ 1139 [2002] INLR 55 (albeit decided before the decision in Boultif was published). There is, however, no special principle in cases of importation or supply of drugs. Although the Court understands national authorities show great firmness to those who actively contribute to this scourge and the case for deterrence of others by deportation, such action may be disproportionate. In Amrollahi v Denmark [2002] ECHR 522 an Iranian man married to a Danish wife had committed an offence of trafficking 450 grams of heroin one week after his marriage. In the light of the family's circumstances the family could not be expected to follow the claimant to Iran. As a consequence it would be impossible for them to continue family life outside Denmark and expulsion was accordingly disproportionate to the legitimate aim. We are not aware of a case where the Strasbourg court has held that family life enjoyed between spouses and minor children is practically impossible abroad but deportation is nevertheless proportionate, but the Maslov criteria may not have ruled this out. Practical impossibility or insurmountable obstacles is of significance in the proportionality assessment but it is not the single criterion for assessing whether there is a violation of Article 8.

56.
In the United Kingdom the House of Lords, Supreme Court and the Court of Appeal have in recent years identified that a relevant question as to whether immigration action constitutes an interference with the right to respect for family life, is whether it is reasonable to expect the spouse or child to follow the claimant to the country of removal or deportation: see for example Huang [2007] UKHL 11 [2007] 2 AC 167 at [35]; AB (Jamaica) [2007] EWCA Civ 1302 at [33]; Beoku-Betts [2008] UKHL 39 at [48]; EB (Kosovo) [2008] UKHL at [41]; LM (DRC) [2008] EWCA Civ 325 ; VW (Uganda) [2009] EWCA Civ 5 at [40] to [53] ; and AF (Jamaica) [2009] EWCA Civ 240 at [20] and [42].

57.
At one end of the spectrum are cases where both parties to a marriage come from the same country, are nationals of that country, are familiar with the language, religion and way of life there, and face no obstacles to relocation. Immigration action may hardly be an interference with family life at all and very little by way justification would be required to enforce the ordinary scheme of the state's immigration control regime. At the other end the practical impossibility of enjoying family life outside the Contracting state is likely to make the interference disproportionate.

58.
In between these two ends of the spectrum are cases like the present three where the Maslov factors are of importance, in particular:

i)
the nature and seriousness of the offence committed by the applicant and the strength of the case for deterrence;

ii)
the duration of the applicant's stay in the country from which he is going to be expelled, the status on entry and whence family ties were instituted;

iii)
the time which has elapsed since the commission of the offence and the applicant’s conduct during that period;

iv)
the nationalities of the various persons concerned;

v)
the applicant’s family situation, such as the length of the marriage and other factors revealing whether the couple lead a real and genuine family life;

vi)
whether the spouse knew about the offence at the time when he or she entered into a family relationship;

vii)
whether there are children in the marriage and, if so, their age, the length of residence in the host state and their best interests

viii)
the seriousness of the difficulties which the spouse would be likely to encounter in the applicant’s country of origin [2] .

6. The interests of the child

59.
ZH (Tanzania) v SSHD [2011] UKSC 4 concerned a mother who was a national of Tanzania and formed a relationship with a British citizen. They had two children, a daughter, T, born in 1998 (who was then 12 years old) and a son, J, born in 2001 (who was then 9). The children were both British citizens, having been born here to parents, one of whom was a British citizen. They had lived here with their mother all their lives, nearly all of the time at the same address. The Court of Appeal upheld the Tribunal's finding that the children could reasonably be expected to follow their mother to Tanzania. The Supreme Court considered: “in what circumstances is it permissible to remove or deport a non-citizen parent where the effect will be that a child who is a citizen of the United Kingdom will also have to leave?

60.
Lady Hale giving the leading judgment said at [25]-[33]

….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". Miss Joanna Dodson QC, to whom we are grateful for representing the separate interests of the children in this case, boldly argued that immigration and removal decisions might be covered by section 1(1) of the Children Act 1989:

"When a court determines any question with respect to –

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration."

However, questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them. The UNHCR, in its Guidelines on Determining the Best Interests of the Child (May 2008), explains the matter neatly, at para 1.1:

"The term 'best interests' broadly describes the well-being of a child. . . . The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that:

◦
the best interests must be **the determining factor for specific actions ,** notably adoption (Article 21) and separation of a child from parents against their will (Article 9);

◦
the best interests must be **a primary** (but not the sole) **consideration for all other actions** affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3)."

This seems to me accurately to distinguish between decisions which directly affect the child's upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live. Article 9 of UNCRC, for example, draws a distinction between the compulsory separation of a child from her parents, which must be necessary in her best interests, and the separation of a parent from his child, for example, by detention, imprisonment, exile, deportation or even death.

1.
Nevertheless, even in those decisions, the best interests of the child must be a primary consideration. As Mason CJ and Deane J put it in the case of Minister for Immigration and Ethnic Affairs v Teoh [1995] HCA 20 , (1995) 183 CLR 273, 292 in the High Court of Australia:

"A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it."

As the Federal Court of Australia further explained in Wan v Minister for Immigration and Multi-cultural Affairs [2001] FCA 568 , para 32,

"[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."

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.

2.

However, our attention was also drawn to General Comment No 6 of the United Nations Committee on the Rights of the Child (2005), on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin. The context, different from ours, was the return of such children to their countries of origin even though they could not be returned to the care of their parents or other family members (para 85). At para 86, the Committee observed:

"Exceptionally, a return to the home country may be arranged, after careful balancing of the child's best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights based arguments such as those relating to general migration control, cannot override best interests considerations."

3.
A similar distinction between "rights-based" and "non-rights-based" arguments is drawn in the UNHCR Guidelines (see, para 3.6). With respect, it is difficult to understand this distinction in the context of article 8(2) of the ECHR. Each of the legitimate aims listed there may involve individual as well as community interests. If the prevention of disorder or crime is seen as protecting the rights of other individuals, as it appears that the CRC would do, it is not easy to see why the protection of the economic well-being of the country is not also protecting the rights of other individuals. In reality, however, 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 his or her continued presence poses a more general threat to the economic well-being of the country. It may amount to no more than that.

Applying these principles

4.
Applying, therefore, the approach in Wan to the assessment of proportionality under article 8(2), together with the factors identified in Strasbourg, what is encompassed in the "best interests of the child"? As the UNHCR says, it broadly means the well-being of the child. Specifically, as Lord Bingham indicated in EB (Kosovo), it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away.

5.
Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8). In Wan , the Federal Court of Australia, pointed out at para 30 that, when considering the possibility of the children accompanying their father to China, the tribunal had not considered any of the following matters, which the Court clearly regarded as important:

"(a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle' (Vaitaiki v Minister for Immigration and Ethnic Affairs [1998] FCA 5 , (1998) 150 ALR 608, 614);

(b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;

(c) the loss of educational opportunities available to the children in Australia; and

(d) their resultant isolation from the normal contacts of children with their mother and their mother's family."

6.
Substituting "father" for "mother", all of these considerations apply to the children in this case. They are British children; they are British, not just through the "accident" of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community (as might have been the case, for example, in Poku , para 20, above). But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well.

7.
Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. As Jacqueline Bhaba (in 'The "Mere Fortuity of Birth"? Children, Mothers, Borders and the Meaning of Citizenship', in Migrations and Mobilities: Citizenship, Borders and Gender (2009), edited by Seyla Benhabib and Judith Resnik, at p 193) has put it:

'In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.'

8.
We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as Edore v Secretary of State for the Home Department [2003] 1 WLR 2979 , where Simon Brown LJ held that "there really is only room for one view" (para 26). In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer.”

61.
Lord Hope concurring added at [41]:

The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood.

He concluded at [44]:

There is an obvious tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children are involved, the best interests of the children must be a primary consideration. The proper approach, as was explained in Wan v Minister for Immigration and Multicultural Affairs [2001] FCA 568 , para 32, is, having taken this as the starting point, to assess whether their best interests are outweighed by the strength of any other considerations. The fact that the mother's immigration status was precarious when they were conceived may lead to a suspicion that the parents saw this as a way of strengthening her case for being allowed to remain here. But considerations of that kind cannot be held against the children in this assessment. It would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible.

62.
Lord Kerr agreed and added his own observation at [46-47] that ‘a primacy of importance’ that must be accorded to the best interests of a child of which United Kingdom nationality formed a significant part:

The significance of a child’s nationality must be considered in two aspects. The first of these is in its role as a contributor to the debate as to where the child’s best interests lie. It seems to me self evident that to diminish a child’s right to assert his or her nationality will not normally be in his or her best interests. That consideration must therefore feature in the determination of where the best interests lie. It was also accepted by the respondent, however, (and I think rightly so) that if a child is a British citizen, this has an independent value, freestanding of the debate in relation to best interests, and this must weigh in the balance in any decision that may affect where a child will live. As Lady Hale has said, this is not an inevitably decisive factor but the benefits that British citizenship brings, as so aptly described by Lord Hope and Lady Hale, must not readily be discounted.

63.
ZH (Tanzania) was a removal case. Poor as the mother’s immigration history was assessed to be, she had not been convicted for criminal offences disturbing the general public order. Lady Hale recognised that a rights based approach to factors that outweighed the interests of the child as a primary consideration would more readily find weight in protecting the public from dangerous individuals. We conclude that preventing crime by deporting individuals in cases of particular seriousness would also be a legitimate aim that could outweigh the best interests of children, particularly when combined with other aspects of the public interest.

64.
As already noted the case of Lee (supra para 49) was such a case where the Court of Appeal considered the impact of ZH (Tanzania) in a revocation appeal by someone sentenced to a lengthy term of imprisonment for drug related offending. Although the Court talked of permanent separation, we do not understand that it was excluding future revocation after the expiry of an appropriate passage of time, particularly where some contact could be maintained between parent and child [3] . Although it may have been unreasonable to expect the family to live in Jamaica, there was no

suggestion that it was practically impossible for them to do so or that cultural differences or other factors prevented visits there.

65.
The Upper Tribunal has considered these cases in its determination in Omotunde (best interests) [2011] UKUT 00247 (IAC) where it set out the current approach to proportionality in the context of deportation. We summarise the learning relevant to deportation cases as follows:-

a.
Article 8 is to be interpreted in a manner consistent with Article 3 of the UN Convention on the Rights of the Child and the statutory duty to have regard to guidance designed to promote the best interests or welfare of the child set out in s.55 the Borders, Citizenship and Immigration Act 2009.

b.
The welfare of the child is a primary but not a paramount consideration in immigration decision making. That is to say it is a consideration of the first order and not merely a factor, but not the only consideration or necessarily a determinative consideration.

c.
The welfare principle applies irrespective of the nationality of the child, but where the child is British that is a particular pointer to the place where the child's future lies. British nationality imposed a significantly higher threshold when a decision-maker was considering whether a child should be expected to join a parent abroad.

d.
Factors that may outweigh the welfare of the child in a particular case are rights based considerations such as those contained in Article 8 (2) in particular the prevention of disorder or crime or the protection of the health and rights of others.

e.
Weighty reasons are required to justify separating a family who are legitimately resident together in the United Kingdom.

f.
Even where it is not reasonable to expect the other partner to a relationship or the children to accompany the person subject to immigration action to reside abroad the interference with family life may be justified.

g.
Notwithstanding the distress caused to a child and the loss of advantage to the child of (in these cases) a father's presence guidance and support, the conduct of the person facing deportation may be so contrary to the public interest as to make such separation proportionate and justified.

66.
We further note that in respect of children (foreign or British) in the United Kingdom there is the statutory guidance on making arrangements to safeguard and promote the welfare of children issued by the Secretary of State under s.55 the Borders, Citizenship Immigration Act 2009 "Every Child Matters Change for Children." Paragraph 1.4 states:

Safeguarding and promoting the welfare of children is defined in the guidance to section 11 of the 2004 Act as:

- protecting children from maltreatment;
- preventing impairment of children's health or development (where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development');
- ensuring that children are growing up in circumstances consistent with the provision of safe and effective care;
- and undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully .

67.
In re-making these decisions we give particular importance to the fact the children are British as a strong pointer to the fact that their future lies in the United Kingdom. If their fathers are removed each child will suffer the loss of the presence of a father from the household in which they now are growing up. We shall consider whether there is evidence that such an event would cause maltreatment, loss of safety or impairment of health or development.

7. The application of Article 20 TFEU as interpreted in Zambrano

68.
Since the decision in ZH Tanzania the importance of the nationality of the child has been emphasised by developments in European Union law. The spouses/partners and children of each of these appellants are British citizens. None has exercised Treaty rights by living, working or engaging in relevant economic activity in another Member State. They have not moved to or resided in a Member state other than that of which they are a national. So none of the family members in these appeals can be the beneficiary of rights under the Citizen's Directive.

69.
In Zambrano , the Court of Justice considered that in certain circumstances, even where there had been no such trans-national movement, and no rights under the Directive, Article 20 of the Treaty on the Functioning of the European Union may be relied on directly. The Article is in these terms:-

Article 20 (ex Article 17 TEC)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b) …

(c) …

(d) …

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

70.
In this case a Colombian couple, who lived in Belgian but had no residence rights there, gave birth to two children who became Belgian citizens under provisions designed to prevent them being stateless as they had not acquired Columbian nationality.

71.
The two children were infants and dependent on their parents. Their parents sought the right to reside and work in Belgian in order to support their Belgian children. The Court said this:

41. As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 Grzelczyk [2001] ECR I-6193 , paragraph 31; Case C-413/99 Baumbast and R [2002] ECR I-7091 , paragraph 82; Garcia Avello , paragraph 22; Zhu and Chen , paragraph 25; and Rottmann , paragraph 43).

42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, Rottmann , paragraph 42).

43. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

45. Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

72.
Each of the appellants submits that these observations have application to them. The Union citizenship affords the family members rights of residence in the Union and is destined to be the fundamental status of the Union. The rights incidental to that status cannot be exercised if the children of their mothers or both have to live in India or Jamaica respectively with each of the appellants.

73.
The respondent disagrees with this submission. She contends in her written submissions that the Zambrano principle is confined to a narrow factual scenario, namely:

“when refusing residence would deprive the Union citizen of the genuine enjoyment of the substance of their European citizenship rights. In practice this means that refusal of the right of residence to the third country national, and so their removal, would require the Union Citizen to leave the Member state by virtue of their dependency upon the third country national.

…For the United Kingdom, this means that the judgment applies only to cases involving a dependent British citizen. However where there is another parent or guardian upon whom the child is or can become dependent. Then this will fall out of the scope of Ruiz Zambrano . This is because the removal of the third country national would not oblige the child to leave the EU because an alternative care is available.”

74.
The respondent further contends that a third country national cannot rely on Article 20 for greater protection than is provided by the Citizens Directive:

“where a person potentially comes within the scope of Ruiz Zambrano they can still be deported where their presence in the UK is not in the public interest.”

75.
We will deal with this supplementary submission first. On the 24 October 2011 we posed two questions of the respondent in response to this submission:-

1.
What is the source of the proportionality derogation of the child’s Treaty rights?

2.
If there is a power to outweigh the child’s Treaty rights by the public interest in deporting someone whose conduct otherwise makes deportation conducive to the public good, is this an EU balance thus essentially requiring the deportee to represent a present and personal threat to the public interest, see for example C-340/97 Nazli [2000] ECR 1-957 or an Article 8 balance unconnected to EU law where deterrence may have a role to play?

76.
In the answer to these questions we received helpful written submissions on behalf of the respondent from Mr Devereux, Assistant Director UKBA and Head of European Operation Policy, for which we are grateful. He drew our attention to Articles 45(3), 52 and 62 TFEU permitting derogations from free movement rights of workers, the self-employed and those providing services on grounds of public policy.

77.
Chapter VI of the Citizens Directive is headed “Restrictions on the Right of Entry and the Right of Residence on Grounds of Public Policy, Public Security or Public Health. Articles 27 to 31 establish the criteria and procedural protections available to EU citizens who are exercising the specific free movement rights referred to in Articles 45, 52 and 62 and also the general right of free movement exercisable simply as a citizen. The Preamble to the Directive refers to Article 18 of the Treaty Establishing the European Community in these terms:

“Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect .”

78.
Mr Devereux also reminded us of the terms of Article 20 itself that provide that the right to move and reside freely within the territory of the Member states is subject both to “the limitations and conditions laid down in this Treaty” and “by the measures adopted to give it effect”. We were not referred to any other provision of the Treaty that subjects the right of residence to limitations and conditions, so we must turn to the measures to give it effect.

79.
The written answer then continues:

“As we assert that Directive 2004/38/EC is not applicable, then the relevant principles governing the derogation on public interest grounds must be determined on the basis of the domestic laws of the Member States. The application of those domestic laws will, of course, be subject to the general principles of Union law (where the conditions set down in Ruiz Zambrano are met); and the ECHR. In this regard, the particular circumstances justifying a derogation on public interest grounds may vary from one country to another and from one period to another”.

80.
We do not accept the respondent’s submission that EU law leaves it to national law to decide whatever restriction on rights each country considers appropriate from time to time. Whilst the national court may decide its own laws as to citizenship, the law of Union citizenship lies inevitably within EU law. If exceptions exist in EU law, it is illogical and inconsistent with principle for those restrictions to be determined nationally. The respondent’s submission seems to us inconsistent with virtually everything the Court of Justice has had about the need for an EU interpretation of Treaty rights.

81.
We note that in cases of rights afforded to Turkish Nationals under the Ankara Agreement, the European Court has required that public policy derogation be strictly interpreted and precluded purely deterrent measures that might otherwise be available in national law. Thus in C-340/97 Nazli [2000] ECR I-957at [59] the Court said :

The Court has thus concluded that Community law precludes the expulsion of a national of a Member State on general preventive grounds, that is to say an expulsion ordered for the purpose of deterring other aliens (see, in particular, Case 67/74 Bonsignore v Stadt Köln [1975] ECR 297, paragraph 7), especially where that measure has automatically followed a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that conduct represents for the requirements of public policy (Calfa , cited above, paragraph 27).

82.
It is inconceivable that lesser standards would apply to derogations from Treaty rights afforded to European Citizens themselves. In practice we would anticipate that Article 27 Citizens Directive would have to apply. It states:

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 interest of society. Justifications that are isolated from

the particular facts of the case or that rely on considerations of general prevention shall not be accepted.

83.
If the residence right is only afforded to the non-citizen parent where otherwise the child would be forced to leave the European Union, it seems difficult to justify that consequence by reason of the criminal wrongdoing of the parent. It is one thing to justify the exclusion of an EU national from one part of the Union requiring him or her to return to their state of nationality, and quite another to require that person to leave the Union altogether. It seems to us that the Court of Justice was applying the principle of international law that a citizen cannot be expelled from their own state in any circumstances, to citizenship of the European Union and concluding that a measure that required an EU citizen to leave the Union would be contrary to EU law.

84.
In Zambrano , there was no suggestion that the children as Belgian citizens, could be expelled from Belgium. Nor, as Union citizens, could they be expelled from the Union as a whole and, had there been a decision made by the Belgian authorities to that effect, it would have been justiciable by the Court of Justice. But the Court went further: the expulsion of their Colombian parents (not citizens of the Union) amounted to the children's constructive expulsion from the Union. The Court was not therefore directly applying Article 20 which is non-derogable but granting rights to non-Union citizens necessary to give effect to the rights of Union citizens. However, if the collateral right of residence afforded to the parents is a narrow one and limited to cases where it is necessary to enable the child to enjoy his or her rights, it may very well be that there is no room for any derogation at all, and our assumptions to the contrary in Omutunde at paragraph 32 (cited at [65] above) should not be regarded as sound in the absence of a decision of the Court of Justice on the point in a case that raised the issue.

85.
We now return to the principal question, whether the deportation of any of these three appellants requires their minor children to give up their residence in the European Union.

86.
We consider that the respondent's submissions on this issue are substantially supported by the decision of the Court of Justice in the subsequent decision in C-256/11 Murat Dereci and others [2011] ECR 1-0000 .

87.
The claimants in this decision were spouses and adult children of Austrian citizens resident in Austria. There were two common themes: the Austrian citizens had never exercised Treaty rights to move to or reside in another Member state, and the citizens were not financially dependent on the family member facing expulsion. The Court rejected an attempt to expand the Zambrano principle to give rights of residence to all non-national parents and said:-

66. It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.

67 That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of

residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.

68 Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.

69 That finding is, admittedly, without prejudice to the question whether, on the basis of other criteria , inter alia , by virtue of the right to the protection of family life, a right of residence cannot be refused. However, that question must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case.

88.
Mr Dereci was a Turkish national who had entered Austria illegally and was married to an Austrian citizen by whom he had three minor children. The family lived together in the same household. It is to be inferred from the decision that the children would not be required to leave Austria by reason of their father's removal because they had their mother to turn to for support and care. In fact, Mr Dereci succeeded on another point considered by the Court, namely his rights under the Ankara Agreement, but that is irrelevant to the present appeals.

89.
In the present cases the mothers of all of the British citizen children are citizens themselves and cannot be removed as family members of a person facing deportation or in their own right. Although the removal of the father would have adverse economic impact on all the families, as well as the interests of each child living in a household with its father, it cannot be said that either the children or their mothers will be required to leave with him. There is an analogy with the case of Mr Dereci who was found not to have a Zambrano right of residence. Economic reasons for maintaining family unity are not sufficient.

90.
We recognise that the appellants have submitted by way of reply that according to the Advocate General's opinion an impairment of the exercise of the Treaty right of residence may suffice to engage the Zambrano principle. This was not how the Court answered the question, however, and in our judgment, if on the facts removal of the appellant will not require the children or spouse to follow because they have no capacity for exercising their Treaty rights independent of the person facing removal, what is being impaired is not the right to reside in the EU but the right to enjoy family life whilst so residing.

91.
Each of the children are not accordingly dependent on their fathers for the exercise of their Union rights of residence and removal of the fathers will not deprive them of the effective exercise of that right of residence in the United Kingdom or elsewhere in the Union.

92.
Cases where the remaining parent not facing removal is either a British citizen or a third country national will be governed by Article 8. It is in that context that the nationality of the remaining parent as well as that of the child has relevance.

93.
Finally, we note that a further question on which we asked for the respondent's assistance was in these terms:

"Does the respondent agree that in a case where a non-national parent is being removed and claims it is a violation of that person's human rights to be separated from a child with whom he presently enjoys family life as an engaged parent, that a consequence of the CJEU's judgment is that it is not open to the respondent to submit that an interference can be avoided because it is reasonable to expect the child (and presumably any other parent/carer who is not facing deportation/removal) to join the appellant in the country of origin? If not why not? "

94.
To this Mr Devereux replied on 24 November 2011:

"We do accept, however, that in a case where a third country national is unable to claim a right to reside on the basis set out above it will not logically be possible, when assessing the compatibility of their removal or deportation with the ECHR to argue that any interference with Article 8 rights could be avoided by the family unit moving to a country which is outside of the EU".

95.
We shall take this helpful submission into account when we consider the application of Article 8 to each appellant's case. We agree with it. This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so. The case serves to emphasise the importance of nationality already identified in the decision of the Supreme Court in ZH (Tanzania) . If interference with the family life is to be justified, it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation.

8. The Assessment of individual appeals

96.
Having set out the body of principles that applies to cases such as the present appeals we will now remake the decisions in the light of the particular circumstances of each case.

Sanade

97.
Mr Sanade is a citizen of India born in 1975. He first came to the United Kingdom in July 2003 with leave to enter as a student. This leave was varied to permit him to undertake approved employment as a nurse with an NHS hospital trust. He remained in such employment until 2010 and the events giving rise to the decision to deport him.

98.
Whilst he was in the United Kingdom he met his wife Veli. She was also an Indian national and a qualified nurse who had come to the United Kingdom for study and employment as such in her own right. Mr and Mrs Sanade are both members of the Seventh Day Adventist Church. Mrs Sanade had been brought up in an orphanage run by that Church in India. In March 2005 they married at a church in Bangalore, India. In 2006 the couple bought a home together in Chingford Essex and have two children, P born on 17 July 2007 and N born on 13 February 2010. In July 2009 they were granted indefinite leave to remain in the United Kingdom. Mrs Sanade had completed four years in approved

employment and Mr Sanade had been treated as her dependant since 2006, so he was granted indefinite leave to remain in line with her. Up to this point, these facts show a history of an ordinary couple, who qualified for admission and permanent residence under the Immigration Rules by virtue of their employment in public service as nurses and who had supported and accommodated themselves and their young family.

99.
On 24 June 2010 he was sentenced to 12 months imprisonment by the Chelmsford Crown Court and a sexual offences prevention order (SOPO) was made against him. On 29 October 2010 the Court of Criminal Division varied the terms of the SOPO to prohibit him “from doing any work for any institution which involves the care of individuals and in which he has direct access to and may come into contact with those individuals”. As a result of his conduct he has been struck off the register of nurses. His conviction and sentence meant he has to remain on the sexual offenders register for 10 years with the associated obligation of notification and renders him liable to automatic deportation under the Borders Act 2007 s.32(5).

100.
Mr Sanade was released on immigration bail on the 22 December 2010 having served his sentence. He appealed against a decision to deport him taken three days earlier and that appeal was heard by a panel of the First tier Tribunal Immigration and Asylum Chamber and dismissed on 25 February 2011. The panel concluded that the offence was serious and that the wife and children could be expected to return with the appellant to India to continue their family life there.

101.
The panel assumed without deciding that one of the children was British. It noted that it was bound by the recent decision of ZH (Tanzania) handed down in the Supreme Court on 1 February 2011. It did not direct itself that the best interests of the children were a primary consideration in considering the appellant’s deportation and did not consider what those best interests may be independent of their parents or what the impact of British nationality on those interests may be.

102.
The appellant is unable to work and has been looking after the children and taking P to her nursery whilst Mrs Sanade is at work. She is paying the mortgage of £1,000 per month from her salary of £1,700. N was a British citizen from birth because he was born in the United Kingdom to parents settled here. P has been registered as such a citizen pursuant to s.3(1) British Nationality Act 1981 and on 1 June 2011 Mrs Sanade was naturalised as such a citizen.

103.
There is obviously family life enjoyed between Mr Sanade and his wife and children. It is family life that deserves respect as Mr Sanade was been accepted for permanent residence as the spouse of his wife, having originally been admitted here as a worker. There has been no breach of immigration control, no false representations used and the status of the parties was not precarious at the time when family life was entered into and subsequently.

104.
We accept that at eight years Mr Sanade’s period of residence in the United Kingdom has not been particularly long and his residence here with indefinite leave to remain has been short. His wife is of Indian origin and cultural background, some ties have been maintained with that country, and there is nothing to suggest that relocation of the family there would be practically impossible. The children

have lived all their lives here but they remain very young without any substantial experience of the British education system.

105.
However Mrs Sanade and both children are now British citizens. The nationality of the children is an important factor as to where their best interests lay: ZH (Tanzania) . If their nationality, domicile and place of future residence is to be the United Kingdom, their “optimum life chances to enter adulthood successfully” point to the need for continuity of their residence and education during their formative years in the United Kingdom.

106.
Further as British citizens, Mrs Sanade and her children are citizens of the European Union and as such entitled to reside in the Union. The respondent properly accepts that they cannot be required to leave the Union as a matter of law, and that as a matter of relevant consideration they cannot reasonably be expected to relocate outside of the European Union. Accordingly, the question is whether Mr Sanade’s conduct is so serious as to make it proportionate to the legitimate aim in his case to require him to leave his wife and young children for an indefinite period unless and until the deportation order can be revoked?

107.
The judge’s sentencing remarks reveal that on 4 February 2010 at 10.00pm a distressed female patient aged 21 years came into the hospital where the appellant worked. She was concerned that she may have been suffering from breast cancer. The appellant caused her to expose her breasts to him, ran his hands over her breasts under her T shirt and over her body under the pretext of examining her. In reality he did this for his sexual gratification. This was clearly a gross breach of the trust placed in him as a member of a caring profession. It was aggravated by three features. First, the appellant told the patient not to report the incident; secondly he falsified her records to make it less likely she would believed if she did report him; thirdly although he had not previously been convicted of any offence he had been cautioned in 2008 for assault on an elderly patient in his care. The sentencing judge concluded that the breach of trust and aggravating features entitled him to depart from the Guidance issued by the Sentencing Guidelines Council for this class of offence. Contact between the offender’s body and a part of the victim’s body (in both cases other than the genitalia) is regarded as the least serious class of sexual assault. The sentencing guidance identifies a starting point for a finding of guilt after a trial is a Community Order where the victim is over 13.

108.
The legitimate aim here is the prevention of disorder and crime arising out of the criminal conduct of the husband. In our judgment there is no other aim engaged by his continued presence. He has been granted indefinite leave to remain without any taint of misrepresentation and his family life was established in the expectation that as a work permit holder Mrs Sanade would be entitled to remain here indefinitely.

109.
There is no evidence to suggest that in his present circumstances he poses a real risk to others. He has no history of sexual offending. His conduct has not been repeated since his release from prison. The risk of his abusing his position as a nurse to commit offences in the future is low having regard to the fact that he is prevented from working in that profession by his being struck off the register. Further the terms of the Sexual Offences Prevention Order prevent him working unsupervised with women. He is more regulated in his future conduct in the United Kingdom than he would be in India.

110.
Is the offence so serious as to justify the separation of husband and wife and father and minor children? Any offence punished by a sentence of twelve months imprisonment must be considered serious, but for reasons we have already given, the statutory scheme does not mean such a sentence makes interference with family life proportionate save in exceptional circumstances. For the sexual conduct alone, absent the aggravating factors, a significantly less severe sentence would have been appropriate. The aggravating factors have been in some measure addressed not only by the more severe sentence he has served but other measures of general prevention including being struck off the register. Whilst we recognise that this was an offence involving a gross breach of trust this is not criminal conduct at the higher end of the range of seriousness and it involves no violence, weapons, or trafficking in Class A drugs.

111.
In all these circumstances we do not regard the appellant's deportation as proportionate to the legitimate aim. Accordingly the interference with the family life contemplated by his deportation is not necessary in the public interest. We therefore re-make the decision by allowing his appeal.

Harrison

112.
His personal life is rather complex. We will refer to his partners by their first names. He has two children born in 1996 and 1999 by a partner called Donnette; the children are in the United Kingdom but the mother is unwilling for the appellant to have contact with them and they play no significant part in this appeal.

113.
Although Mr Harrison was married to Chantelle in 2000, this relationship was short lived and had broken down by 2002. There are no children of this relationship. He was granted indefinite leave to remain on the basis of a subsisting relationship with Chantelle in January 2003, but he had started a relationship with his present partner, Kelly, in January 2001 and she became pregnant by him while in Jamaica on holiday in August 2001.

114.
Kelly is a British citizen born in the United Kingdom of parents originally from Jamaica. There has been cohabitation since November 2001. There are three children of the relationship: K born May 2002; D born March 2010 and KD born May 2011. They were accordingly 9 years, 14 months and 2 months old at the time of the hearing before us.

115.
The appellant was in detention from November 2003 until he was released on bail on 1 November 2007. He has lived with his partner and children since then and played an active and positive role in their lives. Kelly has full time employment but has been on maternity leave since March 2010 and intended to return to work in August 2010.

116.
The appellant's appeal against the rejection of his human rights and asylum claims was heard in June 2010. He indicated that asylum was not the principal aspect of his case. The panel concluded that he had made false statements about his family life to his probation officer and the author of the OASys report. He misled the Home Office in 2003 by suppressing the fact that his relationship with Chantelle had broken down. It concluded that he would not hesitate to deceive to achieve what he wants and

further his aim. The panel noted “apart from her own views we have no evidence before us as to why (K) could not join her partner in Jamaica. The children are young and could be expected to re-adjust to a different way of life”. It took into account the practical difficulties if the mother was left as a single parent to look after the children.

117.
Mr Harrison has been resident in the United Kingdom since 1999 initially for temporary purposes. In 2000 he was granted leave to remain as the spouse of Chantelle and was given indefinite leave in that capacity in January 2003. However on the findings of fact made below that leave was obtained by deception as whatever the state of the relationship in 2000 it had broken down in 2002 when Mr Harrison was in a relationship with his present partner Kelly. Applying the guidance given in Nunez (at [47] above) we consider that his misrepresentation is a significant factor against him. His relationship with his present partner whether from 1999 or 2001 was initiated against a background of a precarious status.

118.
Within ten months of being granted indefinite leave to remain he was arrested on very serious charges of conspiracy to supply a Class A drug and remained in detention thereafter. The conspiracy started in July 2003. Although he had no previous convictions the sentencing judge concluded that this appellant was the leader and the person in control of this conspiracy who had possession of a prohibited weapon. He remained in custody serving his sentence of a total of seven years imprisonment until he was released on licence in 2007. The First-tier Tribunal found that he lied as to the circumstances of his family life to the maker of the OASys report in early 2007 and that he would be prepared to continue to lie to suit his ends. This does not suggest that the experience of custody has induced a sense of contrition and a desire to subsequently lead a law-abiding life.

119.
His case rests entirely on the impact of deportation on his three children born in 2002, 2009 and 2010. His family life since his release from prison has been maintained in the shadow of the judge’s decision to recommend his deportation; the rejection of this asylum claim on which he relied; and the various appellate hearings in 2010 in which he failed to persuade the First-tier Tribunal panel or a Judge of this Tribunal that his deportation was disproportionate to the legitimate to prevent crime.

120.
We recognise that his young children are the innocent victims of his conduct. K will have known his father for a short time before his arrest and detention, but has had substantial contact with him since his release in November 2007. By reason of their nationality it would not be reasonable to expect the children to leave the United Kingdom and relocate permanently in Jamaica. If their father is deported K will lose the parental contact with his father he presently enjoys and so will the younger children, albeit that they are of a more adaptable age. The best interests of the children will be in some measure impaired by loss of the company of their father. We recognise this is a consideration of the first importance.

121.
However, in the overall context of this case, it is certainly not the only consideration and neither in the last analysis is it the determinative one. The Court of Appeal’s decision in Lee v SSHD makes plain that separation may be the consequence of serious criminal conduct such as that engaged in by the appellant. A few months after lying to secure indefinite leave to remain he organised a very serious offence of supplying crack cocaine. The Secretary of State attaches particular importance to deterring

drug offending by preventive measures such as deportation of those liable to it. So have the courts both in the United Kingdom and Strasbourg. The nature of the offence is not conclusive against the appellant but it is a consideration of considerable weight. The public interest requires us to emphasise that those who use deception to enter or remain in the United Kingdom and then commit very serious offences such as those considered here cannot expect to avoid deportation because they have fathered children who were born here. This is not offending by a young man who grew up here as a child and has lived here most of his live so it is not a Maslov case. Although we have applied the principle of proportionality and not exceptionality we consider that deportation is justified in support in of the legitimate aim on the facts of this appeal.

122.
Nevertheless, if the appellant does lead a law abiding life in the future, and if he does maintain contact with his children and this present partner, it will be open to him to apply to revoke this deportation order at some point in the future after his return to Jamaica. Although a deportation order is indefinite and the rules suggest that a substantial passage of time should elapse before an order will normally be revoked that is subject to the principle of proportionality in the light of the state of the relationship in the future. We make no observation on his prospects of future success, but it is not the case that deportation in such cases always lasts forever. Further we see no reason why the children would need to lose all contact with their father if he is returned to Jamaica. The prospect of return if he maintains contact within his family, supports them financially, makes a regular application for admission and ceases criminal activity is something to which we have regard in the exercise of the proportionality balance.

Walker

123.
Mr Walker has been in the United Kingdom since December 1996, a period of over 15 years, almost all of which has been without leave and a part of it spent in custody. He had previously spent a much greater period – some 25 years – in Jamaica. The conviction that prompted the Secretary of State to decide to deport him was made as a result of his conviction in 2007 when he was 35 years old. His attempts to remain included contracting a marriage of convenience whilst in fact living with his present wife and the mother of his four children, two of whom were born in Jamaica. When Sir Richard Buxton gave permission to appeal the two youngest children were aged 11 and 3 and had been born in the United Kingdom and are United Kingdom citizens. In doing so, he recognised that it did not necessarily follow in spite of his being an obvious candidate for deportation, that the appellant’s deportation could not be stayed, however unmeritoriously, because of its impact on his family. In assessing the impact, he continued, the Tribunal had to consider the practical impact of the deportation decision on the right of abode of the children as British citizens. He spoke of there being no assumption that a child must forfeit that right as a result of a family decision following from a deportation order. It is on this basis that we approach his case.

124.
Although he had offended on a number of previous occasions for a range of offences dealt with without charge and thus considered as comparatively minor contraventions of the criminal law, the offence which precipitated the decision to deport him was a very serious one. Like Mr Harrison it involved the supply of a Class A drug and the deliberate scheme to distribute it to drug-users in Colchester. The episode was described by the sentencing judge as, peddling in ‘misery and degradation’. It was not a one-off transaction at the lowest level. He did not co-operate with the authorities.

125.
Once again, his case rests principally on the impact upon the three children aged 17, 13 and 4. Similar considerations apply to this case as they apply in the case of Harrison. The children will not be required to leave the United Kingdom and we would not consider it reasonable for them to do so. Zambrano does not impact upon the appeal. His wife visited Jamaica for a few days in 2000 and 2006. None of the children has visited, save Y at a time when she was too young to remember.

126.
Notwithstanding the obvious effect upon each of the children of not being able to live with their father, we consider that deportation is justified on the facts of this case. As in Mr Harrison's case there is no evidence before us to conclude that the claimant's presence is needed to prevent the children from being ill treated, their health or development being impaired, or their care other than safe and effective. Again visits to Jamaica and other forms of communication appear possible. We see no reason why all contact would be lost.

127.
We also take account of the poor state of health of his wife and mother. The appellant's wife has been diagnosed as suffering from multiple early disc degeneration without spinal stenosis but with what was described in 2008 as moderately severe back pain. However, the pain is significantly disabling resulting in her being awarded Disability Living Allowance at the Higher Rate. At the earlier hearing before Immigration Judge Wright in 2007, the appellant's wife was suffering from post-natal depression. The appellant's mother-in-law, with whom the family are living, suffers from cancer. The appellant and his wife are her primary carer.

128.
Those factors might well have carried greater weight in the balance but for the absence of any claim for the appellant to remain under the Immigration Rules, his previous resort to a marriage of convenience and the fact that his family members were both aware of his precarious immigration position and his offending. Combined with the interest of the children they may carry weight in an application for revocation of the deportation order.

DECISION

In the case of Sanade the appeal is allowed. In the cases of Walker and Harrison the appeals are dismissed.

Mr Justice Blake

President of the Upper Tribunal

Immigration and Asylum Chamber

7 February 2012

Appendix

Maslov v Austria (1638/03) [2008] ECHR 546

(a) General principles

1. The main issue to be determined is whether the interference was "necessary in a democratic society". The fundamental principles in that regard are well established in the Court's case-law and have recently been summarised as follows (see Üner , cited above, §§ 54-55 and 57-58):

“54. The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, Abdulaziz, Cabales and Balkandali v. the United Kingdom , judgment of 28 May 1985, Series A no. 94, p. 34, § 67, Boujlifa v. France , judgment of 21 October 1997, Reports of Judgments and Decisions 1997 VI, p. 2264, § 42). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see Dalia v. France , judgment of 19 February 1998, Reports 1998-I, p. 91, § 52; Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 34; Boultif v. Switzerland , cited above, § 46; and Slivenko v. Latvia [GC], no. 48321/99, ECHR 2003-X, § 113).

55. The Court considers that these principles apply regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there. In this context the Court refers to Recommendation 1504 (2001) on the non expulsion of long-term immigrants, in which the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers invite member States, inter alia , to guarantee that long-term migrants who were born or raised in the host country cannot be expelled under any circumstances (see paragraph 37 above). While a number of Contracting States have enacted legislation or adopted policy rules to the effect that long-term immigrants who were born in those States or who arrived there during early childhood cannot be expelled on the basis of their criminal record (see paragraph 39 above), such an absolute right not to be expelled cannot, however, be derived from Article 8 of the Convention, couched, as paragraph 2 of that provision is, in terms which clearly allow for exceptions to be made to the general rights guaranteed in the first paragraph.

...

57. Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision (see, for example, the judgments in Moustaquim v. Belgium , Beldjoudi v. France and Boultif v. Switzerland, cited above; see also Amrollahi v. Denmark , no. 56811/00, 11 July 2002; Yılmaz v. Germany , no. 52853/99, 17 April 2003; and Keles v. Germany , 32231/02, 27 October 2005). In the case of Boultif the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria, as reproduced in paragraph 40 of the Chamber judgment in the present case, are the following:

– 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 nationalities of the various persons concerned;

– the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

– whether the spouse knew about the offence at the time when he or she entered into a family relationship;

– whether there are children of the marriage, and if so, their age; and

– the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

58. The Court would wish to make explicit two criteria which may already be implicit in those identified in the Boultif judgment:

– the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

– the solidity of social, cultural and family ties with the host country and with the country of destination.

As to the first point, the Court notes that this is already reflected in its existing case law (see, for example, Şen v. the Netherlands , no. 31465/96, § 40, 21 December 2001, Tuquabo-Tekle and Others v. the Netherlands , no. 60665/00, § 47, 1 December 2005) and is in line with the Committee of Ministers' Recommendation Rec(2002)4 on the legal status of persons admitted for family reunification (see paragraph 38 above).

As to the second point, it is to be noted that, although the applicant in the case of Boultif was already an adult when he entered Switzerland, the Court has held the ' Boultif criteria' to apply all the more so (à plus forte raison) to cases concerning applicants who were born in the host country or who moved there at an early age (see Mokrani v. France , no. 52206/99, § 31, 15 July 2003). Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard 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.”

1. In the Üner judgment, as well as in the Boultif judgment (§ 48) cited above, the Court has taken care to establish the criteria – which were so far implicit in its case-law – to be applied when assessing whether an expulsion measure is necessary in a democratic society and proportionate to the legitimate aim pursued.

2. 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 Article 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 Article 8 pursues, as a legitimate aim, the “prevention of disorder or crime” (see paragraph 67 above), 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.

3. In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family 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.

4. 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 (see, for instance, Moustaquim v. Belgium , judgment of 18 February 1991, Series A no. 193, p. 19, § 44, and Radovanovic v. Austria , no. 42703/98, § 35, 22 April 2004).

5. 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 (see paragraphs 34-35 above).

6. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Üner , cited above, § 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 , § 58 in fine).

7. 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.

8. Finally, the Court reiterates that national authorities enjoy a certain margin of appreciation when assessing whether an interference with a right protected by Article 8 was necessary in a democratic society and proportionate to the legitimate aim pursued (see Slivenko v. Latvia [GC], no. 48321/99, § 113, ECHR 2003 X, and Berrehab v. the Netherlands , judgment of 21 June 1988, Series A no. 138, p. 15, § 28). However, the Court has consistently held that its task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other (see, among many other authorities, Boultif , cited above, § 47). Thus, the State's margin of appreciation goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (see, mutatis mutandis, Société Colas Est and Others v. France, no. 37971/97, § 47, ECHR 2002-III). The Court is therefore empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8.

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[1] As this decision was about to be promulgated, we became aware of the decision of the Court of Appeal in SSHD v Gurung [2012] EWCA Civ 62 where it said at [12]

The tribunal should accordingly entertain both sides' submissions on the public interest, along with such elements as the nature and gravity of the offence; but the fact that one estimation of the public

interest (or of any other element) is the home Secretary's, whether leaning towards or against deportation in the particular case, commands no additional weight. To let it do so as counsel for the Home Secretary have implicitly recognised would be to upset the equal footing on which the Crown and the individual come before this country's tribunals and courts, not least when Parliament has already decided where, other things being equal, the public interest lies. It would also impinge on the independence and impartiality of the tribunal by requiring it to defer to one side's judgment of a material question.

We understand this to be consistent with the approach we adopt.

[2] The Upper Tribunal has recently considered the application of these principles in a case where a serious offender came to the United Kingdom as a young man, see Masih [2012] UKUT 00046 (IAC)

[3] See paragraph 391 of the Immigration rules where human rights may require revocation.