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Family Consultation
UK Border Agency
Home Office
1st Floor, Seacole
2 Marsham Street
London SW1P 4DF

3 October 2011

Dear Sir/Madam,

Re Family Migration: A Consultation

1. We are writing in response to the consultation document 'Family Migration'. We are responding in our capacity as Director and Research Officer for the Human Rights Futures Project (HRFP) at the LSE and on the basis of many years of academic research and scholarship on the Human Rights Act and how it operates (see **Appendix One** for a description of HRFP and our biogs). Our comments will focus on chapter 8 of the consultation document, 'ECHR Article 8: Individual Rights and Responsibilities'. We have attached our legal briefing on deportation and the right to respect for private and family life in Article 8 and set out some further comments below (see **Appendix Two)**.

2. Interpretation of Article 8

2.1 We welcome the government's commitment to human rights at the start of chapter 8 of the consultation and in the Home Secretary's foreword including the recognition that "The provisions of Article 8 do not provide an absolute right to establish a family life in the UK." However, we are concerned that sections of the consultation document, and chapter 8 in particular, could be read to imply that Article 8 itself needs 're-balancing', particularly when read in the light of references in chapter 8 and the foreword to the establishment of a Commission to investigate the creation of a UK Bill of Rights. Any new Guidance in this area should seek to avoid any such implication by explicitly reaffirming the UK government's commitment to complying with ECHR Article 8 in respect of its treaty obligations and its duty under the Human Rights Act Schedule 1.

2.2 The above concern is compounded by the genesis of the consultation which appears to be partly in response to press coverage about the use of Article 8 to challenge deportations, in particular by those convicted of offences. As the summary of case law in **Appendix Two** establishes, many of these press stories are based on misreporting, or fail to explain the full facts of the case. It is not our intention in this response to defend every court decision on every case, nor would it be appropriate for us to do so. But a look behind the headlines reveals that the cases are highly fact sensitive and that even in the most

controversial cases reported in the press, there is generally ample justification for the decisions of the courts within the ambit of Article 8. In the vast majority of these cases deportation is successfully challenged on Article 8 grounds because of the deportees' relationships with family members - mostly their children - or because they have been in the UK since childhood.

2.3 **Appendix Two also includes a section on cases where the courts found that deportation would *not* breach Article 8, illustrating that public interest considerations are already part of the balance generally applied by the courts in Article 8 cases**. This is not sufficiently emphasised in the Consultation document, in our view.

3. Second punishment for family

3.1 Regarding deportations following convictions, we note that those facing deportation will generally have already faced a punishment for their crime – normally imprisonment. It could be said that the imposition of deportation *following* their sentence is a further punishment for their crime, a factor which it would not necessarily be unreasonable for the courts to have regard to when there are other pressing family life considerations such as the age of the individual, the length of time they have spent in the UK, their degree of connection with the UK, whether they have been educated and brought up here and whether they face deportation to a country with which they are not familiar and with which they have few family ties.

3.2 Where the individual being deported has a family – either a spouse, children or parents – this second punishment is also visited on the family members who have to choose between separation or leaving the UK with the deportee. These are factors which have led the courts to hold that when deportation or removal is resisted on Article 8 grounds, what has to be considered is the family life of the family unit as a whole and that the spouse and children have to be considered as potential victims themselves.[1] As Baroness Hale has put it "a child is not to be held responsible for the moral failures of either of his parents".[2]

4. Limiting of discretion

4.1 Para 8.11 suggests there should be a 'general rule' that where a person meets the automatic deportation threshold in the UK Borders Act 2007, it is reasonable to presume the public interest will warrant deportation and that only in 'exceptional circumstances' will such a deportation be a breach of Article 8.

4.2 As **Appendix Two** explains, long before the Human Rights Act was passed, when deciding whether to deport criminals the Secretary of State had to balance the public interest in deportation against any compassionate circumstances of the case. There was also a power for the courts, when hearing appeals against a decision to deport, to exercise discretion and prevent deportation on compassionate grounds. This discretion was narrowed when the UK Borders Act 2007 was passed, making deportation compulsory for foreign criminals over the age of 17 who are sentenced to at least a year in prison. Deportation in these circumstances can now only be prevented by showing there is a breach of the ECHR or the Refugee Convention.

[1] *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39; *AF (Jamaica) v Secretary of State for the Home Department* [2009] EWCA Civ 240.
[2] *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, para 49.

4.3 The suggestion in the consultation document to create a 'general rule' would narrow this further so that only in 'exceptional circumstances' will it be a breach of Article 8 to remove the person from the UK. Para 8.12 acknowledges that the courts in *AP (Trinidad & Tobago)*[3] have already upheld this approach, so it is unclear why changes are needed and what the intention is behind this proposal? It would be of concern if the intention was to effectively remove the courts' discretion under Article 8 in such cases to prevent deportations on family life grounds, if the 'exceptional circumstances' were to be even more tightly drawn than the principles established in *AP (Trinidad & Tobago)*.

5. Responsibilities

5.1 Para 8.13 states that "those who assert that the UK must respect their right to a private and family life in the UK should accept that it is not an absolute right and that it comes with a responsibility on them to comply with the law". Whilst it is true that Article 8 is not an absolute right, access to it, and the other rights in the ECHR, are not contingent upon the past actions of an individual. Like the other qualified rights in the ECHR, Article 8 can be interfered with only where necessary in a democratic society to protect the rights of others or the wider interests of the community, such as for public safety or for the prevention of disorder or crime.

5.2 To this degree responsibilities can be said to be implicit within the concept of human rights. As Lord Bingham has remarked: "inherent in the whole of the ECHR is a search for balance between the rights of the individual and the wider rights of the society to which he belongs".[4] However, this does not mean that individuals who have broken the law should automatically become ineligible for protection under the ECHR in the future, unless the courts deem it to be proportionate to restrict their rights in *specific* circumstances to protect the rights of others or the common good. An approach which *automatically* disqualifies law breakers from human rights protection would go against the grain of the human rights framework developed in the aftermath of WWII, which set out to ensure that never again could groups of people be deemed inherently unworthy of fundamental rights.

6. Proportionality

6.1 The references in paras 8.5-8.8 to the Strasbourg test of 'insurmountable obstacles' to a family living in another country and the test applied by UK courts of whether it is 'reasonable to expect' a family to move to another country, seem to miss the broader issue being raised by the courts in these cases, which is that "the ultimate test remains that of proportionality".[5] As Lord Justice Richards explained:[6]

> "the actual language used is not critical (and the Strasbourg court itself has used various expressions in describing the seriousness of the difficulties of relocation in individual cases) provided it is clear that the matter has been looked at as a whole and that no limiting test has been applied".

6.2 Richards LJ went on to say that even if the difficulties do make it unreasonable to expect family members to move to another country, that will not necessarily be a decisive feature in the overall assessment of proportionality. It is possible, the court held, in a case of sufficiently serious offending that the factors in favour of deportation will be strong enough to

[3] *AP (Trinidad & Tobago) v Secretary of State for the Home Department* [2011] EWCA Civ 551
[4] *Leeds City Council v Price and others* [2006] UKHL 10, para 32.
[5] Rix LJ in *AF (Jamaica) v Secretary of State for the Home Department* [2009] EWCA Civ 240.
[6] *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10, paras 24-7.

render deportation proportionate even if it *does* have the effect of severing established family relationships.

We hope these comments are useful and if you require any further information please don't hesitate to contact us.

Yours sincerely,

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APPENDIX 1

Human Rights Futures Project

The Human Rights Futures Project explores and analyses the future direction of human rights discourse in the UK and elsewhere. The project particularly focuses on monitoring and evaluating the impact of the UK's Human Rights Act (HRA) inside and outside the courts to chart the evolving nature of human rights and challenge its characterisation as a technical, legalised discourse, focused solely on the relationship between the individual and the state.

Recently the Project has been engaging in the current political debates on the future of the HRA and proposals for a British Bill of Rights. Human Rights Futures provides ongoing academic research and analysis on the background and context to the debate and draws on comparative material to signal the global implications of moving away from international human rights norms to a more national focus. The Project is also involved in analysing political and philosophical debates about the nature of the state and human rights.

For more information and for a list of selected legal briefings see
http://www2.lse.ac.uk/humanRights/research/projects/humanRightsFutures.aspx

Professor Francesca Klug

Francesca Klug is a Professorial Research Fellow at the LSE and Director of the Human Rights Futures Project. Francesca was previously a Senior Research Fellow at the Human Rights Incorporation Project at King's College Law School where she assisted the government in devising the model for incorporating the European Convention on Human Rights into UK law reflected in the Human Rights Act.

From 2006-09 Francesca was a Commissioner on the statutory Equality and Human Rights Commission. She is a frequent broadcaster and has written widely on human rights, including *Values for a Godless Age: the story of the UK Bill of Rights* (Penguin, 2000). Francesca's column for the *Guardian's* Comment is Free, 'Blogging the Bill of Rights', was published as a booklet by Liberty in June 2010. Francesca was awarded the Bernard Crick prize for the best article published by *Political Quarterly* in 2009 at the annual George Orwell Prize event in May 2010. Francesca was subsequently appointed as a member of the Political Quarterly Editorial Board. She co-edited a Special Issue of the European Human Rights Law Review, published in December 2010, to mark the 10th anniversary of the Human Rights Act.

For more information and for a list of publications see
http://www2.lse.ac.uk/humanRights/whosWho/francescaKlug.aspx

Helen Wildbore

Helen is a Research Officer on the Human Rights Futures Project. She carries out research for the Project, including monitoring and evaluating the impact of the Human Rights Act inside and outside the courts, drafting legal briefings and maintaining a case-law database.

Helen graduated from University College London in 2001 with a degree in Law and from the University of Nottingham in 2003 with a Masters in Human Rights Law. Her research interests include the impact of the Human Rights Act inside and outside the courts, Bills of Rights, human rights values, equality as a fundamental human rights value and the rights of the child.

For more information and for a list of publications see
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APPENDIX 2

Deportation and the right to respect for private and family life under Article 8 HRA

SECTION 1 - BRIEFING

Background

Well before the Human Rights Act (HRA) was passed, when deciding whether to deport criminals and over-stayers the Home Secretary had to weigh a large number of factors to decide if the public interest required their deportation.

The grounds on which a person who is not a British citizen is liable to deportation from the UK, under the Immigration Act 1971, include:

- if the Secretary of State deems the deportation to be **"conducive to the public good"**[7]

- where a court recommends deportation in the case of a person over the age of 17 who has been **convicted of an offence punishable with imprisonment**.[8]

Until recently, under the Immigration Rules,[9] when deciding whether to deport someone on these grounds, **the public interest had to be balanced against any compassionate circumstances of the case** and the Secretary of State had to take into account factors including the person's domestic circumstances, their strength of connections with the UK and their personal history.[10] It was possible for the Secretary of State (or the tribunal, hearing an appeal against a decision to deport) to conclude that the compassionate circumstances of the case outweighed the public interest in deporting the individual.

This was **amended, following the controversy in 2006** over the Home Office releasing foreign prisoners without considering deportation, to become where a person is liable to deportation, **"the presumption shall be that the public interest requires deportation"** – unless it was a breach of the European Convention on Human Rights (ECHR) or Refugee Convention.[11]

This presumption was given statutory footing in the **UK Borders Act 2007**, which made **deportation compulsory for non-British citizens over the age of 17 sentenced to more**

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[7] Immigration Act 1971 s3(5)(a).
[8] Immigration Act 1971 s3(6).
[9] The Immigration Rules set out the practice to be followed in the administration of the Immigration Act 1971, and later immigration Acts.
[10] Immigration Rules. The factors listed were:
- age
- length of residence in UK
- strength of connections with the UK, personal history - including character, conduct and employment record
- domestic circumstances
- previous criminal record and the nature of any offence of which the person has been convicted
- compassionate circumstances
- any representations received on the person's behalf

[11] New para 364 of the Immigration Rules: "…while each case will be considered on its merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Secretary of State will consider all relevant factors in considering whether the presumption is outweighed in any particular case, although it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees to deport." Statement of Changes in Immigration Rules, House of Commons, 19 July 2006.

than 12 months in prison,[12] except where removal would breach the ECHR or the Refugee Convention.[13]

The Act states that "for the purpose of section 3(5)(a) of the Immigration Act 1971 [above], the deportation of a foreign criminal is conducive to the public good."[14]

What has the provision of automatic deportation in UK Borders Act 2007 changed?

The 2007 Act has narrowed the grounds on which deportation may be prevented. Where the conditions in the 2007 Act (above) apply, the Secretary of State is obliged to make a deportation order unless to do so would breach the ECHR or the Refugee Convention. The wider discretion in the old Immigration Rules (above) has gone.

The Court of Appeal have commented that **Parliamentary intervention through the UK Borders Act 2007 of automatic deportation for foreign criminals "is arguably a matter which should be taken into account in giving *greater* weight to [policy factors in favour of deportation] when drawing the balance of proportionality under Art 8"**.[15]

Principles established at the European Court of Human Rights (ECtHR)

- a State is entitled to control the entry of aliens into its territory and their residence there.[16]

- the ECHR does not guarantee the right of an alien to enter or to reside in a particular country and **Contracting States have the power to expel an alien convicted of criminal offences in order to maintain public order and protect society**.[17]

- However, if such decisions interfere with the rights in Article 8, they must be **in accordance with the law** and **justified** under Art 8(2) as **necessary** and **proportionate** to the legitimate aim pursued.[18]

- Article 8 does not contain an absolute right for any category of alien not to be expelled, but **there are circumstances where the expulsion of an alien will give rise to a violation of Art 8**.[19]

- To assess whether an expulsion is justified under Art 8(2) the ECtHR will consider factors including:
  - the **nature and seriousness of the offence** and **time elapsed** since it was committed.
  - the **length of time in the country** and the solidity of social, cultural and family ties with the host country and with the country of destination.

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[12] UK Borders Act 2007, s32
[13] UK Borders Act 2007, s33 (2) and (3).
[14] UK Borders Act 2007, s32 (4).
[15] Carnwath LJ in *AP (Trinidad and Tobago) v Secretary of State for the Home Department* [2011] EWCA Civ 551, para 44.
[16] Subject to its treaty obligations. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985.
[17] *Uner v Netherlands* (2006) para 54 and 56.
[18] *Dalia v. France*, judgment of 19 February 1998.
[19] For example, *Moustaquim v. Belgium* (1991), *Beldjoudi v. France*, *Boultif v. Switzerland* (2001), *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

  - the **spouse** and if there are any **children**, their **ages**, **best interests** and **well-being**. The seriousness of the difficulties which they are likely to encounter in the destination country.[20]

- In the case of a **young adult** who has not yet founded a family of his own, only the first two of these are relevant.[21]

- For a settled migrant who has *lawfully spent all or the major part of their childhood* and youth in the host country, very serious reasons are required to justify expulsion.[22]

- Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case.[23] In immigration cases the Court has held that there will be **no family life between parents and adult children unless they can demonstrate additional elements of dependence**,[24] **beyond normal emotional ties**.[25]

- **Not all such migrants**, no matter how long they have been residing in the country from which they are to be expelled, **necessarily enjoy "family life"** there within the meaning of Article 8. However, there can be circumstances where the expulsion of a settled migrant may constitute an interference with their right to respect for **"private life"** under Art 8 which encompasses the **social ties between settled migrants and the community in which they are living**.[26]

Principles established in domestic courts

- When deportation or removal is resisted on Art 8 grounds, **what has to be considered is the family life of the family unit as a whole**.[27] Baroness Hale pointed out, **"a child is not to be held responsible for the moral failures of either of his parents"**.[28]

- Where a person who is not a British citizen commits one of a number of very serious crimes, Art 8(2) considerations will include the **public policy need to express society's revulsion at the seriousness of the criminality**[29] and an **element of deterrence** so that non-British citizens understand that **one of the consequences of serious crime may well be deportation**.[30]

- **The seriousness of an offence and the public interest are factors of "considerable importance" when carrying out the balancing exercise in Article 8**.[31]

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[20] *Boultif v Switzerland* (2001) and *Uner v Netherlands* (2006).
[21] *Maslov v Austria* (2008).
[22] *Maslov v Austria* (2008).
[23] *S v UK* European Commission on Human Rights (1984)
[24] *Slivenko v Latvia* (2003); *Kwakye-Nti and Dufie v the Netherlands* (2000); *Khan v UK* (2010).
[25] *S v UK* European Commission on Human Rights (1984)
[26] *Uner v Netherlands* (2006)
[27] *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39; *AF (Jamaica) v Secretary of State for the Home Department* [2009] EWCA Civ 240.
[28] *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, para 49.
[29] May LJ in *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094.
[30] Judge LJ in *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094.
[31] *MK (Gambia) v Secretary of State for the Home Department* [2010] UKUT 281 (IAC) para 27.

- It will rarely be proportionate under Article 8 to uphold an order for removal of an individual who has a **close and genuine bond with their spouse and the latter cannot reasonably be expected to follow the removed person to the country of removal**, or if the effect of the order is to **sever a genuine and subsisting relationship between parent and child**. But cases will need **a careful and informed evaluation of the facts**. The search for hard-edged or bright-line rules is incompatible with the "difficult evaluative exercise which Article 8 requires".[32]

- "In considering the position of family members in deportation [and] removal cases the material question is not whether there is an **'insuperable obstacle'** to their following the applicant to the country of removal[33] but whether they **'cannot reasonably be expected'** to follow him there.[34] However, **it is possible in a case of sufficiently serious offending that the factors in favour of deportation will be strong enough to render deportation proportionate even if [it] does have the effect of severing established family relationships**."[35]

- **The best interests of children had to be a primary consideration** when considering whether removal of a parent was proportionate under Article 8. A child's British nationality was of particular importance. It was not enough to say that a young child might readily adapt to life in another country, particularly when they had lived in Britain all their lives and were being expected to move to a country they did not know. The children had rights which they would not be able to exercise if they moved to another country.[36]

See section 2 for information on how these principles have been applied in cases

Strasbourg or UK leading?

- Dominic Raab MP has claimed that the "rising tide of cases where the applicant relies on the right to family life" is a result of the HRA: "I am not aware of any case prior to the Human Rights Act where the UK *or Strasbourg courts* blocked deportation of a convicted criminal under Article 8".[37]

- **Strasbourg developed jurisprudence on this issue several years prior to the HRA** which says that there are circumstances where the expulsion of an alien will give rise to a violation of Art 8.[38]

- For example, in 1991 the ECtHR found a breach of Art 8 where the Belgium authorities had deported a Moroccan national following offences committed in adolescence.[39] The breach of Art 8 was found on the facts of the case, in particular

[32] Lord Bingham in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, para 12. Upheld in the deportation case of *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10, below.
[33] As set out in some Strasbourg jurisprudence, see for example *Abdulaziz v UK* (1985); *Poku v UK* (1996); *Omoregie v Norway* (2008).
[34] Other Strasbourg jurisprudence has referred to whether a family can 'realistically be expected' to follow a deportee to another country. See *Sezen v Netherlands* (2006); *Boulfit v Switzerland* (2001).
[35] *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10, para 24 and 27.
[36] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4
[37] 'Frustrating Deportation', Dominic Raab MP blog, 12 June 2011, www.dominicraab.com. My emphasis.
[38] For example, *Moustaquim v. Belgium* (1991), *Beldjoudi v. France* (1992), *Boultif v. Switzerland* (2001), *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
[39] *Moustaquim v. Belgium* (1991).

that the applicant had lived in Belgium since the age of two and that all his close relatives lived there.

- The law has been independently developed by the UK courts (see the 'domestic courts principles' section above) – which is in line with the HRA model which only requires the courts to "take into account" Strasbourg case-law[40] – but this is after many of the principles (above) had already been developed at Strasbourg.

- Where the UK courts *have* explicitly exceeded Strasbourg jurisprudence, is in finding that it would be a flagrant denial of Art 8 (on the facts of the case) where the breach in question would take place in the country to which the foreign national would be deported.[41]

Figures on deportation

There are some *inaccuracies* and *omissions* in the reported figures on deportation and human rights in some of the press:

According to the Daily Mail website:

> "In 2010, 233 appeals against deportation were made. Of these, 149 were successful on human rights grounds…figures from HM Courts Service showed."[42]

The figures quoted, here and elsewhere in the press, are the result of a Freedom of Information request by Dominic Raab MP to the Ministry of Justice. They contain an error. The **correct figures**, obtained from the MoJ, show that there were 850 appeals against deportation to the immigration and asylum tribunal[43] in 2010 (not 233 as reported).

The correct figures show that the **proportion of appeals successful on human rights grounds is much lower** than the incorrect figures quoted in the press suggest. The incorrect figures quoted in the press suggest that **64%** of appeals against deportation were successful on human rights grounds (149 out of 233). In fact, it is only **17%** (149 out of 850).

The correct figures show that in 2010, **12% of appeals against deportation to the immigration and asylum tribunal were successful on Article 8 grounds** (102 out of 850).

See section 3 for more information on the figures.

Art 8 used to bring in dependents?

The children of a mother with indefinite leave to remain in the UK have been allowed to enter the UK to be reunited with her, on grounds of Art 8.[44] This is very unusual, but the

[40] Under s2 HRA the domestic courts have to "take into account" Strasbourg jurisprudence but they are not bound by it and can develop their own domestic jurisprudence.
[41] The House of Lords held in 2008 that the deportation of a mother and son to Lebanon would breach Art 8 where the father would automatically obtain custody of the child he had never reared. No previous Strasbourg case had yet found the test of flagrant denial of the deportees' Art 8 rights to be satisfied in a case where the breach of Art 8 would take place in the foreign country to which the family is to be expelled, rather than as the result of expulsion of one of its members. *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64.
[42] Daily Mail website, 13 July 2011.
[43] The Asylum and Immigration Tribunal was re-named Tribunal (Immigration and Asylum Chamber). I will refer to it as the immigration and asylum tribunal for ease of reference.
[44] *Nkurunziza and others v Entry Clearance Officer*, First-tier Tribunal (Immigration and Asylum), 11 August 2010.

immigration and asylum tribunal decision is based on the facts of the case and the "dilemma" facing the children which they described as a "large humanitarian claim".

The children were sent away from their family home in Burundi by their mother (M), for safety, during unrest in 2003 where their father was kidnapped after authorities suspected him of helping rebels. M was sent to prison where she was raped and tortured. She escaped and came to Britain seeking asylum, pregnant from the rape. M was eventually granted indefinite leave to remain in 2007[45] under the 'legacy' provisions,[46] which meant she wasn't granted full refugee status with the automatic right to bring dependents into the UK. M tracked her children down to Uganda where their carer had been diagnosed with HIV and was in poor health.

The children successfully appealed against their refusal of entry clearance to the UK, using Article 8.

The tribunal considered that:

> **"Article 8 does not entail a general obligation for a state to respect a family's choice of the country in which to conduct family life or to authorise family reunion within its territory."**

However, on the facts, the tribunal found that:

> "the **whole dilemma facing the [children] is itself a large humanitarian claim which outweighs the requirements of lawful immigration control**"

The tribunal held that continuing to refuse the children entry clearance to the UK would be a disproportionate response and "public interest does not demand it".

[45] Her initial asylum claim was refused – she says the Home Office refused her claim without interviewing her. For more information see http://www.guardian.co.uk/commentisfree/2010/jul/21/judge-decides-children-asylum

[46] Put in place in 2006 to clear the large backload of asylum cases. Like most of the asylum seekers who have benefited from the 'legacy' scheme, the children's mother was not awarded full refugee status, which confers automatic rights to bring dependants to Britain, but instead was given the lesser status of 'indefinite leave to remain', which does not.

SECTION 2 – Application of principles to cases

Deportation cases where family life issues are considered are "highly fact sensitive" and "there is only limited value in drawing comparisons with the outcome in other cases" as a result.[47]

Examples of circumstances in which the courts have found **deportation to breach the applicant's Art 8 rights**:

- "a drug offender - convicted of beating his girlfriend (they subsequently split up), and who doesn't pay maintenance for his daughter" – Dominic Raab blog[48]
  AP had **lived in the UK since around the age of four**. On the facts the immigration and asylum tribunal concluded that the effect of his removal on all members of the family unit in the UK would result in the deportation being disproportionate, especially as he **has a child who has a strong bond with him** and they had heard evidence that he is a **good and caring father**.[49]

- "a man convicted of killing one of my constituents (in a gang attack), who claimed his right to family life to stay in the UK, despite being an adult with no dependants" - Dominic Raab blog
  RG was 22 year old man who accompanied his parents to the UK from Nepal and is financially dependent on his father as a student. The 'gang attack' was an attack by RG and two other men, on another Nepalese man, who subsequently drowned. The judge at the criminal trial (for violent disorder and manslaughter, for which RG was sentenced to 3 years prison) said RG had **no background of violence**, that the **attack was wholly out of character** and there was **virtually no risk of further serious harm to public from him**. RG had **no close family in Nepal** and the **father (a retired Ghurkha who had lived in the UK for 5 years)** said either he or his wife **would have to return to Nepal with their son**. The immigration and asylum tribunal ruled it would be unreasonable to expect the father and family to relocate to Nepal simply because of RG's criminal conduct.[50]

- "Aso Mohammed Ibrahim, a failed asylum seeker, who left 12-year-old Amy Houston dying after a hit-and-run crash, has been allowed to stay in Britain because of his human rights." – Telegraph[51]
  Although it would have been lawful to do so, the authorities chose not to take steps to remove Ibrahim from the UK at the time of his conviction (in 2003) or release. The immigration judge revealed that had such moves been taken then, it is likely that Ibrahim would have been deported back to Iraq. But **no such steps were taken until five years later**, allowing him the time to settle here, **marry and father two children**, as well as becoming **stepfather to two more children**. The immigration judge took into account the **best interest of the children** and the fact that they could not be expected to leave the UK to move and live in Iraq. Were it not for the children, the judge said his view on the matter might have been different.[52]

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[47] *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10, para 22.
[48] 'Frustrating Deportation', 12 June 2011, www.dominicraab.com
[49] *AP (Trinidad and Tobago) v Secretary of State for the Home Department* [2011] EWCA Civ 551.
[50] *RG (Nepal)* [2010] UKUT 273 (IAC)
[51] 'European human rights rulings 'have put British public at risk'', The Daily Telegraph, 21 April 2011
[52] Immigration and Asylum Chamber, 10 December 2010.

- "A Bolivian man who avoided deportation partly because he had bought a pet cat" – Telegraph[53]
  This case if often listed, misleadingly, alongside cases such as those above of convicted criminals who challenge their deportation on Art 8 grounds. In fact, the case concerned a man who came to the UK as a student and was refused leave to remain and did not concern deportation on grounds of criminal conviction. The immigration judge had **allowed his appeal on the basis of a former Home Office policy** (DP3/96) which said that if an individual lived in the UK with a settled spouse for two years or more without enforcement action being taken against them, they were entitled to leave to remain. The appeal was *also* allowed on Art 8 grounds – **he had a long-term relationship with a British citizen and they had lived together for four years**. The reference to the cat was one detail provided by the couple as evidence of their long-term relationship but did not form any part of the tribunal's reasons for deciding that he should be allowed to stay in the UK.[54] The Home Office appealed but the senior immigration judge upheld the decision on the basis that the former Home Office policy (DP3/96), although it had since been withdrawn, still applied in this case (due to the date of the initial decision).[55]

- "Nigerian rapist who can't be deported because EU judges say it would violate his right to family life"[56]
  AA had been in the UK for 11 years, since the age of 13. At the age of 15 he was convicted of the rape of a 13 year old girl and sentenced to 4 years in detention. He was released after almost 2 years, for good behaviour. After his appeal against deportation failed in UK courts, no efforts were taken to remove him for two and half years, during which time he obtained two degrees and got a job. Although very serious violent offences can justify expulsion even if committed by a minor, the ECtHR said, regard had to be had to the **best interests of the child**, including the **obligation to facilitate his reintegration**. AA's appeal to the ECtHR was successful on the facts: because his risk of re-offending was low and he had made **"commendable efforts to rehabilitate himself and to reintegrate into society over a period of seven years"**. There was insufficient evidence to show that AA could reasonably be expected to engage in further criminal activity, to make his deportation necessary for the "prevention of disorder or crime" in Art 8(2).[57]

<u>Examples of circumstances in which the courts have found **deportation did not breach the applicant's Art 8 rights**:</u>

- A Kenyan man who came to the UK aged 20, who was in a relationship with a Dominican citizen living in the UK, with whom he later had two children. Aged 21 he was **convicted of abducting and imprisoning a woman and raping her three times** and sentenced to 11 years imprisonment. He appealed against his deportation order, which the immigration and asylum tribunal allowed both under para 364 of the Immigration Rules and Art 8 because the risk of re-offending was low and the vulnerability of the family meant relocation to Kenya or Dominica would be very difficult (he was a victim of torture in Kenya[58] and his wife was vulnerable with a history of social services involvement). The Court of Appeal however upheld the deportation order because the **public interest side of the balance has to include**

[53] '102 foreign criminals and illegal immigrants we can't deport', Sunday Telegraph, 12 June 2011.
[54] Correspondence with solicitor and barrister.
[55] Judge Gleeson, Asylum and Immigration Tribunal, 10 December 2008.
[56] Mail on-line, 21 September 2011.
[57] *AA v UK* ECtHR, 20/9/11.
[58] The Tribunal concluded that he was a refugee but that he later (and before this judgment) ceased to be a refugee because of the fundamentally changed circumstances in Kenya.

the public policy need to deter and to express revulsion at the seriousness of the criminality and for very serious crimes a low risk of re-offending is not the most important public interest factor.[59]

- JO – a 27 year old who came to UK from Uganda aged 4 with his mother. He was orphaned at aged 8, living with relatives and then becoming homeless before 18. At 20 he was convicted of drug offences and then for possession of a firearm. On the facts, the immigration and asylum tribunal decided it was proportionate to remove JO from the UK: he was a **young single man with no partner or children in the UK**, his family life in the UK was **tenuous and marginal**, he committed **two exceptionally serious criminal offences**, was subject to disciplinary proceedings whilst in prison, committed criminal offences for financial gain and he was identified as posing a **medium risk of causing serious harm to the public**.[60]

- A 46 year old Jamaican man who came to the UK aged 14, had four British children (aged 25, 24, 18 and 12) and one grandchild. Has a string of **over 30 convictions** including assaulting a police officer, actual bodily harm, drug offences and robbery. His appeal against deportation, relying on Art 8, was dismissed by the immigration and asylum tribunal as a proportionate interference with his family life. He was deported but applied to the ECtHR, again relying on Art 8. The ECtHR also found the interference with Art 8 to be proportionate, taking into account the **sheer number of offences over a large time span**, the fact that he was **warned by the Home Office he would be at risk of deportation** if he came to their attention again, that he has **never lived with any of his children**, that **3 of his children were adults** and not dependent upon him, that the **youngest child lived with her mother and step-father** and the effect on her is unlikely to have the same impact as if they were living together as a family and that he was **unlikely to find himself completely isolated in Jamaica**.[61]

- A 30 year old man who came to the UK from Turkey aged 11, who has three British children and a British partner. He was **convicted of a string of offences**, including a **robbery of which he was the ringleader**. The Home Office warned him he may be deported but in the 5 year delay 2 of his 3 children were born. The immigration and asylum tribunal found no breach of Art 8 and he was deported but applied to the ECtHR. The ECtHR found the interference with his Art 8 rights was proportionate, taking into account the **serious nature of the robbery** committed when he was 22 years old, **he had not lived with his oldest child** (from a previous relationship), his **relationship with his partner was relatively short** and she was aware of his criminal record and risk of deportation, there **would be practical difficulties in the partner and children re-locating to Turkey, but no evidence that it would be impossible or exceptionally difficult** and the **children were young and of an adaptable age**.[62]

[59] *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094.
[60] Upheld by the Court of Appeal: *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10.
[61] *Grant v UK* (2009)
[62] *Onur v UK* (2009)

SECTION 3 – Figures on deportation

There are some *inaccuracies* and *omissions* in the reported figures on deportation and human rights in some of the press:

According to the Daily Mail website:

> "In 2010, 233 appeals against deportation were made. Of these, 149 were successful on human rights grounds…figures from HM Courts Service showed."[63]

The figures quoted, here and elsewhere in the press, are the result of a Freedom of Information request by Dominic Raab MP to the Ministry of Justice. They contain an error. The **correct figures**, obtained from the MoJ, are:

For 2010 in the immigration and asylum tribunal

Number of appeals against deportation	850
Of those, number of appeals successful	233
Of those, number of appeals successful on human rights grounds	149
Of those:	
Number successful on Art 8 grounds	102
Number successful on Art 3 grounds	35
Number successful on mixture of Art 3 and 8	12

- The correct figures show that the **proportion of appeals successful on human rights grounds is much lower** than the incorrect figures quoted in the press suggest. The incorrect figures quoted in the press suggest that **64%** of appeals against deportation were successful on human rights grounds (149 out of 233). In fact, it is only **17%** (149 out of 850).

- The data from the MoJ covers appeals against deportation made to the immigration and asylum tribunal (which are mostly unreported).

- The figures do not tell us in what circumstances the deportation was ordered – whether it was following a criminal offence or an immigration offence.

The 2010 figures as percentages:

Of the 850 appeals against deportation:
27% of appeals were successful
17% of appeals were successful on human rights grounds
Of those:
12% were successful on Art 8 grounds
4% were successful on Art 3 grounds
1% were successful on a mixture of Art 3 and 8

The figures show that in 2010, **12% of appeals against deportation to the immigration and asylum tribunal were successful on Article 8 grounds** (102 out of 850).

[63] Daily Mail website, 13 July 2011.