

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

This briefing covers the following information:

- Background on the position before the HRA was passed
- What the UK Borders Act 2007 has changed
- Principles established at the European Court of Human Rights
- Principles established in domestic courts
- Whether the European Court of Human Rights or domestic courts are leading
- Figures on deportation
- Whether Article 8 has been used to bring dependents into the UK
- Appendix showing the application of the principles in cases

### 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**”<sup>1</sup>
- 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**.<sup>2</sup>

Until recently, under the Immigration Rules,<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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<sup>1</sup> Immigration Act 1971 s3(5)(a).

<sup>2</sup> Immigration Act 1971 s3(6).

<sup>3</sup> The Immigration Rules set out the practice to be followed in the administration of the Immigration Act 1971, and later immigration Acts.

<sup>4</sup> 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

<sup>5</sup> 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.

This presumption was given statutory footing in the **UK Borders Act 2007**, which made **deportation compulsory for foreign nationals over the age of 17 sentenced to more than 12 months in prison**,<sup>6</sup> except where removal would breach the ECHR or the Refugee Convention.<sup>7</sup>

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.”<sup>8</sup>

### **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: 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”**.<sup>9</sup>

### **New Immigration Rules 2012**

On 19<sup>th</sup> June 2012 Parliament supported the new Immigration Rules, which then came into force on 9 July 2012. The Rules largely reflect recent case law on immigration, with some additions. **They include a presumption that decisions made under the new Rules will comply with Article 8 except in “genuinely exceptional circumstances.”**<sup>10</sup> This severely restricts the ability of the Courts to consider the proportionality of deportation and Article 8 in individual cases; Home Secretary Theresa May said that “the exceptional circumstances will be far more limited than they have been up to now.”<sup>11</sup> The Rules also **do not take into account the citizenship of the child** of a potential deportee, and the rights that UK citizenship confers. The new Rules affect immigration, family visits and the deportation of foreign criminals.

Home Secretary, Theresa May, affirmed that Article 8 is a qualified right but said the reason for introducing the Immigration Rules was because since the introduction of the Human Rights Act 1998 the courts have been left to decide on the proportionality of Article 8 themselves without the benefit of the views of Parliament.<sup>12</sup> The stated intention of the Rules is to lower net migration from hundreds of thousands to tens of thousands. The Government proposed that, when considering immigration cases, the Courts should presume that decisions taken within the Immigration Rules comply with the Article 8: “if proportionality has already been demonstrated at a general level, it need not, and should not, be re-determined in every individual case”.<sup>13</sup> In debate, opposition Members suggested that **the UK Border Agency suffers from administrative “chaos”**,<sup>14</sup> quoting the border inspector who stated that one of the main reasons for people not being deported is difficulty obtaining travel documentation.<sup>15</sup>

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<sup>6</sup> UK Borders Act 2007, s32

<sup>7</sup> UK Borders Act 2007, s33(2). Other exceptions relate to Community treaties, extradition and orders under the Mental Health Act.

<sup>8</sup> UK Borders Act 2007, s32 (4).

<sup>9</sup> Carnwath LJ in *AP (Trinidad and Tobago) v Secretary of State for the Home Department* [2011] EWCA Civ 551, para 44.

<sup>10</sup> Home Office, *Statement of Intent: Family Migration*, June 2012, 35.

<sup>11</sup> Home Secretary Theresa May, House of Commons, *Hansard* 19 June 2012 col. 768.

<sup>12</sup> Theresa May, House of Commons, *Hansard* 19 June 2012 col. 760-1. See also Home Office, *Statement of Intent: Family Migration*, June 2012, 33-4; Damian Green, House of Commons, *Hansard* 19 June 2012 col. 821.

<sup>13</sup> Home Office, *Statement of Intent: Family Migration*, June 2012, 40. See also Theresa May, House of Commons, *Hansard* 19 June 2012 col. 762-3.

<sup>14</sup> House of Commons, *Hansard* 19 June 2012 cols. 772, 812.

<sup>15</sup> *Ibid.*, col. 775.

## Decisions of the Upper Tribunal (Immigration and Asylum Chamber) on the June 2012 Immigration Rules

In two decisions of the Upper Tribunal (Immigration and Asylum Chamber), the following principles have been established in respect of the June 2012 rules<sup>16</sup>:

- The first question is whether a claimant is able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims.
- Since the Rules do not provide a complete code for consideration of Article 8 claims (e.g. categories of offender are left out/those seeking leave to enter or remain as a visitor for private medical treatment in a claim that raises Article 8), it will be necessary to go on to make an assessment of Article 8 applying the criteria established by law.
- The procedure adopted in relation to the introduction of the new Rules provided a weak form of Parliamentary scrutiny and so Parliament has not altered the legal duty of the judge determining appeals to decide on proportionality for himself or herself.
- There can be no presumption that the Rules will normally be conclusive of the Article 8 assessment or that a fact-sensitive inquiry is normally not needed.
- The Rules may be considered in the context of the proportionality assessment, but the more the Rules restrict otherwise relevant and weighty considerations from being taken into account (e.g. best interests of the child), the less regard will be had to them in that exercise.
- In particular when considering proportionality, it is the degree of difficulty the couple face continuing family life outside the UK rather than the 'surmountability' of the obstacle (the term used in the Rules) that is the focus of judicial assessment, but as a factor rather than a test.

## 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.<sup>17</sup>
- 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.**<sup>18</sup>
- 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.<sup>19</sup>
- 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.**<sup>20</sup>

<sup>16</sup> *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393(IAC) 31 October 2012; *Izuazu (Article 8 – new rules) Nigeria* [2013] UKUT 45 (IAC) 30 January 2013.

<sup>17</sup> Subject to its treaty obligations. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985.

<sup>18</sup> *Uner v Netherlands* (2006) para 54 and 56.

<sup>19</sup> *Dalia v. France*, judgment of 19 February 1998.

<sup>20</sup> For example, *Moustaquim v. Belgium* (1991), *Beldjoudi v. France*, *Boultif v. Switzerland* (2001), *Amrollahi v. Denmark*, no. 56811/00, 11 July 2002; *Yilmaz v. Germany*, no. 52853/99, 17 April 2003; and *Keles v. Germany*, 32231/02, 27 October 2005

- 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.
  - 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.<sup>21</sup>
- 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.<sup>22</sup>
- 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.<sup>23</sup>
- 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.<sup>24</sup> 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,**<sup>25</sup> **beyond normal emotional ties.**<sup>26</sup>
- **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.**<sup>27</sup>
- Where expulsions are challenged on the basis of Article 8 violation, **it is not imperative that, in order to be effective, a remedy should have automatic suspensive effect** (contrast where there is a real risk of suffering treatment contrary to Article 3).<sup>28</sup>
- However, **where there is an arguable claim that expulsion would violate Art 8, Art 13 with Art 8 require that the state make available the effective possibility of challenging the deportation and of having the relevant issues examined with sufficient procedural safeguards** and thoroughness with guarantees of independence and impartiality.

### **Principles established in domestic courts**

<sup>21</sup> *Boultif v Switzerland* (2001) and *Uner v Netherlands* (2006).

<sup>22</sup> *Maslov v Austria* (2008).

<sup>23</sup> *Maslov v Austria* (2008).

<sup>24</sup> *S v UK* European Commission on Human Rights (1984)

<sup>25</sup> *Slivenko v Latvia* (2003); *Kwakyie-Nti and Dufie v the Netherlands* (2000); *Khan v UK* (2010).

<sup>26</sup> *S v UK* European Commission on Human Rights (1984)

<sup>27</sup> *Uner v Netherlands* (2006)

<sup>28</sup> *De Souza Ribeiro v France* (Application No. 22689/07) [2012] ECHR 2066 Grand Chamber.

- 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.**<sup>29</sup> Baroness Hale pointed out, **“a child is not to be held responsible for the moral failures of either of his parents”**.<sup>30</sup>
- 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**<sup>31</sup> and an **element of deterrence** so that non-British citizens understand that **one of the consequences of serious crime may well be deportation.**<sup>32</sup>
- **The seriousness of an offence and the public interest are factors of “considerable importance” when carrying out the balancing exercise in Article 8.**<sup>33</sup>
- 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”.<sup>34</sup>
- “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<sup>35</sup> but whether they **‘cannot reasonably be expected’** to follow him there.<sup>36</sup> 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.**”<sup>37</sup>
- **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.<sup>38</sup>

See appendix 1 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

<sup>29</sup> *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.

<sup>30</sup> *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, para 49.

<sup>31</sup> May LJ in *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094.

<sup>32</sup> Judge LJ in *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094.

<sup>33</sup> *MK (Gambia) v Secretary of State for the Home Department* [2010] UKUT 281 (IAC) para 27.

<sup>34</sup> 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.

<sup>35</sup> As set out in some Strasbourg jurisprudence, see for example *Abdulaziz v UK* (1985); *Poku v UK* (1996); *Omoregie v Norway* (2008).

<sup>36</sup> 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).

<sup>37</sup> *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10, para 24 and 27.

<sup>38</sup> *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4

Human Rights Act where the UK or Strasbourg courts blocked deportation of a convicted criminal under Article 8”<sup>39</sup>

- **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.<sup>40</sup>
- 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.<sup>41</sup> The breach of Art 8 was found on the facts of the case, in particular 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<sup>42</sup> – 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.<sup>43</sup>

### **Figures on deportation**

**There is a discrepancy in the figures on deportation**, between those from the Court Service and those from the UK Border Agency. For example, **in 2010 there were between 102 and 425 deportations prevented on grounds of Article 8:**

- According to Court Service figures, in 2010, 233 people won their appeal against deportation and of these 102 were successful on grounds of Article 8.<sup>44</sup>
- According to figures from the Independent Chief Inspector of the UK Border Agency, in 2010, 425 foreign national prisoners won their appeal against deportation and these were “won primarily on the grounds of Article 8”.<sup>45</sup>

However, **compared to the number of deportations that took place in 2010, the number of deportations that were prevented on Article 8 grounds is relatively very small:**

- **In 2010 5,235 foreign national prisoners were deported from the UK.**<sup>46</sup>
- Therefore, of those people who faced deportation in 2010, **the proportion who won their appeal on Article 8 grounds is between 2%<sup>47</sup> and 8%.**<sup>48</sup>

<sup>39</sup> ‘Frustrating Deportation’, Dominic Raab MP blog, 12 June 2011, [www.dominicraab.com](http://www.dominicraab.com). My emphasis.

<sup>40</sup> For example, *Moustaquim v. Belgium* (1991), *Beldjoudi v. France* (1992), *Boultif v. Switzerland* (2001), *Amrollahi v. Denmark*, no. 56811/00, 11 July 2002; *Yilmaz v. Germany*, no. 52853/99, 17 April 2003; and *Keles v. Germany*, 32231/02, 27 October 2005

<sup>41</sup> *Moustaquim v. Belgium* (1991).

<sup>42</sup> 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.

<sup>43</sup> 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.

<sup>44</sup> Figures obtained from the Ministry of Justice.

<sup>45</sup> ‘A thematic inspection of how the UK Borders Agency manages foreign national prisoners’, John Vine, Independent Chief Inspector of the UK Borders Agency, 2011. Figures cited are between February 2010 and January 2011.

<sup>46</sup> *Ibid.*

<sup>47</sup> According to Court Service figures. 102 of 5468.

**Most appeals against deportation are unsuccessful. In 2010 32% of appeals lodged by foreign national prisoners against deportation were successful.**<sup>49</sup> Very many appeals against deportation on Article 8 grounds are unsuccessful.<sup>50</sup>

## 2011

It was reported by Home Secretary Theresa May in Parliament that **in 2011 there were 1,888 appeals against deportation**. 185 of those – less than 10% – were allowed on Article 8 grounds.<sup>51</sup>

It was reported in the press that “More than 100 foreign criminals who the Government wants to deport are being released on to Britain’s streets every month to protect their human rights”.<sup>52</sup>

These figures come from the UK Borders Agency, which reported that in 2011 on average approximately 110 foreign national offenders per month were released from immigration detention on restrictions while deportation was considered (90% released on bail by the courts, 10% released by the UK Border Agency).<sup>53</sup> The UK Borders Agency reports that deportations can be delayed for a variety of reasons, including judicial challenges or by the individual’s continued failure to comply with the re-documentation process. No figures are given of how many of these individuals are released on bail due to appealing against their deportation on Article 8 grounds.

**In 2011 4,522 foreign national offenders were removed from the UK**<sup>54</sup> (there are around 11,000 foreign nationals in prison<sup>55</sup>).

## Art 8 used to bring dependents into the UK?

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.<sup>56</sup> This is very unusual, but the 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<sup>57</sup> under the ‘legacy’ provisions,<sup>58</sup> 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.

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<sup>48</sup> According to UK Border Agency figures, note 10. 425 of 5660. This is likely to be an overestimate as the figure assumes that all the successful appeals against deportation were on Article 8 grounds.

<sup>49</sup> Note 10. Figures cited are between February 2010 and January 2011.

<sup>50</sup> For example, see *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094; *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10; *Grant v UK* (2009); *Onur v UK* (2009).

<sup>51</sup> House of Commons, *Hansard* 19 June 2012 col. 765.

<sup>52</sup> ‘Freed to roam our streets, 100 foreign criminals a month’, Daily Mail, 16 May 2012.

<sup>53</sup> Letter from Rob Whiteman, Chief Executive, UK Border Agency, to the Chair of the Home Affairs Committee, 3 May 2012.

<sup>54</sup> Letter from Rob Whiteman, Chief Executive, UK Border Agency, to the Chair of the Home Affairs Committee, 3 May 2012.

<sup>55</sup> *Ibid.* On 31 March 2012 there were 11,127 foreign nationals in prison.

<sup>56</sup> *Nkurunziza and others v Entry Clearance Officer*, First-tier Tribunal (Immigration and Asylum), 11 August 2010.

<sup>57</sup> 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>

<sup>58</sup> Put in place in 2006 to clear the large backlog 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.

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

## APPENDIX – Application of the principles in cases

Below is a small selection of deportation cases. The cases in the first section, where the appeal against deportation was successful, have been reported in the press but the information below provides further details of the reasoning of the judgments. The second section, of cases where the appeal against deportation was not successful, also provides details of the reasoning for these decisions.

As deportation cases where family life issues are considered are “highly fact sensitive”, “there is only limited value in drawing comparisons with the outcome in other cases”.<sup>59</sup>

### 1. Examples of circumstances in which the courts have found **deportation to breach the applicant’s Art 8 rights:**

- AP appealed against the Home Secretary’s decision to deport him after being sentenced to 18 months imprisonment for a drug offence. He 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**.<sup>60</sup>
- AA, a Nigerian, 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).<sup>61</sup>
- Aso Mohammed Ibrahim, a citizen of Iraq whose application for asylum in UK was refused, appealed against his removal from the UK on grounds of Article 8. He had committed a number of offences in the UK, including failing to stop after a traffic accident, where a girl died, for which he received a four month sentence. 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.<sup>62</sup>

<sup>59</sup> *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10, para 22.

<sup>60</sup> *AP (Trinidad and Tobago) v Secretary of State for the Home Department* [2011] EWCA Civ 551.

<sup>61</sup> *AA v UK* ECtHR, 20/9/11.

<sup>62</sup> Immigration and Asylum Chamber, 10 December 2010.

- It has been widely reported that a Bolivian man has avoided deportation under Article 8 because he had a pet cat.<sup>63</sup> This case is often listed, misleadingly, alongside cases of convicted criminals who challenge their deportation on Article 8 grounds. In fact, the case concerned a man (B) 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 allowed his appeal, finding that it would be disproportionate on Article 8 grounds to remove B – **he had a long-term relationship with a person settled in the UK and they had lived together for four years**. The reference to the cat was one detail amongst many provided by the couple as evidence of the genuineness of their long-term relationship. The judge ruled that it would not be reasonable for B's partner to move to Bolivia to live with him as the partner's father was seriously ill and B was helping to take care of him.<sup>64</sup> The judge also relied on 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 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).<sup>65</sup> All other factors in the original determination, including ownership of the cat, were deemed "immaterial".
- Peart, a Jamaican who came to the UK aged 11 to join his mother and British step-father, was imprisoned (aged 22) for 30 months for possession of Class A drug with intent to supply (and had a previous conviction for robbery). He was ordered to be deported. He had **a son with his partner, both of whom were UK citizens**. His appeal was dismissed by the immigration and asylum tribunal. On appeal, the Court of Appeal found that the Tribunal's decision was flawed and couldn't be allowed to stand. This was because the Tribunal did not give sufficient consideration to the **son's best interests**, whose welfare had to be given primary (though not overwhelming) importance; it did not make a significant assessment of Peart's private life and the fact that he **came to the UK aged 11**, had lived here for 14 years, received the bulk of his education here and his social contacts are all in this country; the Tribunal also failed to consider a probation progress report which stated that Peart showed clear signs of making positive change and **assessed the likelihood of him committing further offences as low**. The Court of Appeal allowed his appeal and remitted the case back to the Upper Tribunal for a fresh hearing.

## 2. Examples of circumstances in which the courts have found **deportation did not breach the applicant's Art 8 rights**:

- 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<sup>66</sup> 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 the public policy need to deter and to express revulsion at the seriousness**

<sup>63</sup> See for example, Theresa May, Conservative Party Conference speech, 4 October 2011; '102 foreign criminals and illegal immigrants we can't deport', Sunday Telegraph, 12 June 2011.

<sup>64</sup> Judge Devittie, Asylum and Immigration Tribunal, October 2008.

<sup>65</sup> Judge Gleeson, Asylum and Immigration Tribunal, 10 December 2008.

<sup>66</sup> 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.

**of the criminality** and for very serious crimes a low risk of re-offending is not the most important public interest factor.<sup>67</sup>

- 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**.<sup>68</sup>
- 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**.<sup>69</sup>
- 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**.<sup>70</sup>
- RG was 22 year old man who accompanied his parents to the UK from Nepal and was financially dependent on his father as a student. He was involved, with two other men, in an attack 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 in 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.<sup>71</sup>

This was **subsequently overturned on appeal**. The Court of Appeal held:

<sup>67</sup> *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094.

<sup>68</sup> Upheld by the Court of Appeal: *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10.

<sup>69</sup> *Grant v UK* (2009)

<sup>70</sup> *Onur v UK* (2009)

<sup>71</sup> *RG (Nepal)* [2010] UKUT 273 (IAC)

RG was a **physically fit and intellectually sound young man** who had **lived in Nepal in the past**. There was no objective need for his father to return with him if he was deported. Whilst the public interest in deportation is now established by the UK Border Act 2007, its content and extent in a particular case must be taken into account when assessing proportionality, by the Home Secretary and if necessary by the tribunal.

Much of the tribunal's decision had "the appearance of a search for reasons not to deport him, rather than...an inquiry into whether [automatic deportation would violate his Art 8 rights]". The fact that RG had helped push an unconscious victim into the river had to be recognised in the decision on Article 8.

The Court of Appeal did not accept that the absence of a risk of re-offending is the "ultimate aim" of the deportation regime, as the Upper Tribunal said. The Upper Tribunal erred in part in its approach and had to reconsider the deportation decision.<sup>72</sup>

- K, who came to the UK in 1978, was granted indefinite leave to remain as his parents' dependant. He was deported in 2010, at which point he was in a relationship and had six children in the UK. Since he had lived in the UK since an early age, serious reasons were needed in order to make deportation proportionate. Since 1992 **he had committed a series of violent offences**, which was a compelling reason for deporting him. He had a **limited family life** with his children, further impeded by the time he had spent in prison, and **did not have a lengthy or consistent employment history. He had married in Pakistan**, and travelled there another time: 'he was not deported as a stranger to the country.' The relationship he was in had begun only a few months before deportation. He had therefore not achieved 'a significant level of integration into British society.' **His Article 8 rights did not outweigh the risk of him re-offending.**<sup>73</sup>
- Two drug dealers had their appeal against deportation dismissed (another appeal by a man who had committed a minor sexual offence was allowed). All three claimants were **married** and had **British children**. The court ruled that although Art 8 provides an exception to automatic deportation, this does not mean that the Art 8 claims need to be exceptional. Art 8 will not only be breached in exceptional circumstances; it will be breached when it cannot be justified under Art 8(2). **The more serious the offence, the stronger the case for deportation.** Deportation must always be proportionate; there is no special principle for the importation of drugs, even Class A in significant amounts. The nationality of the children is an important indication as to where the best interest lay (*ZH (Tanzania)*) but the best interest of the children is not the determinative factor.<sup>74</sup>
- B came to the UK from Nigeria aged 3 and lived with an aunt who ill-treated him, and later in foster care. Following conviction at the age of 20 for possession of Class A drugs with intent to supply (for which he was imprisoned for 3 years) the SS ordered him to be deported to Nigeria. The ECtHR found that B's relationship with his girlfriend and relatives in the UK did not amount to family life. It was not disputed by the government that B enjoyed a private life in the UK and his various relationships formed part of and strengthened that. However, the ECtHR found that the interference with B's private life through deportation would be proportionate taking into account the **very serious nature of his offence and his several previous convictions, most of which were committed when he was an adult**. Although he came to the UK aged 3, spent the greater part of his childhood here, was entirely educated here and brought up in the care of the UK social services, "**the fact remains he is responsible for his own actions**". The Court had sympathy for the circumstances of his formative years, but B "cannot excuse his past criminal conduct by reference to his upbringing".<sup>75</sup>

<sup>72</sup> *Gurung v Secretary of State for the Home Department* [2012] EWCA Civ 62.

<sup>73</sup> *AH Khan v UK*, ECtHR, 20.12.11

<sup>74</sup> *Sanade and others v SSHD* Upper Tribunal (Immigration & Asylum Chamber), 07/07/11

<sup>75</sup> *Balogun v UK* ECtHR, 10/4/2012.