ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 27 March 2007

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Drabu
Senior Immigration Judge Grubb

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Ms N Mallick, instructed by Duncan Moghal
For the Respondent: Mr T Eicke, instructed by the Treasury Solicitor

(1) The word 'conferred' in s84(1)(f) has to be read in some sense such as 'confirmed'. (2) HC 1337 introduced a substantive change, not merely a change of emphasis or clarity, into paragraph 364 of the Immigration Rules. (3) Deportation decisions made before 20 July 2006 are made under, and on appeal are to be reviewed in accordance with, the 'old' version of paragraph 364; deportation decisions made on or after 20 July 2006 are made under, and are to be reviewed in accordance with, the 'new' version. (4) Decisions to make deportation orders and decisions to issue removal directions under s10 now need to be carefully distinguished. (5) ***In determining an appeal against a deportation decision made on 'conducive' grounds on or after 20 July 2006*** *the Tribunal should first confirm that the appellant is liable to deportation (either because the sentencing judge recommended deportation or because the Secretary of State has deemed deportation to be conducive to the public good); if so, secondly consider whether deportation would breach the appellant's rights under the Refugee Convention or the ECHR; if not, thirdly consider paragraph 364. (6) Paragraph 364 is only in issue if the appellant fails to establish a claim under either Convention; and if an appeal is to be allowed under paragraph 364 the Tribunal must identify the reasons, state why they amount to "exceptional circumstances",*

and state why they are so strong that the appellant is able to establish that his own circumstances displace the public interest. (7) Removal decisions under s 10 (as distinct from deportation decisions) carry a wider right of appeal on the ground that the discretion should have been exercised differently, but, given the terms of s 92, that right can by no means always be exercised from within the UK. (8) ***In determining an appeal against a decision (whether before or after 20 July 2006) to give directions under s 10*** *(as distinct from directions for removal of an illegal entrant) the Tribunal should first consider whether the decision shows, by its terms, that the decision-maker took into account the factors set out in paragraph 395C and exercised a discretion on the basis of them. If it does not, the appeal should be allowed on the basis that it was not in accordance with the law and that the appellant awaits a lawful decision by the Secretary of State. If the decision was made properly, the Tribunal should secondly consider whether the removal of the appellant would breach his rights under the Refugee Convention or the ECHR, and, if not, thirdly whether the discretion under paragraph 395C should be exercised differently, bearing in mind that paragraph 395C does not have the restrictions contained in the 'new' paragraph 364. The process is somewhat similar to that under the 'old' paragraph 364.*

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Turkey, who arrived in the United Kingdom on 28 January 2004. He claimed asylum unsuccessfully, and subsequently, also unsuccessfully, applied to remain in the United Kingdom as a businessman. On 11 May 2005 in the Crown Court at Gloucester, on a plea of guilty, he was convicted on indictment of two charges of sexual assault on a female and on 2 August 2005 he was sentenced to a conditional discharge for two years, required to sign the Sex Offenders' Register for 2 years and he was recommended for deportation. On 23 January 2006 the Secretary of State decided to make a deportation order against him by virtue of s3(6) of the Immigration Act 1971. He appealed against that decision. A panel of the Asylum and Immigration Tribunal allowed his appeal. The Secretary of State sought and obtained an order for reconsideration. Thus the matter comes before us.

2. This appeal was listed (together with another, which was conceded by the Secretary of State) in order to enable the Tribunal to give guidance on the approach to paragraph 364 of the Statement of Changes in Immigration Rules, HC 395 following its amendment in July 2006, and on the scope of appeals against deportation decisions taken on the ground that the appellant's deportation would be conducive to the public good, with the advantage of submissions made by counsel for the Secretary of State who was fully instructed to deal with all relevant issues.

The legislation: deportation

3. Section 3 of the Immigration Act 1971 is headed "General Provisions for Regulation and Control". Subsections (5) and (6) as in force at all material times are as follows:

"(5) A person who is not a British citizen is liable to deportation from the United Kingdom if –
(a) the Secretary of State deems his deportation to be conducive to the public good; or
(b) another person to whose family he belongs is or has been ordered to be deported.
(6) Without prejudice to the operation of subsection (5) above, a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so."

Section 5(1) is as follows:

"(1) Where a person is under 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force."

The rest of s5 relates to the procedure for deportation and contains provisions dealing specifically with those liable to deportation under s3(5)(b). Section 6 contains supplementary provisions relating to deportation under s3(6). Schedule 3 to the Act also contains provisions about deportation. We do not need to set them out.

The Immigration Rules

4. Part 13 of the Immigration Rules relates to deportation and administrative removal under s10 of the 1999 Act. We are primarily concerned with paragraphs 363 and 364. Paragraphs 363-363A summarise the circumstances in which a person becomes liable to deportation as follows:

"363. The circumstances in which a person is liable to deportation include:
(i) where the Secretary of State deems the person's deportation to be conducive to the public good;
(ii) where the person is the spouse or civil partner or child under 18 of a person ordered to be deported; and
(iii) 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.

363A. Prior to 2 October 2000, a person would have been liable to deportation in certain circumstances in which he is now liable to administrative removal. These circumstances are listed in paragraph 395B below. However, such a person remains liable to deportation, rather than administrative removal where:
(i) a decision to make a deportation order against him was taken before 2 October 2000; or

(ii) the person has made a valid application under the Immigration (Regularisation Period for Overstayers) Regulations 2000."

5. Before 20 July 2006, paragraph 364 was as follows:

> "364. Subject to paragraph 380 in considering whether deportation is the right course on the merits, the public interest will be balanced against any compassionate circumstances of the case. While each case will be considered in the light of the particular circumstances, the aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects. … Before a decision to deport is reached the Secretary of State will take into account all relevant factors known to him including:
> (i) age;
> (ii) length of residence in the United Kingdom;
> (iii) strength of connections with the United Kingdom;
> (iv) personal history, including character, conduct and employment record;
> (v) domestic circumstances;
> (vi) previous criminal record and the nature of any offence of which the person has been convicted;
> (vii) compassionate circumstances;
> (viii) any representations received on the person's behalf."

From 20 July 2006 paragraph 364 was changed by HC 1337 so as to read as follows:

> "364. Subject to paragraph 380, 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. The aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects. … ."

6. The omitted words in each version of paragraph 364 concern the transitional cases covered by paragraph 363A (above) and are not relevant for present purposes. The reference to paragraph 380 is a reference to those whose deportation would breach rights of theirs under either the Refugee Convention or the European Convention on Human Rights.

<u>The legislation: appeals</u>

7. By s82(2)(j) of the Nationality, Immigration and Asylum Act 2002, a decision to make a deportation order is a decision carrying a right of appeal under s82(1). Section 84(1) is as follows:

"**84 Grounds of appeal**

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds-
  (a) that the decision is not in accordance with immigration rules;
  (b) that the decision is unlawful by virtue of section 19B of the Race Relations Act 1976 (c. 74) (discrimination by public authorities);
  (c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;
  (d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;
  (e) that the decision is otherwise not in accordance with the law;
  (f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;
  (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

8. Section 86 is headed "Determination of appeal" and, so far as relevant, reads as follows:

"86. …
(3) the Tribunal must allow the appeal in so far as it thinks that –
  (a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or
  (b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.
…
(5) In so far as subsection (3) does not apply, the Tribunal shall dismiss the appeal.
(6) Refusal to depart from or to authorise departure from immigration rules is not the exercise of a discretion for the purposes of subsection (3)(b)."

9. We need also to make reference to the predecessors of these provisions. The appellate structure set up by the 1971 Act, and repeated with few changes (none of which were material) by the Immigration and Asylum Act 1999, did not specifically enumerate permitted grounds of appeal, although there were some restrictions on the grounds of appeal. Section 19 of the 1971 Act was, so far as relevant, as follows:

"**19. Determination of appeals by adjudicators**
(1) Subject to sections 13(4) and 16(4) above, and to any restriction on the grounds of appeal, an adjudicator on an appeal to him under this Part of this Act -
  (a) shall allow the appeal if he considers –

(i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case; or

(ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently; and

(b) in any other case, shall dismiss the appeal.

(2) For the purposes of subsection (1)(a) above the adjudicator may review any determination of a question of fact on which the decision or action was based; and for the purposes of subsection (1)(a)(ii) no decision or action which is in accordance with the immigration rules shall be treated as having involved the exercise of a discretion by the Secretary of State by reason only of the fact that he has been requested by or on behalf of the appellant to depart, or to authorise an officer to depart, from the rules and has refused to do so."

What is the scope of an appeal against a deportation decision?

10. A decision to make a deportation order against an individual is an exercise of the Secretary of State's discretion. It is clearly amenable to challenge under a number of the grounds set out in s84(1). If the Secretary of State purports to decide to deport a person who is not in truth liable to deportation, there may be a successful appeal on (at least) the grounds that the decision is not in accordance with the Immigration Rules and is "otherwise not in accordance with the law". If he makes a decision to deport a person whose deportation would breach his rights under the Refugee Convention or the Human Rights Convention, there may be a successful appeal on the same grounds (because of paragraph 380) or the ground set out in s84(1)(g). If, in making his decision, he fails to comply with generally-applicable rules of administrative law, there may perhaps be a successful appeal on the ground that the decision was "otherwise not in accordance with the law". So much is clear.

11. The question which concerns us is whether, if the Secretary of State makes a decision which is not unlawful, there is scope within the appellate process for reviewing the exercise of his discretion in taking that decision. Before the coming into force of the 2002 Act, the answer to that question was clearly in the affirmative. The Adjudicator or the Tribunal considering an appeal against a decision to make a deportation order was to allow it if it thought that the discretion should have been exercised differently. The provision relating to the allowing or dismissing of appeals in s86 of the 2002 Act, is very similar to that in s19 of the 1971 Act. But before the Tribunal makes a decision there must be an appeal, and, as we have seen, the possible grounds of appeal are set out in the 2002 Act, where the ground relating to discretion is specifically confined. The possible ground of appeal in s84(1)(f) relates only to a discretion *conferred by Immigration Rules*. We appreciate that it may well be that those words were intended merely to exclude grounds based on discretions contained only in the plethora of published policies outside the Immigration Rules. Since the decision of the Court of Appeal in Abdi (DS) v SSHD [1996] Imm AR 148 it has been clear that an appellant may succeed by

showing that the Secretary of State has failed to follow his own published policy. If that is the case, however, his decision is not in accordance with the law. The Tribunal has no power to substitute its own exercise of the Secretary of State's discretion in such cases. But that purpose would seem to be achieved by s86(6), which is a re-enactment of s19(2) of the 1971 Act and its successor in the 1999 Act. The effect of those provisions is that, if the appellant cannot succeed under the Immigration Rules, the fact that the Secretary of State has announced a policy, incorporating a discretion, will not assist an appellant who seeks, in the Tribunal, a review of the exercise of the discretion: for the discretion in question does not count as a discretion for the purposes of s86.

12. Section 84(1)(f) goes much further. By comparison with the preceding appellate structure, it appears to remove from the appellate process consideration of any discretion not "conferred by Immigration Rules". Looked at from the opposite point of view, a person who seeks to argue that a discretion should have been exercised differently apparently needs to show that the discretion is "conferred by Immigration Rules".

13. The problem is, of course, that it is difficult to see that any discretions are conferred by Immigration Rules. The Immigration Rules are, in the words of s3(2) of the 1971 Act, statements of the rules laid down by the Secretary of State "as to the practice to be followed in the administration of this Act". The discretions are conferred on the Secretary of State by the Act or, perhaps in some cases by the prerogative power that underlies it and is preserved by s33(5). In particular, the discretion to make a deportation order is conferred, as we have seen, in the clearest possible terms, by s5(1) of the Act.

14. Dealing with this issue in the course of this appeal presents some difficulties. On the one hand, the words of s84(1)(f) are clear. On the other hand, nobody seems to want them to bear their clear meaning. Ms Mallick (and she may be taken to represent any appellant in a similar situation) wishes to preserve a right of appeal allowing the Tribunal to examine the exercise of the discretion to make a deportation order. Mr Eicke, on instructions, does not take a contrary view. He points out that if the words "conferred by Immigration Rules" are given their obvious meaning, the ground set out in s84(1)(f) is entirely nugatory. There are no discretions which have the character described. If we understood him correctly, his submission was that the words of s84(1)(f) were indeed intended to exclude only those discretions not mentioned in Immigration Rules.

15. We are unaware of any principle of statutory interpretation which would enable us to disregard the only possible meaning of words used in primary legislation. On the other hand, there is no doubt that deportation appeals, in particular, have proceeded ever since the coming into force of the 2002 Act without this point being taken, and nobody wants to take it now. We are entirely unpersuaded that we should ignore the phrase or that the word "conferred" can have anything other than its ordinary and only meaning, which is "given". Indeed, the register in

which the word "confer" is used is a rather formal one: it is in our view inconceivable that the word could properly be used to attribute something to a person who already has it.

16. Bereft of assistance from the parties, it seems to us that there are two and only two possible solutions. One is that the closing words of s84(1)(f) are to be given their ordinary meaning, even though the effect would be that no appeal could be brought on the ground set out in that subsection. (Section 86(3)(b) would still have an effect, because there are (for example) discretions to be exercised in relation to the family members of EEA nationals, which could be invoked under the grounds set out in s84(1)(d). And s86(6) would still have effect in relation to discretions contained in policies.)

17. The only other solution, which we tentatively suggest, is that "conferred" in s84(1)(f) is a misunderstanding, misreading or mishearing of the draftsman's word "confirmed" at a very early stage of the legislative process. That reading would have the advantage sought by everybody: it is the discretions (whatever their origins) that form part of the process set out in the Immigration Rules that would be the subject of this subsection. But to seek to correct an Act of Parliament is a serious matter. So far as we are aware, there has never been any constitutional examination of the process by which the Queen's Printer issues printed errata changing the terms of statutes that have completed their passage through both Houses and received the Royal assent. That the practice exists, however, shows an acknowledgement that mistakes of this sort are made in the haste of the modern legislative process. So it is very far from impossible that something of the sort has happened here, even though it has not been previously noticed.

18. Those, we think, are the two alternatives. If there is a third, we should be glad to hear of it. The first alternative solution is sought by nobody and would put an end to virtually all appeals against deportation decisions, this one included. It is, however, with the greatest hesitation that we select the second alternative, and proceed on the basis that paragraph 84(1)(f) of the 2002 Act should be read as:

> "that the person taking the decision should have exercised differently a discretion *confirmed* by Immigration Rules."

19. That reading leaves open the possibility of an appeal succeeding on the ground that a discretion conferred by the Act but whose existence is confirmed in the Immigration Rules, which contain instructions for exercising, should have been exercised differently.

<u>Was there a substantive change in paragraph 364 in July 2006?</u>

20. We have set out above the form of paragraph 364 before and after its change by HC 1337 on 20 July 2006. The present appeal is one of a number in which the Secretary of State sought and obtained an order for reconsideration on the grounds including

an allegation that the change was not one of substance and that the Tribunal should therefore, in considering an appeal against a decision made before 20 July 2006, take the same factors into account as in an appeal against a later decision. Ground 1 of the grounds for reconsideration in the present appeal was as follows:

> "1. The Explanatory Memorandum to the recent Statement of Changes in Immigration Rules HC 1337 states that:
>
> '7.2 Paragraph 364 of the Immigration Rules states that the public interest will be balanced against any compassionate circumstances of the case. It does not however articulate where the public interest lies.
>
> 7.3 In line with Home Secretary's written ministerial statement of the 23 May (Official Report, Column 80WS) in relation to foreign national prisoners, this Rules change makes clear that the presumption shall be that the public interest requires deportation and that 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 European Convention on Human Rights and the Refugee Convention to deport.
>
> 7.4 This rules change is being made with immediate effect in order to clarify what constitutes the public interest as soon as possible and to maximise the protection of the public'.
>
> It is submitted that the Explanatory Memorandum makes clear that the purpose of the changes made by HC 1337 was to ***clarify*** that the public interest has always favoured deportation, and this clarification is given effect in the amended paragraph 364 by the use of the phrase 'where a person is liable to deportation the presumption shall be that the public interest requires deportation'. However, it is submitted that the public interest ***always*** required that criminals with no entitlement to be in the United Kingdom should be deported save in exceptional circumstances.
>
> It is therefore submitted that the Tribunal has materially erred in failing to take into account the principles set out in HC 1337 and to recognise the presumption that the public interest requires deportation. It is submitted that as a result of this initial misdirection in law, the determination as a whole is fundamentally unsafe."

21. As we have indicated, similar grounds were advanced on the Secretary of State's behalf in a considerable number of reconsideration applications: there can be no doubt that the view set out in these grounds was that taken by those responsible for making decisions on the Secretary of State's behalf.

22. That view is clear. It is a view that the change of wording in paragraph 364 merely clarified the existing law: it did not change it. It is, further, a view that the considerations going to the exercise of the discretion to deport were the same

before and after the change. If that is right, a number of things follow. One is that the question whether the decision under appeal was made before or after the change would have no impact on the issues to be considered. That is why this argument is raised in the present appeal, where the decision was made before the change.

23. What is said in the grounds for reconsideration, however, also goes rather beyond being an assertion about the appropriate standards of review in the appellate process. It appears also to be an assertion about the Secretary of State's decision-making process. The Immigration Rules are addressed primarily to decision-makers: so far as the appellate process is concerned, they are merely the point of reference. The Secretary of State's grounds for reconsideration must be taken as asserting that, despite the changes of wording introduced by HC 1337, the Secretary of State had not changed its practice in deciding whether an individual should be deported or not.

24. The impact of the grounds for reconsideration in this and similar cases goes further still. Whatever may be held to be the legal meaning of the Immigration Rules as published, there can, it appears, be no doubt that by these grounds the Secretary of State asserts that he intended to make no change. It follows that the explanations given to Parliament and the published explanatory note (which is cited in the grounds) are asserted as having been intended to mean that no substantive change was taking place.

25. These assertions and arguments are entirely coherent. In the light of the grounds, we expected to hear submissions about the position before and after HC 1337, and to be asked to interpret both in the light of the statements made by the Secretary of State to Parliament and in writing in the form of the explanatory memorandum. Such was not to be. At the commencement of the proceedings Mr Eicke told us that the Secretary of State no longer relied on ground 1. The Secretary of State's position now was that HC 1337 had indeed introduced a substantive change to paragraph 364.

26. Taken in isolation, that concession or withdrawal is not particularly surprising. Taken in context it is astonishing. It means that the Secretary of State was wrong when, at the time these and similar grounds were being drafted, it was being asserted that there had been no change in the practice of primary decision-making. It also means that the Secretary of State's explanations, intended, as it is asserted that they were intended, to convey that there was no substantial change, are now to be taken as asserting the opposite.

27. Both rules and statements of principle have to be made in words. Sometimes words are used with one intention, but a subsequent judicial or other decision holds them to bear a meaning different from that which was intended. But here, the change in meaning comes from the user of the words himself. The Secretary of State says that the words he used in the rule, and the words he used in explaining

it, have a meaning different from that which he previously asserted that they bore. It looks as though he knew neither what he was doing, nor what he meant to do. More seriously, it is somewhat alarming if the Secretary of State can effect a policy change by changing nothing except his own view of the meaning of his own words.

28. Assisted or not by the Secretary of State's prevarication, we have no doubt that the substantive meaning of paragraph 364 after amendment by HC 1337 is very different from that which it previously bore. The range of issues expressly falling for consideration in the exercise of the discretion to make a deportation decision in the old version is such as to suggest a general duty to look at the issues already considered in the evaluation of the human rights claim and to apply what might be termed a lower standard to them. That range of considerations does not feature in the new version, which instead introduces a presumption in favour of deportation.

29. In the absence of express contrary provision, decisions made under the Immigration Rules are made according to the rules in force at the time when the decision is made, and on appeal are reviewed on the basis of the rules as they were at the time the decision was made. Deportation decisions made before 20 July 2006 were made under paragraph 364 as it was, and on appeal are to be reviewed in the light of paragraph 364 as it was. Decisions made on or after July 2006 are made under paragraph 364 as amended, and on appeal are to be reviewed on that basis.

30. The decision in the present appeal was made on 23 January 2006 and therefore the amended version of paragraph 364 does not apply to it. Our substantive consideration of this appeal under the old version of paragraph 364 is at paragraphs 48-61.

<u>The process of decision-making and the process on an appeal</u>

31. It is clear from both s3(5) and (6) of the 1971 Act, and from paragraphs 363-364 of the Immigration Rules that the first question for a decision-maker is whether an individual is liable to deportation. So far as concerns a person who has been recommended for deportation by a criminal court, his liability for deportation has been effected by the sentencing judge. The liability for deportation as a member of the family of a deportee is parasitic upon a deportation decision made in respect of another person. But the liability to deportation on "public good" grounds needs a little elaboration. Contrary to what might be supposed, it is clear throughout that the liability to deportation does not arise from an individual's misconduct. It arises from the Secretary of State taking a view: a person is liable to deportation under s3(5)(a) if the Secretary of State deems his deportation to be conducive to the public good. In cases of this sort, therefore, the first stage is the process by which the Secretary of State decides that a person's deportation is conducive to the public good. It is that decision of the Secretary of State which renders the individual liable to deportation.

32. Now both that decision and the decision of a sentencing judge to recommend deportation are decisions importing a discretion. But they are not appealable. The decision that a person is *liable* to deportation (as distinct from the decision that he is to be deported) is not a decision listed in s82(2). So whatever view is taken of the meaning of s84(1)(f), an appellant has no scope for arguing that the discretion exercised in rendering him *liable* to deportation should have been exercised differently.

33. If the person is liable to deportation for one of the reasons set out in s3(5) and (6) (and summarised in paragraph 363), the next question is whether he should be deported. This, as we have said, is again a discretionary decision. It is to be made under s5(1) but on the basis of paragraph 364.

34. On an appeal, the Tribunal ought to consider first, whether the appellant is liable to deportation. In view of what we have already said about that, this means that the Tribunal will need to check that the Secretary of State has deemed his deportation to be conducive to the public good, or he is the family member of a person who is to be deported, or he has been recommended for deportation by a criminal court. The Tribunal ought then to go on to consider whether the appellant's deportation would breach any right of his under the Refugee Convention or the European Convention on Human Rights: if it would, there is no power to deport him, and, on its face, paragraph 364 does not apply to him. It is only if an appellant is liable to deportation, and not prevented by one of the Conventions from being deported, that the exercise of the discretion under paragraph 364 comes into the matter at all.

35. In saying that, we largely endorse the view of the Immigration Appeal Tribunal in CM [2005] UKIAT 103 and CW [2005] UKIAT 00110 that the exercise of the discretion under paragraph 364 is essentially over a wider field than the assessment of proportionality in the determination of rights under Article 8. It must be, because paragraph 364 involves the exercise of a discretion in a case where the individual *can* be deported: there is no room for the exercise of a discretion to deport a person who (because of his rights under Article 8) *cannot* be deported. With the greatest respect, however, we differ from the views expressed in those cases about the order in which the Tribunal should approach the issues. In CM at [38], cited also in CW at [37], the Tribunal said this:

> "[I]n applying Huang [2005] EWCA Civ 105 to deportation cases, as there are Immigration Rules which apply to deportation, the position under the Rules should be considered first. If the case under the Rules fails, it is very difficult to see what factors under Article 8 are not subsumed already in paragraph 364. Article 8 should then be considered with Huang in mind, but it is difficult to see how a case which fails under the Rules here could be disproportionate under Article 8. However, the Article focuses on family and private life and respect for those interests is a right which requires to be outweighed by other legitimate interests: immigration control and the prevention of crime."

36. We have little difficulty with the underlying assumption that because the discretion under the Rules covers a wider field than the assessment of the appellant's human rights, it is unlikely that a claim that fails under the rules would succeed under Art 8. It seems to us, however, that the process envisaged in CM risks ignoring the provisions about human rights in the Rules themselves. As we have shown above, paragraph 364 is (in both versions) specifically subject to paragraph 380; and it follows that the application of paragraph 364 to an individual case necessarily imports a consideration of the appellant's human rights as a prerequisite to the possibility of the exercise of the discretion under the rest of paragraph 364. We appreciate that it may sometimes be right in the interests of judicial economy to go straight to the end, and to say that a person's claim cannot succeed even at its best or even if the jurisdiction is taken at its widest. But that is not the logical way, and it is not the way that the phrasing of the Rules requires.

37. There is another reason why we think that, in an appeal, human rights issues should be treated before the discretion under paragraph 364. As the phrasing of that paragraph makes clear, the power to make a deportation decision only exists in a case when the individual's human rights do not prevent his deportation. We think it is a salutary exercise in considering the issues under paragraph 364 to remember that if the Tribunal is looking at the discretion under paragraph 364 it is *necessarily dealing with a person whose human rights will not be breached by his removal*. Taking the issues in the logical order helps to give the process under paragraph 364 its proper value.

38. In deciding whether the discretion should have been exercised differently, it seems to us that the Tribunal is bound to bear in mind the context in which it falls to be exercised at all. If there is any substance in the ground of appeal relating to the exercise of discretion, it is a ground which clearly makes reference to the Immigration Rules. The discretion which is to be reviewed is not the Secretary of State's general discretion to make a deportation order, but the discretion *considered in the context of the decision-making process set out in paragraph 364*. Paragraph 364 as it now is (after the July 2006 amendment) sets out a clear context for the exercise of the discretion in deportation decisions and in our judgment it is not open to the Tribunal to substitute a discretionary judgment save one based on the principles set out in paragraph 364. The starting point is, as we have pointed out above, that a person liable to deportation has failed to establish that his human rights (or Refugee Convention rights) prevent his deportation. Although there is still a discretionary decision to be made, the presumption is that the public interest requires deportation. The discretion to deport him will, therefore, be exercised against him unless there are "exceptional circumstances". Further, the effect of those circumstances needs to be that the individual's claims outweigh the public interest in his deportation that is deemed to arise from the conclusions about him reached so far. (An individual appellant is unlikely to be able to exploit, in an individual appeal, an argument based on the aim of consistency and fairness between one person and another.)

39. Of course each case must be decided on its own merits, but we venture to suppose that the cases where it can properly be said that the discretion to make a deportation order exercisable under paragraph 364 (as it now is) should be exercised differently are likely to be rare indeed. In reaching such a decision it seems to us that the Tribunal must set out what the "exceptional circumstances" are, why they are to be regarded as particularly strong and why they enable the individual's claim to displace the public interest.

Other removals and the appeals process

40. As we have already indicated, the part of the Immigration Rules dealing with deportation deals also with "administrative removals", that is to say removal of those liable to removal under s10 of the 1999 Act. Such persons are most often those who have overstayed their leave. We set out the relevant paragraphs of the Immigration Rules in the form which they had from 20 July 2006.

> "395A. A person is now liable to administrative removal in certain circumstances in which he would, prior to 2 October 2000, have been liable to deportation.
>
> 395B. These circumstances are set out in section 10 of the 1999 Act. They are:
> (i) failure to comply with a condition attached to his leave to enter or remain, or remaining beyond the time limited by the leave;
> (ii) where the person has obtained leave to remain by deception; and
> (iii) where the person is the spouse civil partner, or child under 18 of someone in respect of whom directions for removal have been given under section 10.
>
> 395C. Before a decision to remove under section 10 is given, regard will be had to all the relevant factors known to the Secretary of State including:
> (i) age;
> (ii) length of residence in the United Kingdom;
> (iii) strength of connections with the United Kingdom;
> (iv) personal history, including character, conduct and employment record;
> (v) domestic circumstances;
> (vi) previous criminal record and the nature of any offence of which the person has been convicted;
> (vii) compassionate circumstances;
> (viii) any representations received on the person's behalf.
>
> In the case of family members, the factors listed in paragraphs 365-368 must also be taken into account.
>
> 395D. No one shall be removed under section 10 if his removal would be contrary to the United Kingdom's obligations under the Convention and Protocol relating to the Status of Refugees or under the Human Rights Convention."

41. These provisions of the Immigration Rules have had effect since 2 October 2000. In their case, the change on 20 July 2006 was certainly not substantive. The change was to insert into paragraph 395C the words which, as we have seen, were before

that date in paragraph 364. Until then, paragraph 395C had simply contained a reference to those words in paragraph 364. Following their deletion from paragraph 364, they needed to be set out in full in paragraph 395C.

42. The "old learning", if we may so express it, on those subject to removal under s 10 was that their rights of appeal were severely limited. They could appeal on the ground that they were not in truth liable to removal, or on the ground that their removal would breach the Refugee Convention or the Human Rights Convention, but little else was available to them. During the course of argument relating to the scope of the right of appeal against deportation decisions, it emerged that the Secretary of State's view was that the scope of an appeal against a decision to remove under s10 should not be so narrowly construed. After taking instructions again over the short adjournment, Mr Eicke confirmed that the Secretary of State's view was that in an appeal against a decision to issue removal directions under s10 of the 1999 Act (which is an appealable decision under s82(2)(g) of the 2002 Act) all the grounds of appeal set out in paragraph 84(1) may be deployed, including that relating to the exercise of discretion.

43. We agree with this reading of the statutory provisions; but this is also an important concession. That is why we record it here, even though it has not immediate bearing on the matters we have to decide.

44. So far as the appellate process is concerned, two conclusions follow from it. The first is that, where the decision to give removal directions under s10 does not clearly demonstrate a proper consideration of the matters set out in paragraph 395C and the exercise of a discretion to make the decision, the decision will be one which is challengeable on the ground that it is not in accordance with the law, and the result should normally be that an appellant's appeal is allowed on that basis only, leaving the Secretary of State to make a new and lawful decision in accordance with the Immigration Rules.

45. Secondly, if the decision was procedurally proper and was one which was open to the Secretary of State to make, the appellant can nevertheless succeed in an appeal by showing that the discretion to make the decision, conferred by s10 of the Act and appearing also in paragraphs 395A to D of the Immigration Rules, should have been exercised differently.

46. We do, however, need to point out in this context that a decision that a person is to be removed by way of directions under s10 does not carry a general right of appeal from within the United Kingdom. That is because s82(2)(g) is not in the list of immigration decisions carrying that right in s92(2). But there is an in-country right of appeal under s92(4) if the appellant "has made an asylum claim, or a human rights claim, while in the United Kingdom". "Asylum claim" and "human rights claim" are phrases defined in s113 and are subject to amendments by the 2006 Act which have not yet come into force. What does appear to be clear, however, is that, for example, an overstayer who claims asylum and is refused, and appeals, may, in

addition to grounds of appeal relying on his *rights* under the Refugee Convention or the European Convention on Human Rights, deploy an argument that, even if he has no right to be in the United Kingdom, the Secretary of State's *discretion* should have been exercised in such a manner as to allow him to stay.

47. We should also add that nothing we say here affects the process in the case of the removal of illegal entrants and those refused leave to enter. Their liability to removal arises under paragraphs 8-10 of Schedule 2 to the 1971 Act: paragraphs 395A ff of HC 395 do not apply to them.

The present case

48. As we have said, the decision against which the present appellant appeals was made on 23 May 2006, that is to say while the old version of paragraph 364 was in force. Because of the uncertainty about the effect of the change, to which we have referred above, which led to the view that decisions before and after 20 July 2006 should arguably be treated similarly, it was thought that the appellant's case was itself one which would provide an up to date example of the operation of the appellate process. That view, it is now clear, was mistaken. The appellant's case is to be considered under the old version of paragraph 364: the new version of paragraph 364 has no relevance to this appeal. We are therefore concerned with whether the Tribunal panel which heard this appeal made a material error of law, as asserted by the grounds, in allowing it.

49. In making its determination, the Tribunal panel set out the appellant's history, noting that he now 21 years old and recording his claimed asylum and his application for leave to remain as a businessman. They also noted that the appellant had a number of relatives in the United Kingdom including his sister and her husband, with whom he is a partner in business (we do not know whether lawfully or not).

50. The Tribunal panel set out extracts from the Judge's sentencing remarks as follows:

> "I accept entirely that you have not committed the most serious of crimes and I accept entirely that you do not have a long criminal record. These are, in one sense, minor offences, but having said that, they are two offences of indecent assault on women which clearly caused them considerable distress. They were, in my judgment, caused by you as a result of your loneliness, your emotional immaturity and your isolation from your family in Turkey [the Judge then imposed a conditional discharge for two years]. In other words, provided you keep out of trouble, commit no further offences and do not offend again, you will hear no more about this matter. On the other hand, if within the two year period, you commit any further offences, then you will be dealt with for this matter as well."

Considering other possible ways of dealing with the appellant, the Judge expressed a concern that the appellant's behaviour had been very similar in respect of the two offences, which were committed within a period of less than two weeks. The pre-

sentence report's recommendation of attendance of a sex offender's treatment programme was not available because the appellant was then not yet 21. The Judge concluded his sentencing with the following words:

> "I think that there is a significant and serious risk were you to remain in this country, that you may commit a serious offence in the future and it is on that basis that I am making the recommendation for deportation."

There have, in fact, been, so far as we are aware, no further offences. The Tribunal panel that heard the appeal took the view that the recommendation for deportation was "no doubt at least in part" because the Programme recommended in the pre-sentence report was unavailable.

51. The panel then embarked on its consideration of paragraph 364. Having reminded itself of the appellant's personal characteristics, it continued as follows:

> "14. In undertaking what has been referred to as that balancing exercise required by paragraph 364 it is necessary for us to give considerable weight to the public interest in the light of the offences in the light of the offences for which the appellant was convicted at Gloucester Crown Court. We find that there is something of an anomaly between the imposition of a two year conditional discharge for the offences on the one hand and the recommendation for a deportation on the other hand. The primary reason given by the charge for that apparent anomaly was the concern that because the appellant could not benefit by the Sex Offender's Treatment Programme, there existed a significant and serious risk that if he were to remain in this country then he might commit a serious offence in the future. However, the passage of fifteen months has given the appellant the opportunity to demonstrate that he has learnt his lesson and has not committed any offence, and certainly not the serious offence that was of concern to the trial judge. To that extent, we must give the appellant credit for his good behaviour subsequent to the conviction.
>
> 15. We acknowledge that this appellant has no legal immigration status in the United Kingdom at the present time because his application for leave to remain as a business person was refused by the respondent on 23 January 2006. It seems, however, that notice of decision did not reach the appellant either as it was sent at the same time as the letter requesting representations against the making of a deportation order. The fact that the appellant has no legal immigration status necessarily means that, as things stand at the moment, it would be necessary for him to leave the United Kingdom in order to make an out-of-country application to return. If he is made the subject of a deportation order then, during its currency, he would not be permitted to make an application for entry clearance. Effectively, that will remove him from the United Kingdom for the currency of the deportation order. That is a significant penalty upon him. In considering whether that exercise of the power of deportation is consistent and fair as between one person and another, we have regard to the statement made by the respondent on 25 July 2006. The Home Secretary then said:

> 'We have said that where people have been given a custodial sentence over a given time, which we have not specified, at present it is one year for non-European Economic Area nationals and two years for EEA nationals – there should be a presumption of deportation. There will be cases where, in any civilised society, we will decide that we ought not to implement that because of certain … '.
>
> That statement does not lay down cast iron rules but it is guidance available to us. This appellant was not given a custodial sentence let alone a sentence of one year. That does not mean that a deportation order cannot be appropriate in certain circumstances. However, in our view, there would need to be the most exceptional circumstances relating either to the appellant himself or to the offences before we could find that a person sentenced to a two year conditional discharge could reasonably be made the subject of a deportation order. To do so would be go outside the general guidelines as they were explained to Parliament by the Home Secretary so recently. We are unable to find the existence of such facts which could justify going outside those guidelines in this case.
>
> 16. Accordingly, and having considered all the factors laid down under paragraph 364, we find that the decision made by the respondent does not represent a proper exercise by him of the discretion granted by that rule and, accordingly, is not a lawful decision. Therefore the appeal under the rules must succeed and it is not necessary for us to proceed to consider the appeal under Article 8 of the Human Rights Convention."

52. It appears that the Tribunal panel did not decide that the discretion should have been exercised differently. It decided that the decision was not lawful: that is to say, presumably, that the Secretary of State had committed some legal error in making it. What that error could have been is somewhat obscure. The statement to which reference is made was, as we have seen, one of a number of statements made about that time. It does not say that only those who have been sentenced for periods of imprisonment will be regarded as liable for deportation: indeed, it is difficult to see how it could say that in view of the clear terms of s3(5) and (6) of the 1971 Act and paragraph 363. The panel appear to recognise that in their statement that "that does not mean that a deportation order cannot be appropriate in certain circumstances". But they then appear to proceed on the basis that the deportation of a person who has been sentenced as the appellant has been is something which, save in exceptional circumstances, cannot lawfully happen. No reason for this is given at all. As we pointed out at the hearing, it looks as though the Tribunal panel construed, from a presumption that those sentenced to certain terms of imprisonment should be deported, a presumption that those not sentenced to those terms of imprisonment should not be deported. There is no justification for that construction. On the basis of it, however, the Tribunal panel clearly made their decision.

53. That, in our judgment, is sufficient to disclose a material error of law by them. We should, however, add that we have considerable concerns about their dissection of

the sentence imposed by the trial judge. Generally speaking, as it seems to us, a sentence should be seen as a whole and it should be recognised that the Judge may well have adjusted some elements of a sentence because of the presence of other elements. One well known aspect of that is the principle of totality, according to which the sentences for individual offences sentenced at the same time will be adjusted in order that the total sentence properly reflects the offender's level of wrongdoing. It may or may not be the case that the Judge's recommendation for deportation flowed from the fact that the Programme was not available. But one cannot treat those two elements of the sentence in isolation from the third element: the conditional discharge. We do not know what part the decision to recommend for deportation played in the Judge's fixing of the other elements of the sentence. The Tribunal panel come very near to disregarding the recommendation for deportation because of the way in which it came about. However, the position, which they should have recognised, was that that recommendation was made, it was made as part of a sentence tailored to the offences of which the appellant had been convicted, it was not the subject of an appeal, and it was what made the appellant liable to deportation under s3(6).

54. As Mr Eicke pointed out, there is an additional reason why the Tribunal panel should have placed no reliance at all upon the statement of which they set out a part in their determination. It was made on 26 July, well after the day of the decision, after the terms of paragraph 364 had been changed, and apparently in relation to the new regime. Even if they had interpreted it correctly, therefore, it could not have any bearing on the decision under appeal. Further again, Mr Eicke submitted that the statement to which reference is made in the Tribunal panel's determination could not be traced as having been made, or made on the date given by the panel. Mr Eicke referred us to a statement made on 3 May 2006 (before the date of the decision in the present case) setting out the possibility of change to paragraph 364 and adding as follows:

> "Those proposals would replace the current practice of considering for deportation only non-European Economic Area nationals with a sentence of 12 months or more; EEA nationals with a sentence of 24 months or more; cases in which the individual has three lesser convictions in a five year period, and all cases in which the sentencing judge has recommended deportation (Hansard, HC, 3 May 2006, Col 972)."

That statement makes it very difficult indeed to see how a person who had been recommended for deportation by the sentencing Judge could be regarded as a person in respect of whom the Secretary of State could not properly decide to make a deportation order.

55. Amongst the sometimes rather incoherent arguments put on behalf of the appellant in the written skeleton, in an attempt to save the Tribunal panel's determination is the following:

> "Alternatively the decision made by the AIT was clearly made properly on the application of Paragraph 363 and Paragraph 364. A person is liable for deportation *inter alia*, where a Court recommends deportation in the case of a person over the age of 17 years who has been convicted of an offence punishable by imprisonment. The appellant, as the SSHD noted at paragraph 19(a)(ii) [apparently of his skeleton argument although we have not been able to trace the allusion] was not convicted of an offence punishable with imprisonment but was given a conditional discharge. Therefore despite the Court recommendation the appellant was not "liable for deportation" under paragraph 363 and therefore the decision to deport was not lawful. Therefore any error of law was not material."

That argument is intelligible, but clearly wrong. It confuses the individual punishment of an offence with whether the offence is "punishable with imprisonment". Sexual assault is punishable with imprisonment and there is no doubt that the recommendation for deportation was lawfully made. Another argument raised on the appellant's behalf is that:

> "The challenge of lawfulness of a decision can be to the SSHD deeming the person's deportation to be conducive the public good. The acts must impinge on the public domain in a real senses. There must be some public interest at stake in favour of removal. Therefore the question is whether the offence is of a kind which strikes at the heart of the community? Such crimes such as Arson, Rape of a stranger, Class A/B drugs, violent robbery can be said to be crimes that impinge in the public domain, other crimes such as handling, theft are not.
>
> If the SSHD decision is unlawful under paragraph 363, then there is no need for the decision-maker to look at paragraph 364, (although it will good practice to do so if the decision is wrong under paragraph 363). Paragraph 363 is prescriptive, so whilst the words in paragraph 363 state, 'the circumstances in which a person is liable to deportation include (i) … . (iii) … The rule is in fact complete and prescribes the circumstances in which a person becomes liable for deportation. This is in contrast to Paragraph 364, which confers the discretion and how that discretion is to be exercised i.e taking all relevant factors into account, fairly unconsistently. The SSHD does not keep any statistics as to how he exercises his power under paragraph 364, and there are no guidelines provided to caseworkers as to what weight is to be provided to any particular factor, in such circumstances it is difficult to see how any decision can be made that is consistent and fair. The burden of course of showing consistency and fairness is on the SSHD. Where he is unable to do so, the challenge on the exercise of discretion is made easier. The task for the IJ is to review the SSHD decision, assessing whether he has considered all the relevant factors and accorded the appropriate weight. [s86(3) of the 2002 Act is then set out.]"

56. As we have explained above, the decision that makes a person liable for deportation is not itself an appealable decision. It is not amenable either to the grounds set out in s84(1)(f), or to a Tribunal determination of the form set out in s86(3)(b). In any event, in the present case, the liability arose not from the Secretary of State's deeming the appellant's deportation to be conducive to the public good, but from the Judge's recommendation for his deportation.

57. We are entirely unpersuaded by Ms Mallick's defence of the Tribunal panel's judgment. We must proceed to substitute a determination allowing or dismissing the appellant's appeal.

58. Both parties before us confirmed that there were no additional facts or evidence that we should take into account in making our decision on this appeal. The appellant is now aged about 22. He lived in Turkey, the country of which he is a national, until he was over 18 years old. He then came to the United Kingdom. He has been here only two and a half years, and has had no legal immigration status here. Other than his sister and her husband, the majority of his family, including in particular his parents, remain in Turkey. As we have noted, the sentencing Judge took the view that his offences were partly prompted by isolation from his family in Turkey, although we are of course unable to say whether that was part of the mitigation advanced on his behalf. He has entered into a business partnership with his brother-in-law here although there is no reason to suppose that he is entitled to engage in business or self-employment or to work whilst he is here.

59. So far as his rights under Article 8 of the European Convention on Human Rights are concerned, there will be some interference with his private and family life if he is deported to Turkey, but the interference will be minimal. He will lose the close contact with his sister and brother-in-law, but will receive instead close contact with the other members of his family. He will not be working here, but he will be able to work there, with no doubts as to the legality of so doing, in Turkey. There is no reason to suppose that he cannot maintain his private and family life in Turkey. He has a criminal conviction, but even apart from that it does not appear to us that there is anything in his case showing that he has a right to remain in the United Kingdom despite the provisions of the Immigration Rules. He is therefore not a person whose deportation is inhibited by Article 8 or by paragraph 380 of the Immigration Rules.

60. Looking now at paragraph 364 as it was at the date of the decision in this case, we take into account the same factors again. We note in addition that the appellant has been recommended for deportation, having been convicted on a plea of guilty to two offences of sexual assault. Other than the suggestion that these offences should be regarded as minor and not themselves meriting deportation (a submission in flat contradiction to the view of the sentencing Judge) no substantial reason has been given why the appellant should not be deported. We are entirely unpersuaded that the Secretary of State's discretion should have been exercised differently.

61. For the foregoing reasons, having found that the original Tribunal materially erred in law, we substitute a determination dismissing the appellant's appeal.

C M G OCKELTON
DEPUTY PRESIDENT
Date: