AC (Deportation, Article 8, Appellant) Turkey [2004] UKIAT 00122

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 24th March 2004
Date Determination notified:
2nd June 2004

Before:

The Honourable Mr Justice Ouseley (President)
Mr K Drabu (Vice President)
Mr L V Waumsley (Vice President)

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT
APPELLANT

and

RESPONDENT

For the Appellant: Ms R Chapman, instructed by Glazer Delmar
For the Respondent: Mr S Kovats, instructed by Treasury Solicitor

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of an Adjudicator, Mr R McKee, promulgated on 13th June 2002, in which he allowed the Claimant's appeal on human rights grounds against the Secretary of State's refusal to revoke a deportation order made against her. He dismissed her asylum appeal and that is not being pursued. It is acknowledged to have been false from the very start.

2. The Appellant before him, whom we shall call the Claimant, is a citizen of Turkey, now aged 29, who arrived clandestinely in England in August 1995 and claimed asylum, falsely it transpired. In September 1995, she married her fiancé, also a Turkish citizen who was then living in this country and by whom she had a daughter in August 1996. Some months later, the marriage broke down. In April 1998, she attacked a lady of 79 who, with her husband, had befriended the Claimant. She was convicted of causing grievous bodily harm with intent to do so and was sentenced to eight years in prison (reduced on appeal from ten years) and she was recommended for deportation. Her asylum claim was not determined by the Secretary of State until May 2001 when it was refused. In September 2001, the Secretary of

State signed the deportation order. In November 2001, she appealed against the refusal of asylum and the Secretary of State's refusal to revoke the deportation order, a refusal which he maintained in May 2002 when he provided the substantive reasoning for his decision. This echoed his reasons for detaining her in immigration custody immediately following her notional release, in April 2002, from her sentence.

3. In the letter of 1st May 2002, the Secretary of State referred to her immigration history, her illegal entry and her attempts to press her application to stay on the basis of her marriage, even after it had broken down. He pointed out the gravity of the offence, noting the comments of the Court of Appeal. Her time in this country had either been unlawful or in custody. He considered the Probation Officer's assessment that she presented only a low risk of re-offending, but thought that the risk was higher in view of her misleading characterisation of the attack as an act of self-defence, and her absence of insight into her behaviour. There was at that time limited contact with her daughter which, for the sake of argument, the Secretary of State accepted as constituting family life. But he concluded that her removal from the United Kingdom, in the light of the serious offence of which she had been convicted, was necessary for the prevention of crime and the protection of health and morals.

The Adjudicator's determination

4. The Adjudicator allowed the appeal of the Claimant on human rights grounds, but dismissed the asylum appeal. The Adjudicator noted evidence of what he described as a loving relationship between mother and daughter developed on the prison visits which the father, with whom the daughter was by now living, had been made by court order to accept. He referred to various parole assessments which spoke of remorse, a low or nil risk assessment of future offending, and her desire to make up for the harm which she had caused, which would prevent her committing any further offences.

5. Having summarised that evidence, the Adjudicator commented that it showed that the Secretary of State's worries about re-offending were misplaced. The Claimant was anxious to resume a normal relationship with her daughter and could not bear the separation which deportation would bring, especially as her former husband would never allow the daughter to go to Turkey to visit her.

6. He continued in paragraphs 5 and 6, paragraphs much criticised by the Secretary of State:

> "5. I found the appellant wholly credible in her feelings for [S], and was able to indicate my decision at the close of proceedings. All the evidence points to a nugatory risk of the appellant re-offending. Her offence was very grave, as reflected in the sentence, but it was a *crime passionel,* which the appellant has greatly regretted ever since. It is truly a 'one-off'. The effect upon the appellant of deportation at this point would be devastating. The hostility of her ex-husband would ensure that she would never see her daughter unless she could return to Britain, and that she could not do for at least the first three years, and perhaps for several years longer. Revocation

of a deportation order is not automatic after three years. There is a very real risk that deportation would prevent any contact between mother and daughter during the formative years of [S]'s life. I must take her human rights into account, as well as her mother's, in coming to my decision. As Dr Storey puts it in *Met Sula* [2002] UKIAT 00295, 'in the context of an appeal brought by an appellant with family dependants, the decision made on the appellant's appeal must not amount to an act which is incompatible with the human rights of any relevant members of his family'.

6. The mother-child relationship is the most fundamental of all human relationships. If the appellant were simply being removed, she might hope to get entry clearance under paragraph 246 of HC 395, to return and exercise her rights under the Contact Order which she has been granted. But deportation precludes that. In these compassionate circumstances, deportation is clearly a disproportionate interference with the family life of the appellant and her daughter. The appeal is therefore allowed on human rights grounds."

7. The Secretary of State appealed on the grounds that the matters raised in the decision letter had been ignored; (the Secretary of State, once again, had not been represented before the Adjudicator). It was wrong for the Adjudicator to have seen the offence as a crime passionel. The Adjudicator had effectively considered the merits of the deportation order. He had also omitted to deal with the fact that the father had been awarded custody of the child. She had spent nearly two years with foster parents but had been living with her father since February 2000.

<u>The Tribunal's preliminary ruling</u>

8. When the appeal first came on for hearing before the Tribunal in August 2002, counsel and solicitor were present purporting to represent the daughter in addition to those representing the mother. It is not entirely clear upon what basis the daughter's legal representatives had been instructed. However, counsel for the daughter sought to argue that the daughter should be a party to the mother's appeal, or should be allowed to intervene in it, or to argue that her human rights fell to be taken into account in deciding the mother's human rights appeal.

9. The Tribunal rejected the claim that the daughter was a party to the appeal; she had never appealed to the Adjudicator. Although her nationality status was said at that time to be uncertain, the decision against which her mother appealed was not one which could properly be made against the daughter. It was not a case in which the child's position in this country fell to be determined as a consequence of or in line with the determination of her mother's position. The Adjudicator said that as the father was now settled in the United Kingdom and as there was a Residence Order in force, she was entitled to be registered as a British citizen by virtue of section 1(3) of the British Nationality Act 1981.

10. The Tribunal concluded that as section 65 of the 1999 Act refers to the ground of appeal as being that the decision in question, relating to the "a*ppellant's*" or "*that person's*" entitlement to enter or remain, was a breach of "*the appellant's human rights*", the daughter had no appeal under section 65 because no decision had been taken which related to her entitlement to

enter or remain. The daughter could bring proceedings in the Administrative Court in respect of any assertion by her that the Secretary of State's decision in respect of her mother was a breach of her own rights; section 7 of the Human Rights Act 1998. The Tribunal rejected an argument that there was a power for the daughter to intervene in the mother's appeal.

11. It then considered whether the human rights of the daughter fell to be considered at all in the mother's appeal. It set out paragraphs 8 and 9 from Kehinde (01/TH/2668*); these conclude that, for the same essential reasoning as precludes the daughter from appealing herself, the rights at issue in a section 65 appeal were those of the appellant alone. It distinguished and explained the Tribunal decision in Met Sula upon which the Adjudicator had placed reliance. It pointed out that the passage which he quoted appeared to be in direct conflict with the starred and binding decision in Kehinde. It pointed out that the circumstances which arose in Met Sula did not arise here. We shall return to that later.

12. In paragraphs 26 and 28, the Tribunal said:

> "For those reasons, which we have set out at much too great length, we conclude that [S] has, as such, no interest in presenting her human rights in this appeal. It follows that, when this appeal is determined on the merits, we should be concerned, of course, with the circumstances of the family as a whole, but not by looking at [S's] right not to have her mother removed, if she is said to have such a right, but to look at the mother's rights. We shall be concerned to decide whether it is right to say that the mother's removal infringes the mother's human rights as a whole – including any right to be with [S].
>
> No doubt when the appeal is heard, on which we shall give directions shortly, there will be evidence about the daughter's position and the mother's relationship with the daughter as it was at the date of the decision. We emphasise that we are not seeking to exclude evidence of such matters, but in a case where it is not suggested that the removal of the mother is, of itself, something which is necessarily inhibited by the daughter's position, the daughter's own human rights do not fall to be taken into account at all."

The Judicial Review

13. Judicial Review was sought of that last ruling. Jack J gave judgment on it in R (AC) v IAT and SSHD [2003] EWHC 389 Admin in March 2003. The judgment says (paragraph 24):

> "Section 65 makes plain that an appeal under it is on the ground of a breach of the appellant's human rights and that this is the question to be examined and that this is the ground on which the appeal may be allowed. The appeal is not concerned with the human rights of others. To that the proviso must be added that the human rights of others may impinge on the human rights of the appellant. It would therefore be more complete to say that appeals under section 65 are directly concerned only with the human rights of the appellant, but may become concerned with the human rights of others in so far as they impinge on the human rights of the appellant."

14. In paragraph 32, Jack J draws attention to the fact that the impact of events on the parties to the relationship which constitutes family life may be different depending upon which individual is being examined.

> "The consequences for a mother of losing contact with her child will be quite different to the consequences for the child of losing her mother. That is in part because one is a child of a particular age and development whereas the other is an adult. It is also because the relationship of child to mother is not the same as that of mother to child. There will be those differences even where the relationship is equally strong on either side. But it may not be equally strong. Thus it is possible that a mother might be relatively indifferent to her child, while the child very much needs its mother." He continued: "If a child will be distressed, perhaps harmed, by its separation from its mother, the impact of that on the mother is something to be taken account of in considering the mother's position. In that way the child's position has its impact on the mother's position."

15. He concluded in paragraph 38:

> "I conclude that the Tribunal was right in deciding that it was not primarily concerned with the human rights of S. The grounds of appeal under section 65 are restricted to breaches of the human rights of the appellant. The human rights of another person will only be relevant if a breach of them impinges on the human rights of the appellant. I also conclude that the Tribunal was wrong if, as I think that it did, it concluded that in considering the rights of the appellant, AC, under Article 8 it should take no account of the impact of the proposed deportation on S. On an appeal under 65 the adjudicator and the Tribunal should take account of the impact of the proposed deportation on the family life of any person with whom the appellant has established a family life."

16. There is some scope for debate as to what this judgment decides in the light of paragraphs 33 and 34 which could be said to run counter to what is said in paragraphs 24 and 32. The first part of paragraph 38 might be thought to sit ill with the last part. The Order does not directly quash or uphold the ruling and no order as to costs was made. It quashes paragraphs 26 and 28 of the Tribunal's ruling in so far as they conflict with paragraph 38 of the judgment. There was some debate before us as to what the judgment decided and, in any event, as to what the true position in law is.

<u>The relevance of rights of those who are not appellants</u>

17. It is not necessary to set out the statutory provisions; they have been summarised above. We regard it as clear that the effect of section 65 is to require the Adjudicator and Tribunal to decide whether or not the decision breaches the appellant's human rights and not whether it breaches the rights of others who are not appellants. An appellant's human rights are not breached by a decision relating to his entitlement to enter or remain simply because the rights of someone else who is not an appellant may be breached by that decision. That other person has the ability, if a victim, to bring proceedings in the Administrative Court under section 7 of the 1998 Act. It may be cumbersome, but it avoids an appellant making claims related to someone else who may be unaware of what is being said, or who may disagree with it. A child of divorced or separated parents may be in a particularly difficult position in this respect.

18. That is not to say that the position of others is always irrelevant. As the Tribunal pointed out in its ruling on this matter, the impact on the human rights of a third party may be relevant in this way. If their return to the country to which it is proposed to remove the appellant is precluded because that would put their Article 3 rights there at risk, that may be very material to the degree to which they might be able or unable to return and hence to the degree of interference with the appellant's rights which the latter's removal might entail. We also accept, as Jack J pointed out in AC, that although the right to family life and the effect of interference on it is examined, under section 65, from the viewpoint of the appellant, the impact of separation on another may cause distress or anxiety to the appellant and that indirect impact on the appellant should be taken into account. It is right to recognise that although some family relationships may involve complete reciprocity, others, and parent-child relationships are the obvious example, may be very different depending upon the person from whose viewpoint the matter is examined.

19. Although there was room for some argument before us as to the meaning of the judgment, we consider that, read as a whole, it is accepting the point that an appeal under section 65 must be determined by whether or not the decision breaches the rights of the appellant in all the circumstances. We agree with Jack J's observations if we are correct in our understanding of them; they are in line with Kehinde and with the paragraphs of the ruling referred to in the Order.

20. We do not accept the submissions of Miss Chapman, who appeared for the Claimant, that the Adjudicator was correct. She submitted that the daughter was a dependant to her mother's appeal and that her human rights were before the Adjudicator as a dependant, that no legal distinction was drawn in AC between those dependants whose immigration status or entitlements depended on the appellant, who were therefore appellants, and those dependants whose status or entitlements were not so dependant. She said that the daughter came within the category of those "*directly affected*" by the decision whose human rights fell to be considered according to Met Sula.

21. True it is that, in what the Adjudicator described as an oversight, the Secretary of State refused the daughter's application to remain in the United Kingdom as a dependant of the Claimant, and the daughter featured in the Claimant's statement of additional grounds for appealing, but the Adjudicator did not treat her as an appellant and accepted the Claimant's contention that the daughter could not be removed from the United Kingdom without leave of the court because of the Residence Order pursuant to which the daughter lived with the father. This restriction was a necessary component of the Claimant's Article 8 case. The Adjudicator set the daughter's position out correctly as Mr Kovats for the Secretary of State accepted; she is entitled to stay. The daughter's status is not affected by the decision on her mother. She is not an appellant, nor could she be. She is not liable to be deported with her mother under sections 6 and 3(6) of the Immigration Act 1971 and no such notice has been given in respect of her.

22. Section 74 of the 1999 Act, which deals with the disclosure of grounds of appeal and the one stop notice provisions, refers to "*relevant member of his family*" as those upon whom the Secretary of State must serve notice requiring them to state any additional grounds which they may have for wishing to stay in the United Kingdom. By section 74(8), the Immigration and Asylum Appeals (One-Stop Procedure) Regulations SI 2000 No 2244, regulation 6(a) defines the relevant decisions and those people. The decision here is not one of those mentioned; section 74(3) (a) relates to a deportation order under section 3(5) of the 1971 Act.

23. Met Sula does not assist in this case. The passage relied on by Miss Chapman and by the Adjudicator is at odds with the starred decision in Kehinde and should not have been applied in that way. It has not been uncommon for that passage to be cited to urge a result contrary to the effect of Kehinde. It is to be hoped that that will cease. The decision was concerned in certain passages to indicate how dependant appellants should be referred to, but as the Tribunal pointed out in its preliminary ruling here, those remarks were both obiter and not applied consistently by the Tribunal in Met Sula itself. It was also concerned with the impact of the irremovability of someone other than the appellant on the human rights of the appellant. If a third person cannot be removed without breaching that third person's own rights, that irremovability and the rights which give rise to it become relevant in that way to the assessment of the existence of a breach of the appellant's human rights. It is in that context that what was said in Met Sula can be reconciled with Kehinde and is the position which arises here.

24. However, that is not the way in which the Adjudicator understood the position or applied it. His reliance on a partial quote and misunderstanding has led him to make an appraisal not of the appellant mother's human rights but of her daughter's as well. His decision is erroneous in law in that respect.

25. We point out that the appeal before the Adjudicator and us is not an appeal against the refusal to revoke the deportation order as such. An appeal on that basis, under section 63(1)(b) of the 1999 Act can only be brought once the appellant has left the country; section 64(3). That is important because the basis of such an appeal under the Immigration Rules is somewhat wider than the ground under section 65. It is in that context that the comment in Singh v IAT [1986] 2 All ER 721 HL about the potential relevance of the interests of third parties in a deportation appeal need to be considered; see now paragraph 390 of the Immigration Rules which deals with the revocation of a deportation order.

26. We therefore consider the Secretary of State's appeal and the Claimant's resistance to it on the basis that it is only her human rights, essentially those under Article 8 relating to her relationship with her daughter, which are at issue. When the appeal came on again before the Tribunal, there was no further attempt by the daughter to be represented or to claim to be a party, and no steps had been taken to raise a claim in the Administrative Court on her behalf.

The further material

27. The Claimant had however sent further witness and other material to the Secretary of State, which the Tribunal had before it. The evidence related to the daughter's welfare and the progress of the mother's level of contact with her. She had been released from immigration detention in April 2003 and her contact with her daughter had developed since then. The Claimant gave evidence about how her relationship with her daughter was progressing and about the difficulties she experienced with her former husband over contact. It was agreed that on the appeal it was necessary for the Tribunal to consider all the up to date material which bore upon the relationship between the mother and her daughter.

28. The Secretary of State responded to the further material which had been sent to him in a letter dated 18th March 2004. He maintained his view that deportation was a proportionate interference with the Claimant's family life and indeed that even taking into account the rights of the daughter, he did not consider that deportation was disproportionate. He relied strongly upon the gravity of the offence.

29. There was an issue however as to the relevance of the latest letter from the Secretary of State. It was contended by Miss Chapman that it should not be considered by the Tribunal because it post dated the decision under appeal notified on 6th November 2001 and the reasoned letter of 1st May 2002. She described it as inappropriate for further evidence and reasons to be given, and took issue with them. We do not accept that argument in principle; whether the reasons given are sound is another matter. It seems to us bizarre that the Claimant should rightly be able to give evidence as to the current position and send it to the Secretary of State to see if it changed his mind, yet seek to preclude any assessment of it by him being taken into account. The comments which he makes upon the material are comments which for better or worse can be made by his advocate or they can be the subject of further evidence from the Secretary of State, but there can be no doubt but that the views in the letter are not the uninstructed views of those who happen to be present in Court. Taking account of them through the letter does not mean that a fresh appealable decision is being considered. It has the advantage that in so far as there have been changes of facts which significantly undermine his earlier consideration of proportionality, there is an up to date assessment of proportionality by the person who is the primary decision taker.

30. We now turn to the merits of the appeal having delineated its scope in the light of the first error by the Adjudicator.

The framework of the decision

31. We accept Mr Kovats' submissions as to the framework for our decision drawn by him from Samaroo v SSHD [2001] EWCA Civ 1139. Is any provision of the ECHR engaged? There was agreement that at least Article 8 was engaged through the Claimant's family life with her daughter. Would anything short of deportation achieve the Secretary of State's objectives?

The contrary was not seriously contended in the general sense that it was acknowledged that "*the objective of preventing crime and disorder is sufficiently important to justify limiting a fundamental right, and that the deportation of those convicted of serious criminal offences... is a measure rationally connected to that objective*", (Samaroo para 20, Dyson LJ). It was contended, in particular, by Miss Chapman that the Adjudicator's assessment of the offence and the risk of re-offending should not be interfered with either on its merits or as a matter of the tribunal's powers, and that was very relevant to whether the degree of interference with the Claimant's rights was proportionate. Would deportation be disproportionate in the light of the interference with the Claimant's Article 8 rights? There was an issue as to precisely how that should be approached.

32. It is convenient at this stage to deal with Miss Chapman's contentions about the limits on the power of the Tribunal to re-examine the Adjudicator's conclusions about the significance of the offence and the likelihood of re-offending. Miss Chapman submitted that before interfering with the Adjudicator's conclusions we had to be satisfied that there were objective grounds upon which we ought to conclude that a different view was the right one; Subesh v SSHD [2004] EWCA Civ 56 para 44. Mr Kovats submitted that the test was satisfied here because the Adjudicator had clearly erred in his approach to the offence and offender, and so a fresh appraisal was called for. As will become apparent, we have concluded that the Adjudicator made a mistake of law in his characterisation of the offence and of the offender. His appraisal is legally inadequately reasoned and is erroneous in law because it proceeds upon a fundamental misunderstanding or omits the consideration of significant and relevant factors. Once that has happened, the question for the Tribunal is the conclusion to which it should come given that the appraisal below is not one which it can adopt. That sort of error is outside the range of circumstances to which Laws LJ's remarks in Subesh were being addressed. Laws LJ was addressing what is an important issue as to the approach to error of fact which falls short of being an error of law. He was not purporting to curtail the error of law jurisdiction. Either way, the Adjudicator determination requires re-consideration by us because objective grounds drive us to a different view. In any event, the Tribunal has to reach the decision overall afresh because the Adjudicator has adopted an erroneous approach to the Claimant's appeal on Article 8, as we have explained and it is accepted that there is fresh material for us to take into account after the date of his decision.

The assessment of the offence and the Claimant

33. The components of the Adjudicator's assessment of the offence and the offender, of which the Secretary of State complained, are the reference to it being a "*crime passionel*", a description which Miss Chapman conceded was at least unhelpful, the view that the Claimant has regretted it ever since, that it was a one-off and that all the evidence pointed to the risk of re-offending being nugatory. All these were significant inputs to his assessment of proportionality.

34. Some months after the Claimant had split from her husband in early 1997, she met an elderly couple; the wife was 79 and the husband 73 Or 74. She was 23. This couple befriended her and invited her to their home on number of occasions. She had started seeing the husband occasionally on his own. From the judge's sentencing remarks, the husband appears to have taken something of a shine to her. On one such occasion, she asked the husband, who said that he had been invited to her flat for sex, to wait for her somewhere while she did some shopping. She knew that the husband would therefore not be at his home and would not return there soon, because he would instead be waiting for her. She went to their house where the wife was alone. She attacked the old lady about ten minutes after arriving, in what the judge described as a highly pre-meditated attack.

35. From behind, when the victim was off-guard, she threw a curtain over the victim's head. She beat the victim, tried to strangle her, hit, punched and bit her. She tried to gouge out her eyes. In response to some resistance, she grabbed the victim by the hair and repeatedly knocked her head against the door frame rendering her unconscious. The victim was in hospital for two weeks, two days of which were in intensive care. She said that the Claimant had been her assailant.

36. It was plainly a very serious offence and the sentence of eight years, albeit reduced from ten years on appeal, shows that to be the case for a woman of 23 with no known previous convictions and a very young child. The Claimant had pleaded not guilty on the basis that she had not done it, had not been there, and knew nothing about the allegations made by the husband that she had offered him sex. The DNA evidence arose from contamination. The victim and her husband were lying. But her own evidence on oath was disbelieved. She maintained her story on appeal. She did not appeal against the recommendation for deportation. She showed no regret.

37. A psychiatric report prepared for her sentencing hearing concluded that if she had committed the offence that would be a "*bad prognostic factor*" for the assessment of the future risk she posed. In all other respects she was normal and of above average intelligence. All the other factors including her personal history were good factors "*meaning that apart from the alleged offence she is unlikely to re-offend*". But, we note, she <u>had</u> committed the offence. The PSR faced the same problem that the Claimant denied having committed the offence, although she expressed sympathy for the victim. It concluded that there did not appear to be any motivation for the offence nor any previous indications that she could be a danger, leading to the conclusion that her actions were "*uncharacteristic*".

38. After conviction, she would understandably have had parole in mind at the earliest opportunity. A parole assessment report of 2001 prepared in prison, upon which the Adjudicator relied, states that her version of the offence was markedly different from the prosecution's. The author speculated that a possible motive for the attack was that, following her divorce, the Claimant wanted the victim out of the way so that she could pursue a relationship with the husband so as to advance her immigration status. He recounts the Claimant telling him that she had told the victim that the husband was

making unwanted advances to her, whereupon the victim attacked her with a knife against which she was forced to defend herself by pushing the victim away, which caused her to fall and hit her head. She had had no intention of hurting her. She was persuaded to plead not guilty when she had wanted to plead guilty. Her prison behaviour had been excellent. The Probation Officer said that although the fact of conviction of a very serious offence meant that there was a medium risk of re-offending and of danger to the community, a low risk assessment was appropriate following interview and discussion with others. She was desperate to be re-united with her child and her concern for the victim was genuine. He would have made a positive recommendation for release into the community.

39. It is difficult to avoid the conclusion that that assessment is based solely on the Claimant's account. The description of the attack accepted by the jury could not possibly have involved self-defence by the Claimant; the injuries were not consistent with what the Claimant describes as a push leading to accidental head injuries; the genuineness of the concern could not sensibly be assessed without the Claimant acknowledging what she actually did. Regret and sympathy for someone unintentionally hurt by a push given in self-defence against a knife is very different from regret and sympathy for someone who was subjected to a planned, unprovoked and seemingly motiveless attack, of the degree of violence sustained here. Neither at trial nor at appeal had the Claimant shown any remorse. She was in fact still continuing to lie about the attack, and to distort and minimise what she did.

40. The Adjudicator also relied on an assessment for deportation of November 2001. This describes how polite and helpful the Claimant has been in prison and the educational opportunities of which she has taken advantage. She had already obtained a degree in Turkey. It states that she has very much accepted responsibility for the offence, regrets very much ever going to see the victim but thought that she was doing the right thing because of the husband's advances. She again said that she reacted in self-defence to a quite violent attack by the elderly lady, and had pushed her away, causing her to fall. It was the Claimant's fault, she said, for going to see the victim at all to speak to her. She felt great remorse, and the report described how she seemed a very sincere and genuine person; the assessor could see the depth of remorse in her face and eyes. He had no doubts that she would never re-offend again.

41. The assessment make no reference at all to the prosecution case which was accepted, to the lies told at trial that she had not been there at all and does not contemplate the variance between what the Claimant said and the medical evidence which included evidence of gouging and biting. It is simply untrue for the Claimant to contend that she acted in self-defence or that she merely pushed the victim away causing her to fall. She did not even try to say that what had started out as self-defence changed into a sustained and vicious attack against an old lady through a loss of her temper and self-control. This assessment of remorse and risk is based on the acceptance of continued lies by the Claimant about what she did, and why. She may have come to believe her own lies; the assessor certainly did. The Adjudicator could place no sensible reliance on it.

42. The material simply confounds any suggestion that the Claimant has shown regret ever since the offence. In reality, on that material it is difficult to see that she had ever done so. It is impossible to say that the evidence points to a nugatory risk of re-offending. Either there was no usable risk assessment or the indications were that there was some degree of risk, drawing on the psychiatric and probation reports to the extent that they refer to the position in relation to a very serious offence. Accordingly, it cannot be said that this was a one-off offence; it was an unexplained, seemingly motiveless but planned, sustained and vicious attack on an elderly lady. "*Crime passionel*" it was not; if by that phrase the Adjudicator had in mind the possible motive of doing away with the victim to advance the immigration status of the Claimant, it would have pointed to a very dangerous person, although an attempted murder charge was dropped.

43. The Tribunal has had two further reports provided to it. The first is a short letter saying that since her release on bail, the Claimant has complied with all the requirements of her licence. The second is a psychologist's report of October 2002, from Ms Crassati commissioned on behalf of the Claimant, and based upon documentation which included the Court of Appeal judgment and a two and a half hour interview with the Claimant in prison. It was asked to address the question of risk in particular. The report refers to the judgment and then provides, in considerable detail, the Claimant's version as summarised above from other reports. She explained the curtain found on the old lady by saying that she had put it there to cover her up because her skirt was open while she was lying unconscious. She had intended to go to the police but had changed her mind so as to see her daughter. Having changed her clothes and calmed down, she collected her daughter and went home. The police came early the next day and she told them that she had done it.

44. Her solicitors strongly advised her to plead not guilty and she tried to change solicitors; but she was bewildered and frightened; she was not aware that she could have pleaded guilty in court. It was her solicitors who wished to appeal and told her what to say.

45. Within the context of her account, Ms Craissati thought that there was no real attempt to avoid responsibility. The Claimant seemed to view her actions as naïve and misguided. She expressed apparently sincere concern and was not annoyed at the victim for lying about how the attack had occurred. But she was unable to explain the bite marks. She rejected the possibility that she had some immigration related motive for the attack.

46. On the HCR 20 Checklist of risk factors she scored extremely low, (assuming this to have been a first offence for which there was only the Claimant's word). These factors chiefly related to chronic anti-social behaviour. On the Psychopathy Checklist, which had to be used with extreme caution with female offenders, the report said:

> "There is also very little evidence for psychopathic personality traits such as cold, callous and disregarding attitudes to others, superficial emotions, lack of remorse or failure to accept responsibility for her actions. Clearly she may be lying about

> her entry into the country and the offence, but there is no suggestion that lying and manipulation are pervasive traits.
>
> Denial of offence behaviour is not considered to be a significant predictor of future violence risk, unless it is associated with pervasive psychopathic trains, as described above. Thus denial – or distortions in the offence account – is absent from all well established predication tools."

46. In her summary, the psychologist says in relation to the differing account of events:

> "Ms [C] provides a detailed, measured and vivid account which lends plausibility. It is possible that the level of physical struggle was greater than she described or recalled. However, I fully accept that she may be presenting a well rehearsed lie."

47. The report says that the victim's account makes motivation difficult to discern, for the Claimant is an attractive woman who could have remarried easily when she was free to do so, which she had not been at the time of the offence. The Claimant was not the sort to carry out an ill-considered, reckless and impulsive plan. It was recognised that uncertainty regarding motivation was very unsettling; but motivation was only related to risk in so far as it reflected underlying traits. Denial and distortions were not an indicator of risk; any evidence based approach would lead to the conclusion that she posed a low risk of future violence. The HCR 20 Checklist, which did include the Psychopathy Checklist, supported that, as did the conclusions of other experienced assessors. She had no antagonism towards the victim and if there were an immigration motive, resolution of that would remove that risk element. She had not been manipulative in prison. There was no contrary evidence or special factors to override that conclusion.

48. Miss Chapman submitted that it would be quite wrong for the Tribunal, whose area of expertise does not include the assessment of the risk of re-offending, to substitute a different view for those of the three experts, and of the Craissati report in particular. She points out correctly that the Home Office Parole Unit granted parole at the earliest date and would have applied criteria which required them to focus on the risk of re-offending. Mr Kovats submitted that there were flaws in them of varying degrees which we were obliged to take into account.

49. We have already made comments about the difficulties of taking the two earlier assessments before the Adjudicator at face value. We recognise that risk assessment is not our area of expertise but we are not obliged to accept any expert report at face value and we are entitled to reject the evidence or assessment contained in it if there are proper reasons for doing so. The reasons for rejecting the conclusions of the first two, which we have spelt out, involve no more expertise than reading the reports and pointing out the flaws in the factual material upon which they are based, and the factors which they say are relevant but which are considered on a false or wholly incomplete basis.

50. We now turn to the 2002 Report of Ms Craissati. Again, taking the comments and criteria which she set out, it is not easy to see how the conclusion is at all sustainable at least without considerably more

explanation. We have set out the description of psychopathic traits which Ms Craissati provided and now test the evidence in relation to it. It is impossible to deny that the offence was callous. It was, as the sentencing judge pointed out, "*highly premeditated*". This was not criticised in the Court of Appeal. On the prosecution case which the jury accepted, it clearly was; it is only the untruthful later explanation of the Claimant which suggests otherwise. There are no actions which suggest any remorse; she pleaded not guilty, persisted in an appeal, and subsequently changed her story to one which involved a falsely minimised admission of responsibility for injuries somewhat less than she in fact caused.

51. She has not accepted responsibility for her actions; the report refers to her accepting it in the context of her version but that version is untrue. She blamed the husband for his advances, the victim for attacking her, her former solicitors for preventing her pleading guilty and appealing on her behalf (although neither her PSR nor the psychiatric report contain any hint of that), her husband for making her make what she accepted later was a completely false asylum claim and she takes no responsibility for what she, as an educated and intelligent middle class woman, must have known was an illegal entry into this country in the back of a lorry.

52. Miss Chapman said that it was not surprising that a twenty year old would go along with the suggestion of her fiancé and someone who appeared to be an interpreter about making and signing false claims of torture and political persecution. She had not made a false statement at interview because she had never been interviewed. She disavowed the claim before the Adjudicator for the first time because there had been difficulties in obtaining legal advice in prison and a change of solicitors from those who had been representing both her and her husband. This is not very persuasive; the Claimant is an intelligent, well-educated, middle class woman and was at that time too. We do not think that her age is of any great weight in this. Grounds of appeal were lodged by her present solicitors in November 2001 repeating the allegations, although they say that they did not obtain a signed statement from her and that they were doing what they should do in her interests at a time when instructions were difficult to obtain. She could have withdrawn long before the appeal was lodged and long before the appeal hearing, if honesty had been her aim. She knew she had gone along with a wholly false claim following an evidently illegal entry.

53. She lied persistently about her involvement in the offence to the Courts, to the Probation Service, and medical advisers, and also about her asylum claim which she was still allowing to be pursued in November 2001. She persisted in her marriage application after her marriage had broken down, pursuing both that and her asylum claim in solicitor's letters of November 1997 and March 1998, even though her husband had told the Home Office in July 1997 that the marriage had broken down; her material in relation to contact proceedings says that she left him in January 1997. The decree was made absolute on 8th July 1998, according to her chronology in child care proceedings, just some two and a half months after the offence. (She appears to have told the psychologist that at the time of the offence the divorce was a long way from being settled, as part of her puzzlement at the

speculated immigration related motive.) It is difficult to believe that she was telling the truth when she said that she did not know that there was anything untoward about her journey in the back of the lorry, by which she entered, until her papers were taken off her by someone or that having a tourist visa for Germany was not a sufficient basis for legal entry into the United Kingdom.

54. We are not persuaded by that report in view of the significance of the factors which it identifies as relevant to risk and in respect of which there is readily available material which contradicts what the Claimant said and which on the face of it requires explanation as to why the conclusion could be reached in the light of it that there is a low risk of future violence. It makes the comment that the uncertainty over motivation for the offence is very unsettling of greater significance.

55. It is difficult for us to come to any very clear conclusion as to what the level of risk actually is. Certainly there is no sound evidential basis for an assessment of a low level of risk; what there is suggests a significantly higher level of risk. There is either no motive for a vicious and planned attack on an elderly lady who had befriended her or the motive was to advance her immigration status. But what she says about it is untrue. The Claimant's statement says only that she committed a terrible offence and that if there were anything which she could do to make up for the harm she has caused to the victim and to her own daughter, she would do it. That does not advance matters.

56. Mr Kovats submitted that even if we were to conclude that this was a case in which there was clearly no more than a low risk of re-offending, nonetheless deportation was still in the public interest and achieved a legitimate objective in relation to crime and disorder and the protection of the health, rights and freedoms of others. He relied upon Goremsandu v SSHD [1996] Imm AR 250, in which the Court of Appeal held that it was open to the Secretary of State to decide that certain offences were so serious, in the sense of being sufficiently repugnant to the generally accepted standards of morality that the continued presence of the individual in the community was unacceptable, irrespective of a propensity to commit further offences, that there was a proper public interest served by the deportation. That case involved incest by a father with a teenage daughter and fell within the category of morally repugnant offences. As Miss Chapman pointed out that is not the same types of offence as the one which we are dealing with, but Samaroo illustrates that the application of the principle is not confined to cases which are morally repugnant in that way. Samaroo was convicted of serious class A drug dealing offences, and was not considered likely to re-offend. The Secretary of State had a general policy of deporting those convicted of such offences because of the gravity with which he viewed them.

57. The Secretary of State's letter of 1st May 2002 does not identify any statement of policy as such but says that there are certain types of offence which he regards as particularly serious, essentially those involving violence, sex, drugs and arson. The sentencing Court regarded the offence as serious and there was no appeal against the recommendation for deportation. We

regard it as obvious that a serious violent assault upon an elderly woman, with intent to inflict really serious harm, falls within those categories of offence which are sufficiently repugnant to generally accepted standards that the deportation of the Claimant serves a legitimate public objective even if she had a no or a low risk assessment. It is of the moral equivalence to serious drug dealing or serious sexual offences, particularly when the circumstances of this particular offence and offender are taken into account.

58. However, the Claimant's deportation is acknowledged to engage her rights under Article 8 because of the family life which she has with her daughter. Whether deportation is disproportionate depends on the circumstances of that relationship measured against the public interest which we have already discussed.

Article 8

59. The Claimant married in October 1995 and her daughter, S, was born in August 1996. She says that she left her husband because of his violence in early 1997 and took her daughter with her. When she was arrested in April 1998, her daughter went to stay with foster carers who brought S to see the Claimant two or three times a week and S was allowed to stay for a whole day once a week. After sentence, in January 1999, S was brought to see her once a week and stayed for the whole day once month. But in February 2000, S went to live with her father who appears to have been looking for her and who obtained a Residence Order for her. There was a Contact Order for the mother which permitted her to see S once a week in Holloway. She recounts the difficulties which she says the father made over bringing S for visits and preventing her telephoning S, with various excuses. She obtained a Court Order in July 2002.

60. After her release from immigration detention in April 2003, she went to live initially with the foster carers, who then acted as go-betweens in trying to arrange meetings between mother and daughter because the father was hostile to greater contact. A new Court Order provided for greater contact in May 2003, varied in October 2003 to three hours on Wednesdays and six hours on Saturdays, with continuing telephone contact. The father had been difficult in keeping to the arrangements, refusing to answer the door or telephone and so direct collection from school was arranged. The Claimant says that the father has tried to turn S against her and that means that S only shows affection to her when away from where she lives. The father has brought his mother over from Turkey to help look after S when the father is away on work, which he is quite often. The Claimant complains that the grandmother is elderly, ill-educated, cannot speak English or much Turkish, but only Kurdish, and cannot help with S's homework. Her immigration status is uncertain as she has no right to stay. In January 2004, the Claimant obtained an Order for staying contact. Although she describes a number of difficulties which the father and his mother have created in the difficult relationship, the Claimant has been able to maintain contact with S and have her to stay. The Claimant accuses them of saying that the father will be angry if S stays with the Claimant and causing distress to S when she does try to do so, by various tactics. Much of her statement was devoted to

her complaints about the father rather than to her relationship with her daughter.

61. She pointed out that the Court had ordered the father to surrender S's passport and not to take her abroad. However, she also says that such is the father's antagonism to her that he would never bring S to Turkey to see her mother or allow her to go there, so that deportation would mean that she would never see her daughter again. It would be very difficult to obtain any such Order if she were living in Turkey and to enforce it. Even telephone contact would become very difficult in view of the obstructive tactics which could be readily exploited and which it would be difficult to enforce against effectively from Turkey.

62. She gave oral evidence before us in which, despite her continued complaints against her former husband, she said that she saw S on Wednesdays, collecting her from school and taking her to her father's three hours later and had for two months or so been able to have S to stay from Friday afternoon, from school, until Saturday 4pm. There had been problems with her being frightened of her father and grandmother who were against her staying, but those appeared now to have been overcome. She is now trying to get full weekend staying. She is looking to re-build her relationship slowly and eventually would like S to live with her. There is a growing demonstration of affection from her daughter after a hesitant start. They do various outings together and other things that parents and young children do at bedtime. They talk; she knew the details of S's life. The mother says that S is the most important thing in her life and that she would suffer endlessly if she were unable to see her daughter again. She thought that her daughter would suffer too if she were solely dependant on her father and grandmother for her upbringing because the details of her life were not important to them.

63. The Claimant also produced statements from the foster carers, two of which had been produced to the trial or sentencing Court explaining how mother and daughter had been affectionate when the mother was on remand. The third was recent and had not been before the Adjudicator. It described the love and affection between S and her mother but it also expressed concern about what they said was physical abuse and a lack of care for S from her father and grandmother.

64. A CAFCASS Report, with addendum of January 2004, rehearses the history of the relationships between the father, mother and daughter and the various court hearings. It provides support, along with various Orders, for the Claimant's evidence that there has been, through anger and negative feelings towards her from the father, a lack of co-operation and instead a degree of obstruction to her endeavours to establish a relationship with S. The Report concluded that S felt inhibited in showing affection to her mother in the reporter's presence but when off-guard showed attachment. S's needs, physical, educational and emotional were being appropriately looked after, but she was torn in her loyalties between the adults in her life. She was aware of the attitudes which father and grandmother had towards her mother. It was said that if she continued to be exposed to those views it would be damaging to her and, to avoid that leading to a complete

breakdown in her relationship with her mother, it might be necessary to transfer residence to the mother. There was a risk that the relationship with the mother would break down unless S felt free to visit and enjoy visiting her mother. It was not clear that the father placed S's interests above his own.

65. Neither in that Report nor in the addendum, nor in any evidence from the Claimant was there any support for the suggestions of physical abuse or lack of physical care which the foster carers alleged. We do not consider that if there were any evidence, the CAFCASS Report would have omitted it. The addendum related to a home visit to the father's house. The grandmother spoke at least some Turkish. They made allegations against the mother and would not accept that S might be saying things which she thought they would wish to hear. The reporter continued to recommend gradually increasing contact and voiced her concern as to the effect on S if she felt that she had betrayed her primary carers.

66. The Claimant also produced a report from a social worker who acts as a Children's Guardian, although not appointed so to act in this case. It was dated August 2002, and post-dated the Adjudicator's determination. It was not based on any interviews with mother, father or daughter. It said that it would be extremely traumatic for S were her mother to be deported; she would only see that people in authority had taken away her mother and that could lead to strong anti-authority feelings later in life. She would lose trust in adults and would require counselling through what would be a traumatic episode. The severe consequences might not be reparable.

67. Mr Kovats submitted that there was a prospect that the mother would be allowed back into the country after three years, but we regard that as the minimum which the Secretary of State would require. Miss Chapman pointed out that the Immigration Directorate's instructions were that the period normally appropriate before a deportation order was revoked in the case of someone convicted of inflicting grievous bodily harm was ten years from departure. Although it might be possible for an application to be made which had some prospects of success, we take the view that we have to approach this case on the basis that the gravity of the offence, which is, to the Secretary of State, the key point behind the deportation, would make an exception somewhat unlikely. Mr Kovats did not press the prospects of a Court ordering contact through holidays for S in Turkey in view of the past difficulties and the need, in view of the Residence Order, for the Court to permit the visit in the absence of the father's consent.

68. Miss Chapman sought assistance, as to the level of offending which justified deportation where family life was engaged, from ECtHR cases, in some of which the level of offending, which was held not to justify deportation, was considerably more serious and prolonged than here. But that is too simple an approach. She is right in respect of some of the offending but the circumstances of the offenders are different too and stronger than those present here. We did not find any real assistance in the comparison of facts in an area where so much turns on the precise mix of facts in a particular case.

69. We have to decide whether the deportation would be disproportionate in the sense that deportation would be outside the range of reasonable responses open to the Secretary of State in all the relevant circumstances, balancing the public interest against the undoubted interference with the Article 8 rights of the mother. The approach is set out in R (Razgar) v SSHD [2003] EWCA Civ 840,[2003] INLR 543 at paragraph 41 and also in Edore v SSHD [2003] EWCA Civ 716, [2003] INLR 1361. We do not accept Mr Kovats' submission that there have been no changes since the 1st May 2002 decision which serve significantly to undermine the decision which the Secretary of State took, at least in the sense that there have been developments which mean that the position requires to be re-examined as of now. This is because the Claimant has been released from custody and has been in a position to rebuild in part the relationship which she had before she was taken into custody. She also has the benefit of an up to date CAFCASS report and other material. However, the Secretary of State has considered the up to date position in his letter of 18th March 2004. The Tribunal therefore knows what his view is on the current position and it would be absurd to proceed as if that were irrelevant and as if we were unaware of it. It is our view that we should ask ourselves whether that letter represents an unreasonable approach to the balancing of the conflicting interests.

70. Even if that were not so, we would adopt the approach set out in M (Croatia) [2004] UKIAT 00024* paragraph 28 which would lead to the same result.

Conclusions

71. We regard it as obvious that the interference with the mother's family life would be very severe indeed. She would be likely to lose direct face to face contact with her daughter for many years as her daughter grows from seven to quite possibly seventeen years old. The prospect of visits by the daughter to Turkey to see her mother are fairly remote in reality because of the father's hostility and the difficulty of obtaining and then enforcing any Order while living in Turkey; it cannot be ruled out though as S grows and can undertake independent travel. We are also conscious that the father has been uncooperative at times and has impeded telephonic contact. Although in fact the mother has been able to make such contacts while in prison and after she was released, the probability is that telephone contact could be difficult. Over time, the hostility which the father has for the mother and which he and the grandmother express to S would have an effect which makes it at least possible that S herself would come to regard such contact as undesirable and cease to look for it herself, in order to maintain relationships with her primary carers. The relationship between mother and young child is one of the most important there is viewed from either person's viewpoint. We see no reason to doubt the genuineness of the mother's feelings for S. It has not been suggested by the Secretary of State that there was any benefit in breaking the relationship, though that may well be the sort of thing that the father may say to S. Even if after many years, the Claimant were allowed back into the United Kingdom, it is difficult to see that it can be thought with any real degree of confidence that the relationship could be resumed, transformed as its potential would be by the passage of time. The Claimant would naturally feel an anxiety for the well-being of the

child and the feelings of loss and distress which S would feel would heighten that anxiety. We say that even though we do not accept that there is any evidence that the father or grandmother are falling down in their caring obligations, let alone ill-treating S.

72. The Claimant does not have a Residence Order and it would be a matter of speculation as to whether she ever would. She cannot see herself as the primary carer. The relationship suffered a severe break as a result of her own acts, when she decided to attack her victim. She knew that she had a child, who was not then living with her father, and from whom she would be separated for a long time if she were convicted. A relationship was maintained in custody and has progressed in the time after release during which she has been fighting deportation; in large measure that progress reflects what she has been able to achieve while contesting action properly taken against her.

73. Set against that degree of interference with her Article 8 rights is the gravity of the offence, and it was a very serious offence indeed. There is also the risk of re-offending as to which no assessment can be made, other than that the material relied on does not support a low risk assessment and perhaps suggests a rather higher risk assessment. She also entered the country illegally, and has only been here illegally except when she was in lawful custody. She made and pursued a false asylum claim. So her family relationship has only developed while her presence here was either unlawful or while she was in prison. She has always been liable to removal and she has known that she was liable to deportation as a result ever since sentence in January 1999. It was her actions which have made it impossible for her to take her child with her.

74. There are no other family or private life reasons which tell in favour of the Claimant remaining. She has no job or property or other significant relationships here. She was not brought up in this country.

75. We make it clear that we have not considered the position from the viewpoint of S. We recognise that the decision in this case affects her rights and interests, but for the reasons which we have given we do not bring those into the balance in this decision.

76. We have come to the conclusion that the decision that the Claimant should be deported is not one which is outside the range of responses open to a reasonable Secretary of State. We attach the greater weight to the very serious offence of violence and to the repugnance which we consider the public would rightly feel for someone who committed such an offence, showed no remorse of real significance and has so frequently lied about it. She has offered no credible explanation and what she says about self defence is untrue. So it is at best a motiveless but very violent offence. The low risk assessment cannot be sustained on the current material. To deport a mother who is not the primary carer and who does not live with the child, and who has not lived with her for most of the years of the child's life as a result of her own criminal acts, is not unreasonable in those circumstances, even though it will put in real jeopardy her continuing relationship with the child. She

may be anxious for the well-being of the child but the report from CAFCASS does not provide a foundation for her concerns in that respect. She may be concerned about how the child will develop without her and in view of the attitude the father is likely to adopt. We do not regard the impact on her of those concerns, though not shown to be well-founded, as inconsiderable. Nonetheless, the deportation is in our judgment a not unreasonable balancing of the competing interests.

MR JUSTICE OUSELEY
PRESIDENT