EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Carloway
Lord Hardie
Lord Philip

[2009] CSIH 80
XA191/08

OPINION OF THE COURT

delivered by LORD CARLOWAY

in the application for leave to appeal

by

TP (A.P.)

Applicant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Act: O'Brien, Q.C.; Caskie; Drummond Miller LLP (for Hamilton Burns & Co, Glasgow)

Alt: Haldane; Solicitor to the Advocate General

14 October 2009

1. Background

[1] This case has a long history. Despite the decision to refuse the application, it would appear that the matter may not be at an end (*infra*). The applicant is a Jamaican citizen. On 19 October 2000, she arrived in the United Kingdom accompanied by her

two children, then aged 3 and 10 months, on a six month visitor's visa. She outstayed the limit of that visa. She lived in London. For part of the time, at least, she may have lived with the children at the house of OE, the mother of her former boyfriend and father of her own children, namely LB. OE has young children of her own living with her.

[2] The applicant came to the attention of the authorities on 31 May 2006, when she was found to be transporting heroin and "crack" cocaine with a street value of approximately £78,500 from London to Aberdeen. She was served with a notice identifying her as a person liable to removal in terms of section 10 of the Immigration and Asylum Act 1999. On 27 July 2006 she was convicted of concern in the supply of the drugs under section 4(3)(b) of the Misuse of Drugs Act 1971. On 18 August 2006 she was sentenced to two years imprisonment, backdated to 2 June 2006. The relatively low sentence was attributable in part to her early plea of guilty and her co-operation with the authorities.

[3] On 11 April 2007 the Secretary of State decided to issue a deportation order under section 3(5)(a) of the Immigration Act 1971. The applicant appealed, claiming asylum because she feared persecution in Jamaica because of her sexual orientation. Despite a long term relationship with the father of her children, who remained in Jamaica, she maintained that she was a lesbian. On 26 July 2007, an AIT dismissed her claim. The AIT found that her account of being a lesbian lacked credibility but, in any event, the objective evidence and Country Guidance cases indicated no risk of persecution in Jamaica on this account. The AIT considered the applicant's plea that her Article 8 rights to a private and family life would be infringed. The AIT held that any disruption to the applicant's private and family life, in returning to Jamaica with her

children, was proportionate for Article 8 purposes. An application to the AIT for reconsideration failed.

[4] The applicant applied to the Court of Session for a reconsideration. On 22 January 2008 this application succeeded. The basis for this was set out in a short Note by the Lord Ordinary as follows:

> "(i) The [AIT] were not referred to the policy on deportation in cases where there are children with long residence; that is an important policy which should not be left out of account.
> (ii) In any event, the [AIT] do not give sufficient reasons relating to the interference with article 8 rights..."

The policy referred to was "Deportation Cases where there are children of Long Residence" (DP5/96).

[5] The case came before a Senior Immigration Judge of the AIT to determine the position in relation to the applicant's Article 8 claim. He considered that the original AIT had not followed the structure set out in *EQ (Deportation appeals: scope and process) Turkey* [2007] UKAIT 00062, determined in July 2007. *EQ* required the AIT: first to confirm that an appellant is liable to deportation; secondly to consider any human rights claim and thirdly to apply itself to paragraph 364 of the Immigration Rules, which establish that there is a presumption that deportation is in the public interest in the absence of "exceptional circumstances". Because of the AIT's failure, and the reasons given by Lord Ordinary, a second stage reconsideration took place. This was solely in relation to the rights of the applicant under Article 8 to respect for her private and family life.

[6] In a decision promulgated on 24 September 2008, the AIT dismissed the appeal. The AIT stated:

> "22. We accept that the appellant had family life with her children in Britain. We also accept that the appellant had some sort of private life here. Both elements of her family life and private life here are capable of being infringed but they can only be described as weak. The reality is that she has not had

> family life with her children since June 2006 because of the crime which she committed. [I]t is her evidence that she had not [worked] ...any work which she undertook was without authority. She has had no ascertainable private life since her arrest. Apart from the first months after her entry to Britain as a visitor, the appellant never made any attempt to regularise her stay here and her family life, that of an overstayer is weakened by that offence. Of course, in so far as her children would be able to return to Jamaica with her - that is returning to the country of their Nationality and where they were born - there would be no interference with their family life with the appellant.
> 23. Having accepted that the appellant has exercised some family life with other members of her extended family and exercised private life here, and also, in particular, that her children have exercised private life here, and that that family life is capable of being infringed as there would be interference with their private life in relation to their schooling and their family life with the family of [OE], with whom they live, we have considered whether or not the appellant's removal would be lawful. She has no right to remain here and she is liable to deportation: her removal would clearly be lawful. ...the removal of someone, such as this appellant, who has committed a serious crime, is necessary in a democratic society and is in the interest of the prevention of disorder or crime. She was sentenced to two years' imprisonment for extremely serious drugs offences. Carrying £78,500 worth of Class A drugs is a crime which could lead to very significant harm to society at large. The right of the state to remove serious criminals from Britain is an important one to safeguard society here.
> 24. ...the appellant's crime strongly indicates that the appellant should be removed. Against that overwhelming point, we must consider that the appellant has had some private and family life here. The quality of that private and family life does not appear to be of any particular weight. There appear to be no strong relationships built up... nor has she built up any work record here. We have taken into account the fact that it could well be difficult for the appellant on return to Jamaica but she has lived there, with two babies, on her own in the past and clearly there are a large number of relatives or acquaintances who have connections with Jamaica who might well be able to give some support there. We do not accept her assertion that she would know no one on return and would have to live on the streets.
> 25. We have very little information about the children although some school reports are attached to the papers and [OE] has stated that the children are fond of their mother and miss her. It was...the evidence of the [appellant] that she would not be taking the children with her until she could establish herself and that they would be remaining with [OE] with whom they have lived and who has been their sole guardian or carer since the appellant went into prison. ...Even if it were the case that the appellant's children, who have no status here, were to accompany her, there is no indication that it would be inappropriate for them to do so, returning to the country of their birth and nationality".

[7] The AIT proceeded to consider the policy DP5/96. This policy governed the position of children:

> "either born here, are aged 7 or over or where, having come to the United Kingdom at an early age, they have accumulated seven years or more continuous residence".

The policy emphasises that each case must be considered on its merits but it stresses certain factors as of particular relevance, viz:

"(a) The length of the parents' residence without leave;
(b) whether removal has been delayed through protracted (and often repetitive) representations or by the parents going to ground;
(c) age of the children;
(d) whether the children were conceived at a time when either of the parents had leave to remain;
(e) whether return to the parents' country of origin would cause extreme hardship for the children or put their health seriously at risk;
(f) whether either of the parents have a history of criminal behaviour or deception".

The AIT noted that the children and the applicant had lived together for less than seven years and that, in any event, the children had not lived in the United Kingdom for seven years at the time of the deportation notice. The AIT considered that factor (f) was paramount. The AIT reasoned:

> "It would be extraordinary that the fact that an appellant has been imprisoned for a serious offence would mean that she could qualify for a beneficial policy and we do not accept that that could be the case".

The children were then aged 11 and 8 and the AIT considered that:

> "29. ...There does not appear to be evidence that the return of the children to Jamaica would necessarily cause extreme hardship or put their health seriously at risk. We accept that it would be disruptive and we have taken into account the age of the children,... We consider that they would be able to readjust to life in Jamaica...".

The AIT then concluded:

> "The serious nature of the appellant's crime means that it is the duty of the [respondent] to ensure that criminals are removed and the discretion which is available to the [respondent] has been properly used in this case".

The AIT accepted the need to take the rights of children into account in carrying out the proportionality exercise but emphasised that:

> "31. ...the appellant's crime and her lack of connection with Britain are factors which clearly make it an entirely proportionate response for [the respondent] to decide to deport this [appellant] and for her to be removed and for her children to be expected to follow her".

On 8 October 2008 the AIT refused leave to appeal to the Court. The applicant applied to the Court for leave.

[8] The hearing on the applicant's application to the Court was scheduled to take place on 7 May 2009; efforts having been made to obtain an early diet as the applicant had been detained following her release from prison on 1 June 2008. That diet was postponed at the instance of the applicant because: (a) it was estimated that two days would be required for the hearing; and (b) consideration ought to be given to the children entering the process along with their grandmother and *de facto* carer, OE. The hearing was rescheduled for 14 and 15 October. Meantime, on 23 June 2009, the Court was advised that neither the children nor the grandmother would be entering the process. The hearing was completed well within the first day allocated.

[9] At the outset of the hearing, it was explained by the respondent that there had been further developments, which had not featured in the written pleading or the written arguments submitted in advance. These were that on 9 January 2008 the two children had been advised of their liability to deportation as the children of the applicant. Intimation of this was given to the applicant's "representatives", although it is not clear who these were. Representations from the children about this were rejected by the respondent on 28 March 2008. On 9 June 2008 the two children, who have the surname of their father, namely LB, applied to the respondent for "indefinite leave to remain". On19 September 2008, ten days after the AIT hearing in Glasgow but prior to the promulgation of the decision to refuse the appeal, the applications for leave to remain were repeated, partly under reference to policy DP 5/96 (*supra*). The respondent rejected the application by letter dated 30 June 2009. This was appealed,

apparently by OE, partly on Article 8 grounds. On 29 July 2009, with the consent of the applicant, OE obtained a residency order in respect of the children from the local County Court. A hearing on the appeal was held in London on 3 September 2009.

[10] In a decision dated 23 September 2009, the AIT refused that appeal. The Immigration Judge took into account the AIT decision relating to the applicant, including the findings on the applicant's credibility in the original appeal decision. The IJ made a number of pertinent findings:

> "36. ...there is no intention whatsoever on the part of the respondent to return the children to Jamaica without returning their mother there also.
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> ...
>
> 40. Because of inconsistent accounts I do not accept the appellants have lived with [OE] since they first arrived in the UK although I accept they have been living with her since at least 2006 when [the applicant] was arrested... There is no suggestion the appellants have ever not been properly looked after by their mother and it is reasonable to think that although they may well be close to [OE] and her family, [the applicant] as their natural biological mother must be considered as their closest next of kin relative and with whom it is natural to think they should remain.
> 41. I do not regard [the applicant's] relatively temporary incarceration, formerly in prison and now in immigration detention, as indicating either that the appellants are living apart from their mother or that they are independent from her. All the indications are that [the applicant] has maintained very regular contact with her children and loves them very much... [T]he residence order was obtained purely to frustrate removal and for no other purpose...
> 45. While it is clear the appellants have established a family life in the UK with their mother I cannot find removal would interfere with that established family life because they would all be removed together and not separately.
> 46. While I accept the appellants may well have established some family life with [OE], their paternal grandmother, I regard that family life being interfered with in any event, whether or not removal takes place, because I determined that as soon as the [applicant] is released from detention she will as before, return to being their main carer on whom they are dependent. As stated earlier, I find the appellants have only been temporarily cared for by [OE] until their mother is in a position to resume day to day care as their parent.
> ...
> 56. The appellants have established a private life in the UK and while I do not think for one minute that there will not be disruption to their private lives prompted by removal from this country, and neither do I expect resettlement in Jamaica to be easy, I consider them both to be of an age and background that they would be able to fairly adapt to new surroundings, a new environment and a different education system. Consequently, although I accept there will be some disruption and interference with private lives I find them to have each

> established in the UK, I think it fair to say that the level of interference will not be so great as that portrayed by [OE].
> 57. ...any recent moves by [the applicant] and [OE] to try to transfer care of the children to [OE] have been undertaken purely with a view to trying to frustrate any removal procedures. It would be for the respondent to sort out any legal hurdles that might stand in the way of removal".

This decision is the subject of an application to the AIT for reconsideration.

2. Submissions

APPLICANT

[11] In advance of the hearing, as noted above, the parties had submitted written submissions. However, when it came to oral argument, the applicant's counsel, although adopting the applicant's written argument in general terms, changed the thrust of the applicant's position from that detailed on the printed page to a forceful spontaneous plea that the recent developments with the children in England had rendered the respondent's position "untenable". The starting point for this was that, when looking at the potential deportation of any one person, an AIT required to look at the rights of that person and his family, including any extended family, "in the round". However, here, in dealing with the applicant's case, the AIT had looked primarily just at her Article 8 rights. When the AIT came to look at the two children's Article 8 rights, they did so primarily by examining their rights, with little consideration of the applicant's position. The two applications ought to have been looked at in the same way. Thus, if the applicant's rights had been looked at properly in the first place, there ought to have been no need to re-examine the children's rights separately. Indeed, the two applications should not have been looked at separately at all. The respondent could not come to Court and argue that the children's rights had now been examined properly without accepting that they had not been so examined in the first place by the AIT determining the applicant's case. Given the depth in which the children's rights were examined by the AIT in London, it was "irrational" for the

respondent to argue that they had been properly looked at prior to that decision. What the Court ought to do now is to remit the applicant's case to the AIT for reconsideration along with the children's reconsideration hearing, should that be ordered to take place.

[12] That apart, as already noted, the applicant adopted the written submissions drafted by a different advocate. The detail of these, and it is considerable, can be examined if required and only a summary is attempted here. It was not disputed by the respondent that the applicant's Article 8 rights and those of her children's were, in principle, engaged. It was also not in dispute that the deportation of the applicant might be intended to serve legitimate aims, namely "the interest of public safety" and "the prevention of disorder and crime". The deportation could fall within Article 8(2) if it could properly be said that the petitioner was at risk of re-offending in the United Kingdom, were she to be released from detention. The applicant disputed that her deportation was "necessary in a democratic society", given not only its effect on her but on her children. The deportation would have a necessary and unavoidable effect on the family and private lives of her children, who had been settled in Britain for some nine years. Deportation along with the children would involve an inevitable significant disruption in the children's established family and social relationships. Deportation without the children would involve the break-up of the family. The issue of the proportionality of the deportation of the applicant was inextricably intertwined with an assessment, not only of the effect that this would have on her family life and relationship with her children, but also of the effect this would have on the children's family life and their relationship with her.

[13] The relevant criteria which the European Court of Human Rights uses to assess whether an expulsion measure is "necessary in a democratic society" are set out in

Boultif v *Switzerland* (2001) 33 EHRR 50. The Court established eight guiding principles: (1) the nature and seriousness of the offence committed by the applicant; (2) the length of the applicant's stay in the country from which he is going to be expelled; (3) the time elapsed since the offence was committed as well as the applicant's conduct in that period; (4) the nationalities of the various persons concerned; (5) the applicant's family situation, such as the length of the marriage; and other factors expressing the effectiveness of a couple's family life; (6) whether the spouse knew about the offence at the time when he or she entered into a family relationship; (7) whether there are children in the marriage, and if so, their age; and (8) the seriousness of the difficulties which the spouse is likely to encounter in the country of origin. The principles in *Boultif* were applied in *Amrollahi* v *Denmark*, 11 July 2002, 56811/00; *Mokrani* v *France* (2005) 40 EHRR 5; and *Sezen* v *Netherlands* (2006) 43 EHRR 30. In *Üner* v *The Netherlands* (2007) 45 EHRR 14, the Court reviewed the guidelines in *Boultif* and expanded them with two additional factors: (1) the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant were likely to encounter in the country to which the applicant is to be expelled; and (2) the solidity of social, cultural and family ties with the host country and with the country of destination. These criteria were applied in *Maslov* v *Austria* [2009] INLR 47. In *AC* v *Immigration Appeal Tribunal* [2003] INLR 507 the Administrative Court [of England and Wales] applied the original *Boultif* criteria (Jack J at paras 32-33; see also *Huang* v *Home Secretary* [2007] 2 AC 167; *AB (Jamaica)* v *Secretary of State for the Home Department* [2008] 1 WLR 1893, Sedley LJ at para 20). In *Beoku-Betts* v *Secretary of State for the Home Department* [2009] 1 AC 115 the House of Lords held that the immigration legislation required appellate authorities to take into account the effect of

a proposed removal on all the members of the person's family unit. Once it was recognised that there was only one family life and that, assuming the person's proposed removal would be disproportionate looking at the family unit as a whole, each affected family member was to be regarded as a victim. The interests of the family unit were also stressed in *AM (Jamaica)* v *The Secretary of State for the Home Department* [2008] EWCA Civ 1408; *VW (Uganda)* v *Secretary of State for the Home Department* [2009] EWCA Civ 5; and *AF (Jamaica)* v *Secretary of State for the Home Department* [2009] EWCA Civ 240.

[14] The respondent should have been in a position to inform the AIT, in defence of the decision to deport the applicant, of the inquiries made to establish the matters as set out in Chapter 53 of the internal Guidance; notably: the children's ages; the ties with the natural parent; how often the children saw their natural parent; whether any maintenance was paid towards the children's upkeep; whether the children could easily adapt to a life abroad; whether such a move would cause hardship or put their health at risk; whether the children had a right of abode; and the nationality of the children. The Secretary of State should therefore have led positive evidence on these matters.

[15] At the time of the amendment to policy document DP5/96 in 1999, a Parliamentary answer had been given and a press release made concerning the policy. These were to the effect that, in the case of a child of seven years or more, it would only be in exceptional cases that indefinite leave to remain would not be given and that "the general presumption is that we would not normally proceed with enforcement action". The full details were contained in *NF (Ghana)* v *Secretary of State for the Home Department* [2008] EWCA Civ 906.

[16] There was no evidence that the respondent had ever had regard to policy DP5/96 in reaching a decision. With effect from 19 October 2007 (the date when the children had been in Britain for seven years), the respondent had been under an obligation to have regard to that policy. The AIT had wrongly held that the policy and presumption had no application on the basis that seven years had not passed by the time the applicant first became liable for deportation. The policy was withdrawn in December 2008. Its provisions still applied to the circumstances of the present case on the basis that transitional provisions accompanying its withdrawal stated that: "DP5/96 will continue to apply after 9 December 2008 if before 9 December DP5/96 has been considered in an appeal which remains outstanding". Given that the policy was applicable, it fell to be applied by the respondent and not by the AIT (see *IA (Mauritius)* v *Secretary of State for the Home Department* [2006] UKAIT 82; *AG and others (Policies; executive discretions; Tribunal's powers) Kosovo* [2007] UK AIT 00082). The AIT had erred in applying the policy themselves.

[17] In applying the legal principles, the issue was not whether there had been a fault in the decision making process but whether the Article 8 rights had been infringed (*Nasseri* v *Home Secretary* [2009] 2 WLR 1190, Lord Hoffmann at paras 12-14). The AIT had asserted that, for the purposes of Article 8, the applicant had not had any "family life" with her children since June 2006. But family life meant the existence of a relationship and did not require constant physical presence or that the persons concerned lived together. It was not ended automatically by imprisonment or exile or absence. The AIT had recorded that the applicant had said that she spoke to her children every day and that they had seen her on four or five occasions after she had been transferred to detention in London. The AIT had stated that there was only a "weak family relationship" between the applicant and her two children such that it did

not weigh heavily in the balance. This was "perverse" and disabled the AIT from properly carrying out a proportionality examination The AIT had failed in the task set out in *Huang* (*supra*, paras 14, 18, 20).

[18] The AIT had placed great weight on the applicant being a convicted "drugs mule" who had been sentenced to two years imprisonment. Past case law (*Amrollahi* v *Denmark* (*supra*); *Mokrani* v *France* (*supra*); and *Sezen* v *Netherlands* (*supra*)) did not support their assessment of a non-violent involvement in the illicit drugs trade as a crime so overwhelming that it fell into the exceptional category justifying deportation, notwithstanding the fact that the children had lived in the UK for more than seven years. The AIT had not considered what risk there might be of the applicant re-offending. Instead they saw the deportation as being justified as a continuing punishment after imprisonment.

RESPONDENT

[19] The respondent's central contention was that the application ought to be refused because no error of law had been identified in the AIT's Determination and there was no real prospect of the AIT reaching a different conclusion upon a reconsideration. All that the applicant had said was that the AIT had "got it wrong". Inasmuch as the AIT required to come to their own conclusion on the Human Rights aspects of the applicant's claim, as distinct from analysing the decision making process in relation to other aspects of the claim, they had done so in a clear and cogent manner, having specific regard to relevant authorities (*Nasseri* v *Home Secretary* (*supra*)).

[20] The AIT had engaged in a full and careful treatment of the applicant's Article 8 claim. They had reached a decision that was reasonably open to them in the circumstances, and which was neither "perverse" nor "irrational". The reasons given for the decision were clear (see *R (Iran)* (2005) EWCA CIV 982). Having accepted

that Article 8 was engaged, the AIT had considered whether nevertheless removal of the applicant would constitute a disproportionate interference with Article 8 rights. In so doing, they took account of all relevant factors, such as the relationship of the applicant with her children, and the relationship of the children with their *de facto* carer (paragraph 23) and her children. They correctly identified and applied the principles enunciated in *Beoku-Betts* (*supra*) and reached the conclusion that, standing the applicant's immigration history, and particularly her criminal record, it would not be disproportionate to remove her (paragraphs 24, 25, 31) Reliance by the applicant upon cases such as *Boultif* (*supra*) was potentially misleading. The circumstances of the applicant's case differed markedly from those pertaining in the other cases quoted. Following the *ratio* of *Boultif*, the criminal conduct of the applicant was a highly relevant factor in the balancing exercise. The AIT had been entitled to consider that this factor weighed heavily in favour of the conclusion that deportation was not disproportionate.

[21] The criticism of the AIT that they had considered policy DP5/96 themselves was without merit. The purpose of that policy (now withdrawn) was to give guidance on the criteria to be employed in cases where enforcement action was being considered against persons with children who had either been born in the United Kingdom, and were aged seven or over, or who had lived in the UK for a continuous period of seven years or more. The AIT were required to consider the policy in terms of the Lord Ordinary's interlocutor. They were therefore obliged to take the policy into account. At the time when the decision to deport had been made (April 2007), the children had not been in the UK for seven years and the policy had thus had no application. Nevertheless, the AIT gave proper consideration as to whether or not there were any factors in the policy in favour of the applicant as at the date of the

hearing before the AIT. They have given clear and cogent reasons for concluding that the policy should not operate in a beneficial manner for the applicant.

[22] The interests of the children and the possible effect on them, if they were to be returned to Jamaica, were given detailed and anxious consideration by the AIT. The applicant erroneously relied upon a passage in the Enforcement Instructions and Guidance chapter of the Internal Guidance used by the Border Agency relating to Immigration Offenders. The applicant was a person liable for deportation and in that regard the appropriate passage from the guidance is to be found at Chapter 53.1.3 which states:

> "...the presumption is that the public interest is met by deportation, all relevant factors in each case must be considered to see whether this presumption is outweighed. However, it will only be in exceptional circumstances that the public interest in deportation will be outweighed".

This mirrored the terms of paragraph 364 of the Immigration Rules.

[23] Whilst deportation may interfere to some extent with the family life of the applicant, that interference arose primarily out of the fact that deporting the applicant and her children would inevitably disrupt the relationship between the children and their grandmother, rather than interfering directly in the relationship between the applicant and her children. Such interference, however, was proportionate in all the circumstances of this case and was "necessary in a democratic society...for the prevention of disorder or crime". (Article 8(2)). The applicant had failed to establish that the AIT had erred in its decision making process. No exceptional circumstances outweighing the presumption in favour of deportation had been established. The decision of the AIT should be affirmed.

3. Decision

[24] The Court has little difficulty in accepting much of the content of the applicant's

written submissions, in so far as they relate to the general principles to be applied in determining whether the decision to deport the applicant was proportionate. Much of what is contained in the submissions is well known and established law. As they narrate, it is not disputed that Article 8 is potentially engaged; the applicant at least having a family life with her children. In determining proportionality, the family require to be treated as a unit and thus the children's links with their grandmother and her children would also have to play a part in the balancing exercise (*Beoku-Betts* v *Secretary of State for the Home Department* (*supra*)). In deciding whether the deportation was necessary and served the legitimate aims of public safety or the prevention of crime and the protection of health in terms of Article 8(2), when set against the primary Article 8(1) rights, an AIT requires to bear in mind the criteria set out in *Boultif* v *Switzerland* (*supra*) and *Üner* v *The Netherlands* (*supra*). Essentially, the balancing exercise will include taking into account the nature and seriousness of the crime and, no doubt, the risk of repetition on the one hand and the ties of the applicant and her family with each other and with the deporting and receiving countries involved on the other.

[25] The AIT did take into account all the relevant factors in reaching their decision on the applicant's appeal. On the one hand, the applicant had committed a serious offence of being concerned in the supply of Class A drugs; a crime which, having regard to the havoc which heroin in particular wreaks on Scotland's communities, is regarded as particularly concerning in this country. Although the applicant received a relatively light sentence for the offence, it was still a substantial one and, on the face of things, the democratic interest of preventing drug abuse is weighted heavily in favour of deporting foreign nationals who elect to indulge in this trade. It is clear that this was a factor which did weigh heavily with the AIT in the balance (Determination,

para 23). In this connection, the Court does not accept that, as a generality, the approach of the European Court of Human Rights is to view this type of crime as materially less weighty than the domestic Courts and Tribunals. The cases quoted (*Amrollahi* v *Denmark* (*supra*); *Mokrani* v *France* (*supra*) and *Sezen* v *Netherlands* (*supra*)) deal mainly with a different situation, where a person's deportation will affect members of his family unit who are citizens of the deporting country. They also concern the situation where the family unit can only be maintained by those citizens departing the country of their own birth or nationality.

[26] It is clear that the AIT had regard to the applicant's private life and her family life with her children in the United Kingdom. The AIT perhaps went too far in stating, at one point, that the applicant had *no* family life after her arrest (para 23). But the AIT did in fact consider the extent to which family life was operating. In particular, they had regard to the diminution in the applicant's family life following her incarceration. At the time of the AIT decision, the applicant was either still held in Dungavel or had just been transferred to Yarlswood, near London. She had not been visited by the children during her imprisonment and detention in Scotland, although there appears to have been a change after her transfer. The AIT were thus correct in describing the applicant's family life at that time as "weak" (para 22). That family life, and any private life, was also largely created at a time when the applicant and the children were overstayers.

[27] The AIT recognised that the children were living with OE. Although they acknowledged that they had "very little information about the children" (para 25), they were aware and took account of the children having a family life with OE and her children as well as a limited life with the appellant (para 23). In short, the AIT did approach the issue of family life by looking at the family as a unit and not just from

the applicant's perspective. They took into account the effect of the applicant's deportation, with the children, on the members of that unit. They specifically acknowledged the principles in *Beoku-Betts* v *Secretary of State for the Home Department* (*supra*) (para 31). They also took into account the difficulties of resettling in Jamaica . They did not apply a test of "extreme hardship" or of putting health "seriously at risk", although they used these terms, which come from policy DP5/96, in describing what would not occur if the applicant and the children were returned to Jamaica (para 29). Rather, the AIT acknowledged that there would be disruption but, given the ages of the children, they considered that they could re-adjust in what was, after all, their place of birth and where they also had relatives.

[28] The applicant's position in relation to policy DP5/96 is a baffling one. This is a policy which the respondent would have been bound to consider if it applied to a given situation. It did not apply to the children's position, when the respondent made the deportation decision, since the children had not, at that time, been in the UK for seven years. Given that it clearly did not apply, there is some force in the criticism that the Lord Ordinary may have misunderstood the position when she required the AIT to take it into account in their reconsideration. But it was because of the Lord Ordinary's decision that the AIT did take it into account, yet still decided that the deportation should occur having regard to the applicant's criminal conviction. As the AIT reasoned, it would be very odd if a long prison sentence for a serious crime had the practical effect of bringing the policy into play to prevent the person sentenced from being deported (i.e. if by the end of the sentence the period that the children had been in the UK was then over seven years). The applicant's contention is that, even although the policy had no application at the time of the respondent's decision, time having expired by the time of the AIT's decision, the AIT had to remit the matter back

for the respondent to apply a policy that was not applicable when the decision was taken in the first place. The Court does not agree with such an approach and the case quoted (*IA (Mauritius)* v *Secretary of State for the Home Department* (*supra*)) does not support it. The only policy which required to be considered was one applying at the time of the relevant decision. The policy which was in force, and which the respondent did apply, was the guidance that it was only in "exceptional circumstances" that the presumption that deportation was in the public interest was displaced (i.e. Immigration Rules para 364).

[29] The Court does not consider that there is any inconsistency in the approaches of the AIT or the respondent in dealing with the applications of the applicant and the children. The respondent was bound to take a decision upon the applicant's appeal when that appeal was made. It is clear that the respondent had some information about the children at that time, although the extent of that information is unclear (the decision was not produced). When the applicant appealed against the decision to make a deportation order, the AIT required to determine that appeal. It was a matter for the applicant to decide the extent of the evidence which she wished to lead in support of her contention that her private and family life would be interfered with. It was not for the respondent, at that stage, to institute further investigations into that matter. It is clear that the applicant presented very little information to the AIT, presumably advisedly so. The applicant was legally represented at the hearing and, notwithstanding possible constraints on funding, she could have produced detailed statements on the then family life of the children in London. For whatever reason, she did not do so. The AIT decision had to be taken on the basis of the evidence adduced.

[30] In due course, when the children applied for leave to remain, the respondent was bound to take a new decision on their applications. It is worthy of note that the

respondent's decision letter of 30 June 2009 comments that OE had failed to appear for interview with the children in connection with their earlier representations on the proposed deportation of the children. When OE appealed on the children's behalf against the respondent's refusal to grant leave to remain, the AIT were bound to take another separate decision in that appeal. They required to do so based on the evidence then produced. This included the oral testimony of OE. It is clear that this evidence was more detailed and wide ranging than that before the AIT which determined the applicant's appeal. Curiously, and presumably again advisedly, there was no evidence in the children's appeal, even by way of written statement, from the applicant. However, it is interesting to note that the AIT rejected much of OE's evidence. The AIT did not accept that the children had been living in family with OE other than from the time of the applicant's arrest. The AIT considered that, upon her release, the children would go back to living with the applicant, wherever she chose to live, including Jamaica if deported. Having considered the evidence presented, the AIT again held that removal to Jamaica, along with the applicant, would not amount to a disproportionate interference with private or family life. The decisions of both the respondent and the AIT have been consistent and no difficulty arises in that regard.

[31] It follows that the Court does not consider that any error of law has been identified in the Determination of the AIT which considered the applicant's appeal. It does not consider that there is a real prospect of success on an appeal. This application for leave to appeal must therefore be refused.

[32] Finally the Court should observe that, during the course of the oral submissions, the applicant sought to blame the respondent for not bringing the recent developments in relation to the children's applications to the attention of the Court earlier. It was said that the Court should have berated the respondent, as would, it was said, have

occurred in times past. There is no doubt that the respondent should have brought matters to the Court's attention earlier. The explanation for failing to do so, which related to data protection, was a poor one. But the Court is tolerably certain that the actions taken in relation to the children's application would have been well known to the applicant herself, at least if she had, as is claimed, a significant family life with them. Whatever the knowledge of her agents and counsel at particular times, the applicant was in an equal, if not better, position to draw these matters to the attention of the Court.