Neutral Citation Number: [2014] EWCA Civ 937

Case Nos: C4/2014/0825 and C5/2013/2859

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE NICOL

AND IN THE COURT OF APPEAL (CIVIL DIVISION
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGES PERKINS AND McKEE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 8th July 2014

Before :

LORD JUSTICE MAURICE KAY
LORD JUSTICE McFARLANE
and
SIR STANLEY BURNTON

- -

Between :

The Queen on the application of Irfan Akpinar	**Appellant**
- and -	
The Upper Tribunal (Immigration and Asylum Chamber)	**Respondent**

and between

The Secretary of State for the Home Department	**Appellant**
- and -	
AV (Democratic Republic of the Congo)	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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- -

Stephen Knafler QC and **Gordon Lee** (instructed by **Duncan Lewis**) for **Irfan Akpinar**
Mikhil Karnik (instructed by **Fadiga & Co**) for **AV**

Rory Dunlop (instructed by the **Treasury Solicitor**) for the **Upper Tribunal (Immigration and Asylum Chamber)** and for **the Secretary of State for the Home Department**

Hearing date: 16 June 2014

- -

Judgment

Sir Stanley Burnton :

Introduction

1. We have before us two appeals. The first, by Irfan Akpinar, is against the refusal of Nicol J to grant him permission to apply for judicial review of the refusal of the Upper Tribunal (Immigration and Asylum Chamber) to grant him permission to appeal against the decision of the First-tier Tribunal dismissing his appeal against the deportation order dated 23 January 2013 made by the Secretary of State. He contends, and contended, that his deportation would infringe his rights under Article 8 of the European Convention on Human Rights. The second is by the Secretary of State, against the decision of the Upper Tribunal (Immigration and Asylum Chamber). The First-tier Tribunal had dismissed the appeal of AV against the deportation order she had made. The Upper Tribunal allowed his appeal against the Secretary of State's decision, on the ground that his deportation would infringe his rights under Article 8.

2. Both appeals were heard together because they raise similar issues as to the effect and application of the judgment of the European Court of Human Rights in *Maslov v Austria* [2008] EHRR 546, [2009] INLR 47.

The legislative framework and applicable Immigration Rules

3. Sections 32 and 33 of the UK Borders Act 2007 provide, so far as material:

> "32. *Automatic deportation*
>
> (1) In this section "foreign criminal" means a person—
> (a) who is not a British citizen,
> (b) who is convicted in the United Kingdom of an offence, and
> (c) to whom Condition 1 or 2 applies.
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
> ...
>
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.
>
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33). ...'
>
> 33. *Exceptions*

(1) Section 32(4) and (5)—

(a) do not apply where an exception in this section applies (subject to subsection (7) below), and

(b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention."

4. The relevant provisions of the Immigration Rules are, so far as relevant, as follows:

"A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 9 July 2012 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.'

…

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

...

(b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;

...

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors'

> 399A. This paragraph applies where paragraph 398(b) or (c) applies if
>
> ...
>
> (b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.
>
> 399B. Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate. Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted."

The facts

Mr Akpinar

5. Mr Akpinar is a national of Turkey, born on the 1st January 1994, who entered the UK legally on the 15th August 2003, aged 9, with valid entry clearance to join his father. He was granted Indefinite Leave to Remain ('ILR') on arrival. His father had been granted ILR as a refugee on the 25th September 2002.

6. His convictions were set out by the First-tier Tribunal in its determination:

> "26 March 2009 – affray – sentenced to a referral order for 12 months and ordered to pay compensation of £50.00.
>
> 19 August 2009 – burglary and theft at a dwelling – sentenced to a young offenders supervision order for 12 months and a curfew order for 3 months with electronic tagging. Also ordered to pay compensation of £150.00 and costs of £100.00.
>
> 10 February 2010 – failing to comply with a curfew order – sentenced to continue with the curfew order for 3 months and the electronic tagging order revoked (this was varied on 2 June 2010).
>
> 31 March 2010 – failing to comply with a curfew order – sentenced to continue and ordered to pay a fine of £15.00 and costs of £120.00.
>
> 2 June 2010 – breach of curfew order and resulting from the original conviction of 10 February 2012 – sentenced to 6 months detention and training order.

> 21 January 2011 – possession of a controlled drug class B cannabis/cannabis resin – sentenced on 2 February 2011 to a conditional discharge for 6 months and ordered to pay costs of £30.00 and forfeiture and destruction.
>
> 26 May 2011 – breach of anti-social behaviour order – fined £20.00.
>
> Breach of conditional discharge sentence was continuous from the original conviction of 2 February 2011 and no action on breach.
>
> 23 June 2011 – breach of interim anti social behaviour order – fined £35.00 and a victim surcharge of £15.00.
>
> 12 July 2011 – breach of interim anti social behaviour order – ordered to pay a victim surcharge of £15.00, a fine of £85.00 and costs of £35.00.
>
> November 2011 – possession of a controlled drug class B cannabis/cannabis resin – ordered to pay a fine of £65.00, a victim surcharge of £15.00 and forfeiture and destruction.
>
> 16 December 2011 – handling stolen goods (receiving) – sentenced to a detention and training order for 4 months.
>
> 16 March 2012 at Blackfriars Crown Court – convicted of violent disorder and on 16 April 2012 he was sentenced to twelve months' imprisonment in a young offenders institution".

7. In her decision letter, the Secretary of State considered that section 32(5) of the 2007 Act required her to make a deportation order in respect of Mr Akpinar unless he fell within one of the exceptions in section 33. Neither paragraph 399 nor 399A of the Immigration Rules applied to him. The only possibly relevant paragraph was paragraph 399A(b), but it did not apply to him since he had not spent half of his life in this country, since he had been here for only 8 years and 7 months immediately preceding the date of her decision. It followed that his deportation was to be considered in the public interest unless there were exceptional circumstances that warranted departing from the decision to deport him, and there were no such circumstances.

8. The First-tier Tribunal considered the pre-sentence report that had been prepared for the purposes of Mr Akpinar's sentence for violent disorder. The probation officer stated that he had told him that he had been wrongly convicted. The officer said:

> "The current offence suggests that Mr Akpinar has substantive cognitive deficits in terms of his decision making and he has been unwilling to take full responsibility for his actions. His previous response to supervision is not encouraging and I am uncertain about his level of motivation to address his offending behaviour.

> Based on OASys Mr Akpinar is assessed as posing a high risk of reconviction and as posing a medium risk of harm to the public."

9. The First-tier Tribunal cited the sentencing remarks of the Crown Court Judge:

> "Mr Akpinar, again, I am afraid there is no mitigation in this case, bearing in mind your plea, and I have already set out what the aggravating features were. It was outrageous, the behaviour, and sadly again you have been before the courts on previous occasions, and it is a sadness that you obviously were with Mr Kilinc on 7 August, when you must have been on bail for this offence, and committed an offence then for which you received a detention and training order, and now having had this case rehearsed in the Crown Court, you have to be dealt with it for this offence of violent disorder, and it is unfortunate that you have a previous affray when, of course, you were a very young man.
>
> I have read everything that is said in the pre-sentence report, and put forcefully on your behalf, and you said you cannot remember why or how you breached the supervision order, and it is very sad that you are before the courts as a young man, yet again, having really already had antisocial behaviour orders which you have breached, and here you are revealed as acting as we see in the CCTV footage."
>
> …
>
> "I have to think about the aggravating features, in case anyone wants to review the case and the Court of Appeal could not think of them. It is a group attack. There was no justification for what happened. It was cowardly. It occasioned on one sole person who happened to be with somebody you did not think he should be with, or showing any form of affection – I doubt he even was – because in some ways you felt it was a province for you. Well how outrageous is that. So those are all the aggravating features, and you show absolutely no remorse. None of you have any remorse about this, in my judgment. You fought it tooth and nail till the end, despite what was plain on the CCTV footage."

10. The Tribunal continued:

> "60. We have had the opportunity to see the appellant and we regret to say that we did not find him to be a credible witness at all. The appellant did not appear to show any remorse whatsoever. We are mindful that the Pre Sentence Report states that the appellant was unwilling to take responsibility for his actions and the only explanation that the appellant offered at the hearing was that he was at the wrong place at the wrong

time. He played down his connection with Turkey. He stated that he lived with his grandparents from the age of 5 or 6 and that he did not connect with his mother. He last went to Turkey in 2007.

61. The appellant stated at the hearing that he went with an uncle (father's brother) on the occasion of his grandfather's death. He visited his mother for seven to ten days. He did not know where she lived but was given information of her whereabouts by his uncle. However, in the Pre Sentence Report it stated clearly that he went to Turkey when he was 14 years old (2007/2008) and that he stayed with his mother for three months. His claim now is that he does not know where his mother lives and that he has had no connection with her. We do not believe that he is telling us the truth.

62. The appellant's father and brother also played down the connection that the appellant has with his mother. The appellant's father did not know that he had visited his mother when he went to Turkey in 2007. I appreciate that his father may not have any relationship with his wife but to claim that the appellant did not know that he had visited his own mother is in our view simply not credible. The appellant's brother initially denied that he had any relatives although he like the appellant claimed that he lived with his grandparents before he came here. He has been to Turkey a number of times – the last visit was as recent as August 2013. He then stated that he had in fact visited his grandmother when he previously stated that he did not have any relatives in Turkey and when asked to explain he stated that he had mentioned that because he did not see them regularly.

63. It is clear to us that the appellant has a number of relatives in Turkey. He has his mother with whom we believe he is in touch. He has his grandmother and a number of uncles and aunts from his father's side and his evidence and that of his father that he is no longer in touch with his mother is in our view simply not credible."

11. They summarised their conclusions as follows:

"68. The appellant is under 25 years of age. He arrived in the UK on 15 August 2003. He was granted indefinite leave to enter. He has had a number of convictions and his last conviction was on 6 April 2012 when he was sentenced to twelve months' imprisonment in a young offender institution.

69. In our balancing exercise we have to consider the seriousness of the appellant's last offence. On the one side the appellant had been in the UK since the age of 7 and we accept that this is significant having regard to the *Maslov* principles.

> However, we also have to consider the criteria in the case of an appellant who is a young adult and who has not founded a family on his own. We have regard to and consider significant the nature and the seriousness of the various offences committed by the appellant. We appreciate the length of the appellant's stay in this country. The appellant's offences in this country have been continuous since 2009 and notwithstanding his claim that he has very little contact with his family in Turkey we find that there is ample evidence of social, cultural and family ties with Turkey.
>
> 70. We find that the facts of this case can be distinguished from *Maslov* particularly when we consider the nature and the seriousness of the appellant's offences and his continuing ties with Turkey.
>
> 71. We have given a careful consideration to the totality of the evidence before us. The respondent made a deportation order against the appellant under Section 32(5) of the UK Borders Act 2007. The appellant does not fall within any of the exceptions from automatic deportation. The appellant has failed to discharge the burden upon him that his deportation will breach his rights under Article 8 of the ECHR. It follows therefore that his appeal must be dismissed."

12. Mr Akpinar applied for permission to appeal to the Upper Tribunal on the grounds that the First-tier Tribunal had not been justified in distinguishing his case from the facts of *Maslov* and had failed to apply the requirement, laid down by the European Court of Human Rights in that case, that in a case such as his very serious reasons were required to justify deportation, and that there were in fact no such reasons applicable to his case.

13. In refusing permission to appeal, Upper Tribunal Judge Taylor stated:

> "They properly applied the relevant case aw and were entitled to distinguish this appeal from that of *Maslov*. They reached a decision open to them and again it is simply unarguable to state, as the ground do, that the decision is perverse. The appellant has a long history of offending, he remains a continuing risk of harm to others, and retains contact with his country of origin. The panel may have used a loose phrase in paragraph 69 but that does not detract from their conclusion as a whole."

14. Mr Akpinar applied to the Administrative Court for permission to apply for judicial review of the Upper Tribunal's decision. Nicol J's summary reasons for refusing permission included the following:

> "The First Tier Tribunal was directed to the decision of the European Court of Human Rights in *Maslov v Austria*. Although the Claimant disagreed with the way that the FTT had

> applied the decision, Judge Robertson in the FTT and Judge Taylor in the UT gave detailed and sustainable reasons as to why there was no arguable error of law in the Panel's decision."

AV

15. AV first arrived with his sister in the UK on 21st June 2005, when he was aged 11: his date of birth is 27 October 1993. He claimed asylum on 27 June 2005; it was refused, and his appeal was dismissed. Nonetheless, on 20 February 2008 he was granted indefinite leave to remain. The letter granting leave stated that it was granted because of his mother's length of residence and her domestic circumstances.

16. AV's mother, sister, and younger brother, who subsequently joined the family, are all British citizens.

17. On 17 June 2011 he entered a guilty plea to a joint enterprise of aggravated burglary and possession of an imitation firearm committed on 14 March 2011. He was the youngest of the 3 people involved in the offence. He was sentenced on 15th July to 3½ years detention in an institution for young offenders. He was aged 17.

18. The Secretary of State decided to make a deportation order on 22 January 2013. AV was then aged 19.

19. He appealed to the First-tier Tribunal on the grounds that his deportation would infringe his rights under the Refugee Convention and under Articles 3 and 8 of the European Convention on Human Rights. His appeal to this Court concerns Article 8 only. The First-tier Tribunal's consideration of this claim is in paragraphs 9 and 10 of their determination:

> "9. There can be no question that the offence committed by the Appellant in 2011 was one of utmost seriousness. He was sent to custody for a period of three and a half years for offences of aggravated burglary and possession of a firearm. It is apposite to quote the learned judge in his sentencing remarks when he said as follows:-
>
> > "This was a well organised offence with professional hallmarks. The three of you obviously planned the offence together before it was committed. You targeted the house where you expected there to be valuable items for taking. You expected the house to be occupied otherwise you would not have taken the knife, the imitation firearm and worn the balaclavas. You had obviously obtained the knife and the imitation firearm with the purpose of committing this offence. You wore masks and/or balaclavas. You wore gloves plainly to avoid leaving fingerprints. …..You, Kuvonu had the imitation firearm…Whilst you took turns to guard the victims for about twenty minutes the house was comprehensively ransacked by those who were not keeping guard".

> We note that despite all three of the defendants being caught red-handed inside the property it was the Appellant, who according to the judge "tried to blag your way out of it with some lies". We find it of some concern that at the appeal hearing before us the Appellant when invited by his representative to give an account of the offence was content to continue to tell lies by claiming before us that he knows not why he was going to the house with his two associates but simply went along without having any intention to do wrong. Not only is this a fabrication we hold it to be a worrying sign that even after all of this time the Appellant has not taken anything like full responsibility for the serious crime that he has committed. Still we noted that he attempted to give the impression at the hearing that following conviction he has disassociated himself from his co-accused Amir Naseri when in fact we noted from the OASys Report that not only were the two of them in the same prison together but also that the Appellant and Amir Naseri continued to have regular contact such that they both remained friends and were happy to continue their friendship.
>
> 10. We note from evidence adduced by the Appellant's representatives from Staffordshire and West Midlands Probation Trust that as of 22nd February 2013 the Appellant is assessed as a medium risk of harm to the public from robbery and as a medium risk of reconviction. Thus it is clear that the risks he still poses to UK society are not insignificant. We consider that the nature and seriousness of the offences that he has committed, the Appellant's willingness still to minimise the offence and shift blame on to others as well as the continuing risk the Appellant poses to the public are such that his removal, in our judgment, is wholly proportionate to the legitimate aims of the protection of the public.. We hold that his Article 8 grounds fall very far short indeed of being considered to be exceptions to the automatic deportation provisions. As far as private life is concerned there is nothing to prevent the Appellant from returning to his home country where he speaks the language, is conversant with its culture and who as a healthy adult male would be able to make his way in the world. For the sake of completeness paragraph 399 of the Immigration Rules do not assist the Appellant in any way".

20. AV appealed to the Upper Tribunal on the grounds (in relation to the Article 8 claim) that the First-tier Tribunal had mistakenly thought that his was a case of automatic deportation under the 2007 Act; that the First-tier Tribunal had failed to apply the requirement laid down in *Maslov* for very serious reasons justifying deportation, and there were no such reasons; that the Tribunal had unfairly reached its findings on credibility since it had cut short his evidence as to the circumstances leading up to his offence.

21. In its determination dated 11 July 2013, the Upper Tribunal found that the First-tier Tribunal had indeed erred in considering AV's case as an automatic deportation case, when in fact it was a case in which the Secretary of State had made her order because she considered AV's deportation to be conducive to the public good. The more important error of law that the Upper Tribunal found to have been made by the First-tier Tribunal was its failure to refer to the decision in *Maslov* or to show proper appreciation of its significance. It therefore set aside its determination.

22. The Upper Tribunal made no finding as to whether AV had been unfairly cut short in giving his evidence to the First-tier Tribunal or whether his evidence had been unfairly treated. AV did not give evidence before the Upper Tribunal. Nonetheless, it proceeded on a wholly different factual basis to that of the First-tier Tribunal. Whereas the First-tier Tribunal had rejected AV's protestations seeking to minimise his criminal responsibility, the Upper Tribunal stated:

> "40. As indicated above, the appellant wrote a letter on 26 February 2012. This is where he said that "I understand that my conviction may seem serious". That is not all that he said in this letter. We set out below the entire paragraph from which the respondent quoted selectively. The appellant is entitled to have his comments considered in context. We have emboldened the phrase that was highlighted by the respondent. We do not think that paragraph 34 of the respondent's letter of 22 January 2013 summarises fairly the appellant's case. The appellant said:
>
> > "I am aware that the UK Border Agency presumed that I pose a danger to the public because of my conviction and the length of my sentence. I would like to rebut that presumption and give evidence to why I believe that I do not pose any danger to the public. I understand that my conviction may seem serious and I am surely (sic) sorry for the victims and regretful of my actions. I have never been involved in crimes before, this is my first and only conviction, it was a big mistake and I regret it every day. I had just returned 17 at the time of the offence and I was under a lot of peer pressure from the other people involved. I am no longer in contact with the other people involved and I have kept myself distant from the troublemakers and bad company."
>
> 41. Thus it is plain that the appellant began by apologising for his actions, which is clearly a reference to his criminal activities, and "the effect it may have had on the victims". He wished he could go back in time and do the right thing. He claimed that he was young and immature and acted under peer pressure. He described his conduct as "out of character and not something he would have ever thought about doing". He pointed out that the offence was committed about two years before he wrote the letter and that he had grown up in the interim. He claimed to have addressed issues that led him to

> offend and drew attention to his good behaviour in prison in support of the contention that he had re-organised his life."

23. At paragraph 66 of its determination, the Upper Tribunal said:

> "The conclusion in the letter of 22 February 2013 that the appellant was "assessed as a medium risk of harm to the public from robbery" and a "medium risk of reconviction" seems to arise from a weighting system that acknowledges the previous offences and weaknesses in the appellant's character. It has to be read with the document dated 20 March 2013 from Mr Rhys-Thomas assigning the appellant firmly to the "low" band of risk for likely re-offending."

24. In fact, the email from Officer Rhys Thomas gave as the percentage likelihood of any proven offending within one year as 12, and the percentage likelihood of any proven offending within 2 years as 22.

The contentions of the parties

25. In essence, the submission made on behalf of Mr Akpinar is that the First-tier Tribunal failed to apply the law as laid down or explained in *Maslov*, and applied by this Court subsequently. It followed that the Upper Tribunal should have granted him permission to appeal, and that Nicol J was wrong to refuse permission to apply for judicial review of its refusal to grant permission to appeal. The Secretary of State submitted that the First-tier Tribunal was entitled to decide as it did.

26. In *AV*, the Secretary of State's principal submission was that the Upper Tribunal wrongly took the requirement in paragraph 75 of *Maslov* as a comprehensive test, when it should have weighed up the various factors referred to in earlier paragraphs of that judgment and performed the conventional balancing assessment required by Article 8. In addition, the Upper Tribunal was wrong to apply paragraph 75 of *Maslov* to someone who had not spent not the major part, but only a major part, of his life in the UK, much of it unlawfully. The Secretary of State contended that the Upper Tribunal had failed to take into account the way that the *Maslov* requirements had been interpreted in the Immigration Rules, had failed to have regard to the public interest in deterrence, and had unjustifiably overturned the First-tier Tribunal's findings of fact.

27. For AV, Mr Karnik adopted the submissions made by Mr Knafler QC on behalf of Mr Akpinar as to the effect of the judgment in *Maslov*, and supported the determination of the Upper Tribunal on the grounds it gave.

Discussion: *Maslov*

28. It will be obvious that the discussion of these rival contentions that the starting point is the judgment of the European Court of Human Rights in *Maslov*. The facts were striking. They were set out by the Court as follows:

> 10. The applicant was born in October 1984 and currently lives in Bulgaria.

11. In November 1990, at the age of six, the applicant lawfully entered Austria together with his parents and two siblings. Subsequently, he was legally resident in Austria. His parents, who were lawfully employed, acquired Austrian nationality. The applicant attended school in Austria.

12. In late 1998 criminal proceedings were instituted against the applicant. He was suspected of, inter alia, having broken into cars, shops and vending machines; having stolen empties from a stock ground; having forced another boy to steal 1,000 Austrian schillings from the latter's mother; having pushed, kicked and bruised this boy; and of having used a motor vehicle without the owner's authorisation.

13. On 8 March 1999 the applicant was granted an unlimited settlement permit (Niederlassungsbewilligung).

14. On 7 September 1999 the Vienna Juvenile Court (Jugendgerichtshof) convicted the applicant on twenty-two counts of aggravated gang burglary and attempted aggravated gang burglary (gewerbsmäßiger Bandendiebstahl), forming a gang (Bandenbildung), extortion (Erpressung), assault (Körperverletzung), and unauthorised use of a vehicle (unbefugter Gebrauch eines Fahrzeugs), offences committed between November 1998 and June 1999. He was sentenced to eighteen months' imprisonment, thirteen of which were suspended on probation. The sentence was accompanied by an order to undergo drug therapy.

15. On 11 February 2000 the applicant was arrested and further criminal proceedings were opened against him relating to a series of burglaries committed between June 1999 and January 2000. The applicant and his accomplices were suspected of having broken into shops or restaurants, where they stole cash and goods. On 11 February 2000 the Vienna Juvenile Court remanded him in custody.

16. On 25 May 2000 the Vienna Juvenile Court convicted the applicant on eighteen counts of aggravated burglary and attempted aggravated burglary, and sentenced him to fifteen months' imprisonment. When fixing the sentence the court noted the applicant's confession as a mitigating circumstance, and the number of offences committed and the rapid relapse into crime after the last conviction as aggravating circumstances. It also observed that the applicant, though still living with his parents, had completely escaped their educational influence, had repeatedly been absent from home and had dropped out of school. It further noted that the applicant had failed to comply with the order to undergo drug therapy. Consequently, the suspension of the prison term imposed by the judgment of 7 September 1999 was revoked.

> Following the Vienna Juvenile Court's judgment, the applicant served his prison term.
>
> 17. On 3 January 2001 the Vienna Federal Police Authority (Bundespolizeidirektion), relying on section 36(1) and 2(1) of the Aliens Act 1997 (Fremdengesetz), imposed a ten-year exclusion order on the applicant. Having regard to the applicant's convictions, it found that it was contrary to the public interest to allow him to stay in Austria any longer. Considering the applicant's relapse into crime after his first conviction, the public interest in the prevention of disorder and crime outweighed the applicant's interest in staying in Austria.
>
> 18. The applicant, assisted by counsel, appealed. He submitted that the exclusion order violated his rights under Article 8 of the Convention as he was a minor who had come to Austria at the age of six, his entire family lived in Austria and he had no relatives in Bulgaria. ….

29. The Court set out what it considered to be general principles applicable to the case at paragraphs 68 to 76 of its judgment. Given the centrality of this judgment to the present appeals, I shall set them out.

> "68. The main issue to be determined is whether the interference was "necessary in a democratic society". The fundamental principles in that regard are well established in the Court's case-law and have recently been summarised as follows (see *Üner*, case no. no. 46410/99, §§ 54-55 and 57-58):
>
> "54. The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and *Boujlifa v. France*, 21 October 1997, § 42, Reports of Judgments and Decisions 1997-VI). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see *Dalia v. France*, 19 February 1998, § 52, Reports 1998-I; *Mehemi v. France*, 26 September 1997, § 34, Reports 1997-VI; *Boultif*, cited above, § 46; and *Slivenko v. Latvia* [GC], no. 48321/99, § 113, ECHR 2003-X).

55. The Court considers that these principles apply regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there. In this context the Court refers to Recommendation 1504 (2001) on the non-expulsion of long-term immigrants, in which the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers invite member States, inter alia, to guarantee that long-term migrants who were born or raised in the host country cannot be expelled under any circumstances (see paragraph 37 above). While a number of Contracting States have enacted legislation or adopted policy rules to the effect that long-term immigrants who were born in those States or who arrived there during early childhood cannot be expelled on the basis of their criminal record (see paragraph 39 above), such an absolute right not to be expelled cannot, however, be derived from Article 8 of the Convention, couched, as paragraph 2 of that provision is, in terms which clearly allow for exceptions to be made to the general rights guaranteed in the first paragraph.

...

57. Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case-law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision (see, for example, the judgments in *Moustaquim*, cited above; *Beldjoudi v. France*, 26 March 1992, Series A no. 234-A; and *Boultif*, cited above; see also *Amrollahi v. Denmark*, no. 56811/00, 11 July 2002; *Yilmaz v. Germany*, no. 52853/99, 17 April 2003; and *Keles v. Germany*, no. 32231/02, 27 October 2005). In the *Boultif* case the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria, as reproduced in paragraph 40 of the Chamber judgment in the present case, are the following:

– the nature and seriousness of the offence committed by the applicant;

– the length of the applicant's stay in the country from which he or she is to be expelled;

– the time elapsed since the offence was committed and the applicant's conduct during that period;

– the nationalities of the various persons concerned;

– the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

– whether the spouse knew about the offence at the time when he or she entered into a family relationship;

– whether there are children of the marriage, and if so, their age;

– the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

58. The Court would wish to make explicit two criteria which may already be implicit in those identified in the Boultif judgment:

– the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled;

– the solidity of social, cultural and family ties with the host country and with the country of destination.

As to the first point, the Court notes that this is already reflected in its existing case law (see, for example, *Şen v. the Netherlands*, no. 31465/96, § 40, 21 December 2001, and *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 47, 1 December 2005) and is in line with the Committee of Ministers' Recommendation Rec (2002)4 on the legal status of persons admitted for family reunification (see paragraph 38 above).

As to the second point, it is to be noted that, although the applicant in the case of *Boultif* was already an adult when he entered Switzerland, the Court has held the 'Boultif criteria' to apply all the more so (à plus forte raison) to cases concerning applicants who were born in the host country or who moved there at an early age (see *Mokrani v. France*, no. 52206/99, § 31, 15 July 2003). Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there."

69. In the *Üner* judgment, as well as in the *Boultif* judgment (§ 48) cited above, the Court has taken care to establish the criteria – which were so far implicit in its case-law – to be applied when assessing whether an expulsion measure is necessary in a democratic society and proportionate to the legitimate aim pursued.

70. The Court would stress that while the criteria which emerge from its case-law and are spelled out in the *Boultif* and *Üner* judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Moreover, it has to be borne in mind that where, as in the present case, the interference with the applicant's rights under Article 8 pursues, as a legitimate aim, the "prevention of disorder or crime" (see paragraph 67 above), the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities.

71. In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family of his own, the relevant criteria are

– the nature and seriousness of the offence committed by the applicant;

– the length of the applicant's stay in the country from which he or she is to be expelled;

– the time elapsed since the offence was committed and the applicant's conduct during that period; and

– the solidity of social, cultural and family ties with the host country and with the country of destination.

72. The Court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult (see, for instance, *Moustaquim v. Belgium*, 18 February 1991, § 44, Series A no. 193, and *Radovanovic v. Austria*, no. 42703/98, § 35, 22 April 2004).

73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or

she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec (2000) 15 and Rec (2002) 4 (see paragraphs 34-35 above).

74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see *Üner*, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there (see *Üner*, § 58 in fine).

75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile.

76. Finally, the Court reiterates that national authorities enjoy a certain margin of appreciation when assessing whether an interference with a right protected by Article 8 was necessary in a democratic society and proportionate to the legitimate aim pursued (see *Slivenko v. Latvia* [GC], no. 48321/99, § 113, ECHR 2003-X, and *Berrehab v. the Netherlands*, 21 June 1988, § 28, Series A no. 138). However, the Court has consistently held that its task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other (see, among many other authorities, *Boultif*, cited above, § 47). Thus, the State's margin of appreciation goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (see, mutatis mutandis, *Société Colas Est and Others v. France*, no. 37971/97, § 47, ECHR 2002-III). The Court is therefore empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8."

30. Paragraph 75 of the judgment has been regarded by some, and as is submitted on behalf of Mr Akpinar, as laying down a new rule of law, creating a consistent and objective hurdle to be surmounted by the State in all cases to which it applies; in other words, irrespective of the other factors involved, unless the State can show that there are "very serious reasons" for deporting "a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country", his Article 8 rights will prevail. The phrase "very serious reasons" has been taken to mean "very serious offending".

31. I do not think that this is a correct reading of the judgment. The Court's extensive citation of its previous case law does not suggest that it intended to depart from it. The first words of paragraph 75 "In short", indicate that it was seeking to summarise the effect of the previous jurisprudence. This is how paragraph 75 was read by the Court of Appeal in *JO (Uganda) and JT (Ivory Coast) v Secretary of State for the Home Department* [2010] EWCA Civ 10, in which at paragraph 21 of his judgment Richards LJ described it as pulling together what had been stated in earlier paragraphs. Paragraph 76 of the judgment in *Maslov* shows that the State's and the courts' consideration of an Article 8 claim involves a balancing exercise, in which the factors to which the Court referred are to be taken into account. This is confirmed by the way in which it expressed its ultimate conclusion, in paragraphs 100 and 201 of the judgment:

> "100. Having regard to the foregoing considerations, in particular the – with one exception – non-violent nature of the offences committed when a minor and the State's duty to facilitate his reintegration into society, the length of the applicant's lawful residence in Austria, his family, social and linguistic ties with Austria and the lack of proven ties with his country of origin, the Court finds that the imposition of an exclusion order, even of a limited duration, was disproportionate to the legitimate aim pursued, "the prevention of disorder or crime". It was therefore not "necessary in a democratic society".
>
> 101. Consequently, there has been a violation of Article 8 of the Convention."

This was a conventional balancing exercise, with no reference to "very serious reasons" or their absence.

32. It is not only a textual consideration of the judgment that supports my view. Take two hypothetical examples. The first concerns a United States national, a young man who came to this country with his parents who work in the City, and can afford to make, and do make, regular visits to the USA. He of course speaks the language of his country of origin, and is familiar with its culture. He holidays in the USA regularly, and has a large family there, including grandparents with whom he can stay if returned. The effect of expulsion to the USA on him, on his personal and family life, would be relatively minor. The second hypothetical case concerns a young man from a very different country, such as one of the formerly French African colonies. He speaks neither French nor any of the local languages, and knows nothing of the culture of his country of origin. He has no family there, and has never visited Africa since he left as a child. The effect of expulsion on his personal and family life would be far, far greater than in the case of the American. It seems to me that it would be irrational to require the same "very special reasons" to expel both of them. Manifestly, the balancing exercise should require more serious offending, or the risk of more serious offending, in the second case than in the first if the deportation is to be justified under Article 8.2. The balancing exercise, to which the Court referred in paragraph 76 of its judgment, would be very different in the two cases. I do not think that the Court can have intended or did intend otherwise. What was said in paragraph 75 must be read as relating to the facts of the case before it, among other factors that

the offending in question was, as subsequently stated in *Onur*, no more than acts of juvenile delinquency.

33. Lastly, I think that caution is required in seeking to equate very special reasons with very serious offences. Frequent and continuing repetition of offences that are not individually serious may amount to serious offending, which may justify expulsion. *Miah v UK* (application no. 53080/07) is such a case. The Court upheld a deportation in circumstances in which the last sentence imposed on the applicant was of only 12 months' imprisonment, but "the domestic authorities were entitled to take into account that this was the last in a series of offences and that the applicant had failed to respond to other, less severe, sentences": paragraph 25.

34. I turn to consider whether subsequent judgments of the European Court of Human Rights are inconsistent with my view of the effect of *Maslov*.

35. *Onur v UK* (application 2731/07) concerned the deportation of a Turkish citizen born in 1978. He came to this country in 1989, aged 11, and had been here lawfully ever since. He had committed offences of driving whilst disqualified and a number of offences of burglary and aggravated burglary. He then committed a robbery with 3 others in which weapons were carried, and was sentenced in October 1997, when he was about 19, to 4½ years' imprisonment. He was released in January 2003, and convicted of a road traffic offence in 2005 and of a failure to surrender to custody; a sentence of 28 days' imprisonment was imposed, with a driving disqualification. The European Court of Human Rights cited paragraphs 57 and 58 of its judgment in *Üner*. The Court referred to *Maslov* in paragraph 55 of its judgment in *Onur*, but only to distinguish it on the facts, and without suggesting that it had laid down a requirement of very special reasons:

> "55. Although the majority of the applicant's criminal convictions were at the less serious end of the spectrum of criminal activity and were non-violent in nature, the Court cannot ignore the more serious convictions for burglary and robbery. The conviction for robbery was particularly serious: in sentencing the applicant to four and a half years' imprisonment the judge noted that the applicant was one of the ringleaders of the operation and that the use of weapons made it a terrifying ordeal for the victims. Moreover, although the applicant submits that the majority of his offences were committed when he was between seventeen and eighteen years old, he was in fact nineteen years old when he was last convicted of burglary and twenty-two years old when he was convicted of robbery. The present case is therefore readily distinguishable from *Maslov v. Austria* [GC], no. 1638/03, § 81, 23 June 2008, where the Court found a violation of Article 8. In *Maslov*, the (mostly non-violent) offences were committed by the applicant when he was between fourteen and fifteen years old and could therefore be regarded as acts of juvenile delinquency."

36. The applicant in *A W Khan v UK* (application no. 47486/06 was born in 1975 in Pakistan, had came to this country in 1978 and had lived here since lawfully. He had committed offences of theft, using a forged banker's draft, involvement in the

importation of a class A drug; for the last of these offences he received a sentence of 7 years' imprisonment. Once again, the Court cited paragraphs 57 and 58 of *Üner*, as setting out the factors to be considered. The judges who sat on the case included Sir Nicolas Bratza, who was a party to the judgment in *Maslov*, yet that case was not referred to. Thus the Court did not make a finding that there were, or were not, very serious reasons justifying deportation, but rather performed the conventional balancing exercise:

> "50. In light of the above, having particular regard to the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of any continuing ties to Pakistan, the strength of his ties with the United Kingdom, and the fact that the applicant has not reoffended following his release from prison in 2006, the Court finds that the applicant's deportation from the United Kingdom would not be proportionate to the legitimate aim pursued and would therefore not be necessary in a democratic society."

37. *Grant v UK* (application no. 10606/07) was another case in which deportation was justified not on the basis of serious offences but on the basis of their number. The Court said:

> 38. Although the applicant's criminal record includes offences of dishonesty, violence, possession of a weapon in a public place, and the possession and supply of drugs, none of the individual offences committed by him as at the more serious end of the spectrum of criminal activity. The majority of offences were non-violent in nature and those that involved some violence attracted sentences of twelve months' imprisonment or less (the applicant was fined for assaulting a police officer, he was sentenced to nine months' imprisonment for assault occasioning actual bodily harm, and he was sentenced to twelve months' imprisonment for robbery). Moreover, the applicant's convictions for the supply of drugs relate to small quantities of a Class B drug, and as a consequence he could not be considered to be a "dealer".
>
> 39. The Court cannot, however, ignore either the sheer number of offences of which the applicant has been convicted, or the time span during which the offences occurred. ….

38. *Maslov* was referred to, not as setting out a generally applicable test, but as distinguished on the facts:

> "40. The time span during which the offences occurred is one factor which distinguishes this case from *Maslov v. Austria* (cited above), where the Court found a violation of Article 8. In *Maslov*, the applicant had convictions for burglary, extortion and assault, which he had committed during a fifteen-month period in order to finance his drug consumption. The Court

found that the decisive feature in that case was the young age at which the applicant committed the offences (he was still a minor) and the non-violent nature of the offences (see *Maslov*, cited above, § 81). In the present case, although the applicant's offences are mostly non-violent, he has a much longer pattern of offending and the offences he committed were not "acts of juvenile delinquency".

39. *AH Khan v UK* (application no. 6222/10) was a case in which the Court purported to apply paragraph 75 of *Maslov*. Interestingly, at both points in the judgment in which reference to that case was made, it was cited for the proposition that "serious reasons" rather than "very serious reasons" were required to justify deportation (paragraph 37) and that "such serious reasons" were present. The Court concluded:

> "41. Finally, the Court turns to the question of the respective solidity of the applicant's ties to the United Kingdom and to Pakistan. The Court notes that, unlike his younger brother, the applicant returned to Pakistan for visits following his arrival in the United Kingdom and also married there. In the absence of any evidence to the contrary, the Court assumes that this marriage is still, legally at least, subsisting. The applicant therefore maintained some level of connection to his country of origin and was not deported as a stranger to the country. As regards his ties to the United Kingdom, the Court has addressed the question of his family life, both with his parents and siblings and with his various partners and children, above, and found it to be limited in its extent. Furthermore, the applicant's private life in the United Kingdom, as observed by the Tribunal, has been constrained by his convictions and spells in prison. Whilst he was mainly educated in the United Kingdom and has worked, he does not appear to have established a lengthy or consistent employment history. In short, and despite the length of his stay, the applicant did not achieve a significant level of integration into British society. The Court is aware that, as a settled migrant who spent much of his childhood in the United Kingdom, serious reasons would be required to render the applicant's deportation proportionate (see *Maslov*, cited above, §75). However, having regard to his substantial offending history, including offences of violence and recidivism following the commencement of deportation proceedings against him, the Court is of the view that such serious reasons are present in the applicant's case. His private and family life in the United Kingdom were not such as to outweigh the risk he presented of future offending and harm to the public and his deportation was therefore proportionate to the legitimate aim of preventing crime. As such, the applicant's deportation to Pakistan did not amount to a violation of Article 8."

The judgment highlights the danger of treating "very serious reasons" as if they were a legislative requirement.

40. In *Balogun* (application no.60286/09), the Court did apply *Maslov.* However, once again the Court cited the criteria listed in *Üner,* and carried out a balancing exercise.

41. In its judgment in *Samsonnikov v Estonia* (application no. 52178/10) the Court set out the general principles applicable to the question whether expulsion is "necessary in a democratic society". Under this heading, it cited paragraphs 54 to 58 of *Üner*, but not *Maslov.* That judgment was referred to at paragraph 90 of the judgment:

> "90. … Against this background and having regard to the applicant's age, the length of the period of his criminal behaviour as well as the seriousness of the offences, the Court is unable to conclude that the acts committed by the applicant can be regarded as "acts of juvenile delinquency" (see, by contrast, *Maslov*, cited above, § 81; see also *Joseph Grant v. the United Kingdom*, no. 10606/07, §§ 39-40, 8 January 2009). The Court reiterates, in this context, that an absolute right not to be expelled cannot be derived from Article 8 of the Convention regardless of whether an alien entered the host country as an adult or at a very young age, or indeed whether he or she was born there (see *Üner*, cited above, § 55). …"

I note that the Court did not apply a "very serious reasons" test. In contrast, that test was applied by it in *Abdi Ibrahim v UK* (application no. 14535/10), and was found to be satisfied.

42. *El Habach v Germany* (application no.66837/11) concerned an offender who was, to use the words in paragraph 75 of *Maslov*, "a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country". In holding his application inadmissible, the Court referred to *Maslov* at paragraph 29, but only to distinguish it on the facts at paragraph 32. The "very serious reasons" requirement was not mentioned or applied. Again, in *Moustaquim v Belgium* (application no. 12313/86) 13 EHRR 802, although the deportation concerned "a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country", and was held to infringe Article 8, neither *Maslov* nor the "very serious reasons" test was mentioned or applied, the Court simply stating:

> "45. …
>
> Mr Moustaquim himself was less than two years old when he arrived in Belgium. From that time on he had lived there for about twenty years with his family or not far away from them. He had returned to Morocco only twice, for holidays. He had received all his schooling in French.
>
> His family life was thus seriously disrupted by the measure taken against him, …".

> 46. Having regard to these various circumstances, it appears that, as far as respect for the applicant's family life is concerned, a proper balance was not achieved between the interests involved, and that the means employed was therefore disproportionate to the legitimate aim pursued. Accordingly, there was a violation of Article 8."

43. My conclusion is that there is not a "clear and constant jurisprudence of the Strasbourg court" (see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, paragraph 26, and *R v* ***v.*** *Special Adjudicator ex parte Ullah* [2004] UKHL 26 [2004] 2 AC 323 at paragraph 20) requiring this Court to treat "very serious reasons", if the phrase means "very serious offences", as a precondition of deportation of someone who is a "settled migrant who has lawfully spent all or the major part of his or her childhood and youth" in this country.

44. I am supported in this view by the consideration that to create a pre-condition, applicable in a defined class of cases, to the exercise of the balancing exercise required by Article 8.2 would be inconsistent with its terms and with the intention of the parties to the Convention.

45. I turn to consider our domestic jurisprudence. In *M J (Angola) v Secretary of State for the Home Department* [2010] EWCA Civ 557, this Court did apply paragraph 75 of *Maslov* as if it were a rule of law. Giving the lead judgment, with which the other members of the Court of Appeal agreed, Dyson LJ said:

> "40. Despite the obvious care with which the AIT considered whether the deportation of the appellant would be a disproportionate interference with his right to respect for his private life, in my opinion their determination of this issue was flawed. The appellant had lawfully entered the UK when he was 12 years of age. He spent his adolescence and the whole of adult life here. Much of his offending was committed when he was under the age of 21. In these circumstances, very serious reasons were required to justify his deportation: see *Maslov* at [75].
>
> 41. Miss Grey does not dispute this. She points out that the AIT set out all the relevant facts, including the appellant's age when he entered the UK, the fact that he has ties with this country and that most of his offending was committed when he was young. She submits that, in substance, at paras 66, 84 and 85, the AIT did provide the "very serious reasons" that were necessary to justify the deportation.
>
> 42. I do not agree. What the AIT did was to balance the appellant's right to respect for his private life against the rights of others to be protected from the risk of his re-offending and to conclude that the former was outweighed by the latter. In performing the balancing exercise, which they found "very difficult", they undoubtedly took into account the fact that the

> appellant had resided in the UK for a lengthy period and arrived here as an adolescent: see para 66. But there is nothing to indicate that they appreciated that the fact that (i) the appellant had lived in the UK since he was 12 years of age, (ii) most of his offending had been committed when he was under the age of 21 and (iii) he had no links with Angola meant that very serious reasons were required to justify the decision to deport him. I should add that the AIT are not to be criticised for not appreciating that very serious reasons were required. They did not have the benefit of [75] of *Maslov*: the Grand Chamber had not published their decision at the time of the AIT's determination."

46. I point out that there was no argument before the Court of Appeal as to the effect of *Maslov*, it being conceded that "very serious reasons" were required to justify the appellant's deportation, in a case in which the Tribunal had failed to have regard to the material considerations identified by Dyson LJ in paragraph 42.

47. In *JO (Uganda) and another v Secretary of State for the Home Department* [2010] EWCA Civ 10, Richards LJ (with whose judgment the other members of the Court of Appeal agreed) referred to *Maslov*:

> "21. Where the person to be deported is a young adult who has not yet founded a family life of his own, the subset of criteria identified in para 71 of the *Maslov* judgment will be the relevant ones. Further, paras 72-75 of that judgment underline the importance of age in the analysis, including the age at which the offending occurred and the age at which the person came to the host country. This is pulled together in para 75: for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion; and this is all the more so where the person concerned committed the relevant offences as a juvenile.
>
> …
>
> 51. . … my concerns about the determination [of the tribunal] go deeper than that.
>
> 52. First, in distinguishing *Maslov* on the simple basis that JT's presence in this country had not been shown to be lawful, the tribunal seems to have regarded *Maslov* as being entirely irrelevant to JT's case. Whilst the point of distinction was correct as far as it went, it was not a proper basis for disregarding what was said in *Maslov* about the position of those who have been in the host country since early childhood or about the significance of the age at which criminal offences were committed. Although the tribunal did take into account the fact that JT had been in this country since early childhood, there is nothing to show that it did so with a proper understanding of the importance of this for the issue of private life. Nor did it take proper account of the fact that JT's criminal offences were committed as a juvenile."

48. I do not regard these extracts from the judgment as inconsistent with my view as to the effect of *Maslov.*

49. *MW (Democratic Republic of Congo v Secretary of State for the Home Department* [2011] EWCA Civ 1240, to which I referred above, concerned, as the title suggests, a national of the DRC; he was young and settled here, and it was accepted that he had lawfully spent the major part of his childhood and youth here. Sullivan LJ said, in a judgment with which the other members of the Court of Appeal agreed, said:

> "24. I do not accept Mr. Hall's submission that, notwithstanding *Maslov* , the Respondent may lawfully deport a settled migrant such as this Appellant even in the absence of any very serious reasons to justify deportation. Whether the reference to "very serious reasons" in paragraph 75 of *Maslov* is described as a "rule", "test" or "threshold", or simply as the inevitable consequence of the proper application of the *Üner* criteria to the case of a settled migrant who has spent all or the major part of his childhood and youth in the host country, *Maslov* does pull the threads together and in so doing makes it clear in paragraph 75 that very serious reasons are required to justify expulsion in such a case. In the absence of very serious reasons the deportation of a settled migrant will not be proportionate under Article 8."

50. The appellant in *MW* was very much like the second hypothetical case to which I referred in paragraph 32 above. In that context, I would respectfully agree with what Sullivan LJ said, but I do not think he would have used the same language in the different context of my first hypothetical case.

51. *RS (Uganda) v Secretary of State for the Home Department* [2011] EWCA Civ 1749 concerned a young man who had been found guilty of "steaming", four counts of robbery committed with others of young persons on a train. The Upper Tribunal said:

> "12. I am aware that the ECHR in *Maslov* concluded (paragraph 84) that, "The Court sees little room for justifying an expulsion of a settled migrant on account of mostly non-violent offences committed when a minor". The ECHR went on to say (paragraph 85) that, "The Court had made it clear that very serious violent offences can justify expulsion even if they were committed by a minor". I consider that the appellant's "steaming" offence falls somewhere between those two extremes. I certainly do not find that there should be "little room for justifying" the deportation of this appellant given the offences which he has committed. To that extent, the facts that are to be distinguished from "mostly non-violent offences committed when a minor"…."

52. Although the Tribunal had not found in terms that there were "very serious reasons" for RS to be deported, Etherton LJ said, at paragraph 37, that it was entitled to reach the conclusion that there were such reasons in that case.

53. These decisions of the Court of Appeal must be reviewed in the light of the statutory changes and the Immigration Rules cited at paragraphs 3 and 4 above. They were considered by this Court in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192. That case did not concern a young person such as *Maslov.* At paragraph 4 of his judgment (with which the other members of the Court agreed), Lord Dyson MR said:

> "4. The previous law was stated in a number of decisions of the ECtHR including *Boultif v Switzerland* [2003] 33 EHRR 1179, *Uner v Netherlands* [2006] 3 FCR 229 and *Maslov v Austria* [2008] GC ECHR 1638/03. The essence of the approach required by that law was summarised by the House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167."

This does not suggest that *Maslov* made any significant change to the law, which continues to require the proportionality exercise mandated by the House of Lords in *Huang.* Later in his judgment, the Master of the Rolls addressed the question whether the new Immigration Rules made a difference to the law as previously applied by our tribunals and courts:

> "39. Ms Giovannetti has made it clear on behalf of the Secretary of State that the new rules do not herald a restoration of the exceptionality test. We agree. It is true that, as the UT pointed out at para 38 of their determination, the new rules are not a perfect mirror of the Strasbourg jurisprudence. But Ms Giovannetti concedes that they should be interpreted consistently with it. Mr Husain correctly points out that the rules do not expressly provide for consideration of all questions relevant to article 8 claims, such as what is in the best interests of the child; the age of the offender at the date of entry into the UK and at the date of the offending; the length of time since the offence; the offender's subsequent conduct and so on. But the rules expressly contemplate a weighing of the public interest in deportation against "other factors". In our view, this must be a reference to all other factors which are relevant to proportionality and entails an implicit requirement that they are to be taken into account.
>
> 40. Does it follow that the new rules have effected no change other than to spell out the circumstances in which a foreign criminal's claim that deportation would breach his article 8 rights will *succeed*? At this point, it is necessary to focus on the statement that it will only be "in exceptional circumstances that the public interest in deportation will be outweighed by other factors". Ms Giovannetti submits that the reference to exceptional circumstances serves the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paras 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their

rights under article 8(1) trump the public interest in their deportation.

41. We accept this submission. In view of the strictures contained at para 20 of *Huang*, it would have been surprising if the Secretary of State had intended to reintroduce an exceptionality test, thereby flouting the Strasbourg jurisprudence. At first sight, the choice of the phrase "in exceptional circumstances" might suggest that this is what she purported to do. But the phrase has been used in a way which was not intended to have this effect in all cases where a state wishes to remove a foreign national who relies on family life which he established at a time when he knew it to be "precarious" (because he had no right to remain in the UK). The cases were helpfully reviewed by Sales J in *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin). The fact that *Nagre* was not a case involving deportation of a foreign criminal is immaterial. The significance of the case law lies in the repeated use by the ECtHR of the phrase "exceptional circumstances".

42. At para 40, Sales J referred to a statement in the case law that, in "precarious" cases, "it is likely to be only in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of art 8". This has been repeated and adopted by the ECtHR in near identical terms in many cases. At paras 41 and 42, he said that in a "precarious" family life case, it is only in "exceptional" or "the most exceptional circumstances" that removal of the non-national family member will constitute a violation of article 8. In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase "exceptional circumstances" is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals.

43. The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".

44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a

> proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision-maker is not "mandated or directed" to take all the relevant article 8 criteria into account (para 38)."

54. The Master of the Rolls ultimate decision was as follows:

> "50. Although we have disagreed with the UT on the question whether the new rules provide a complete code, the differences between our approach and theirs is one of form and not substance. They conducted a meticulous assessment of the factors weighing in favour of deportation and those weighing against. As they said, the factors in favour of deportation were substantial. They properly gave significant weight to the serious view taken by the Secretary of State of MF's criminality and his poor immigration history. On the other hand, they attached considerable importance to the interests of F. The decision was finely balanced and a contrary decision would have been difficult for the appellant to challenge. But they did not take into account any irrelevant factors and they did not fail to take into account any relevant factors. In these circumstances, the UT were entitled to strike the balance in favour of MF. We can find no basis for interfering with their decision."

This was a classic *Huang* balancing of the factors for and against deportation.

The application of the law to the appeals before this Court.

Akpinar

55. The First-tier Tribunal found that neither paragraph 398 nor paragraph 399 of the Immigration Rules applied to him, and it is not suggested on his behalf that the Tribunal was incorrect so to find. It follows that the Immigration Rules required his deportation unless there were exceptional circumstances favouring his remaining in this country. The Tribunal found that there were none, and in my judgment there was ample material before them to justify this conclusion: the seriousness of the violent disorder offence, the lack of remorse, the number of his offences, and his connections with Turkey and its culture. Applying the judgment of this Court in *MF*, I conclude that Mr Akpinar's appeal must fail.

56. The best point made by Mr Knafler is that the First-tier Tribunal did not cite paragraph 75 of *Maslov*, and did not in terms find that there were very strong reasons justifying the appellant's expulsion. However, the Tribunal referred to "the *Maslov* principles", and must have had paragraph 75 in mind. In any event, reading the determination as a whole, it is clear that the Tribunal considered all relevant factors and I think it did consider that there were very serious reasons in the context of his case to justify deportation. Moreover, it seems to me that there were and are such reasons. It follows that quite apart from the guidance given by this Court in *MF*, I would dismiss Mr Akpinar's appeal.

AV

57. AV had committed a serious offence involving violence. That fact does not, however, necessarily lead to the conclusion that he should be deported. My difficulty with the determination of the Upper Tribunal is that the only error of law that it found on the part of the First-tier Tribunal, namely the mistaken assumption that his was a case of an automatic deportation order, did not bear on the First-tier Tribunal's findings of primary facts. The Upper Tribunal made no finding that justified its making different primary factual findings from those made by the First-tier Tribunal. Moreover, since the Upper Tribunal did not hear any oral evidence, it was in no position to make findings as to AV's credibility or his remorse (or lack of it) differing from those made by the First-tier Tribunal which had heard his oral evidence.

58. Counsel for AV contended before the Upper Tribunal that the First-tier Tribunal had cut short his evidence to it, and should not have done so. However, the Upper Tribunal made no finding as to whether this contention was justified, and if so whether there was a material irregularity. A tribunal may be entitled to cut short a witness's evidence if, for example, it has become repetitious or irrelevant.

59. In these circumstances, it seems to me that this Court should allow the Secretary of State's appeal and remit AV's appeal to be heard afresh by a differently-constituted Upper Tribunal which can determine whether or not there was any unfairness in the proceedings before the First-tier Tribunal, and if so the consequences, and in particular whether the First-tier Tribunal made any material procedural error. The Upper Tribunal will then determine AV's claim on the facts established by the First-tier Tribunal or by the Upper Tribunal itself.

Lord Justice McFarlane

60. I agree

Lord Justice Maurice Kay

61. I also agree.