Case No: C5/2009/1328
C5/2009/1160

Neutral Citation Number: [2010] EWCA Civ 10
IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE ASYLUM AND IMMIGRATION TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2010

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE RICHARDS
and
LORD JUSTICE TOULSON

- -

Between :

(1) JO (Uganda)	**Appellants**
(2) JT (Ivory Coast)	
- and -	
Secretary of State for the Home Department	**Respondent**

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- -

Richard Drabble QC and Graham Denholm (instructed by **(Hackney Community Law Centre**) for the **Appellant JO**
Richard Drabble QC and Linda Appiah (instructed by **Charles Annon & Co**) for the **Appellant JT**
John-Paul Waite (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date : 8 December 2009

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Judgment

Lord Justice Richards :

1. These two appeals were heard together because they both raise issues concerning the application of recent Strasbourg case-law on the compatibility with article 8 ECHR of decisions to deport, on grounds of criminal offending, foreign nationals who have spent most of their childhood in the host country. *JO (Uganda*) is itself a deportation case and engages that case-law directly. *JT (Ivory Coast*) concerns removal of an illegal entrant who also committed criminal offences; the relevance to it of the case-law in question is one of the issues in dispute. Judgment is being handed down at the same time in *KB (Trinidad and Tobago) v Secretary of State for the Home Department*, an appeal heard by the same constitution a week later than the present appeals but which raises an overlapping issue as to whether the application of article 8 requires a different approach in a deportation case as compared with a case of ordinary removal.

JO (Uganda): introduction

2. JO was born in Uganda in May 1982 and is therefore 27 years of age. His father died in Uganda when he was very young. He came to the United Kingdom with his mother when he was approximately 4 years old. When he was 8, his mother died. He lived with an aunt and then with an uncle, but before he reached the age of 18 he left his uncle's home and was supported as part of a homeless rough sleeper project. In 1995 he was granted indefinite leave to remain in the United Kingdom.

3. On 25 September 2002, at the age of 20, JO was convicted of a number of counts of possession of class A drugs with intent to supply and of possessing a prohibited weapon, for which he was sentenced on 10 January 2003 to 3½ years' detention in a young offenders' institution. The precise date of his release from that sentence is not known, but it appears that he was still on licence when, in August 2005, he was arrested for offences of possession of a firearm and of prohibited ammunition. On 1 December 2005 he pleaded guilty to those offences, the basis of his plea being that he was "minding" the weapon for a third party. He was sentenced to 5 years' imprisonment.

4. On 11 February 2008 the Secretary of State decided to make a deportation order against him under section 3(5) of the Immigration Act 1971 as being conducive to the public good. JO appealed to the Asylum and Immigration Tribunal. His appeal was dismissed in May 2008 but reconsideration was ordered by the Administrative Court. At the first stage of reconsideration the original panel was found to have erred materially in law and a further hearing was directed. The further hearing took place before Immigration Judge Verity and Mr F.T. Jamieson. By a determination promulgated on 30 April 2009 they again dismissed the appeal. JO now appeals against that determination, with permission granted on limited grounds by Elias LJ.

JT (Ivory Coast): introduction

5. JT was born in the Ivory Coast on 9 February 1990 and is therefore 19 years of age. He claims to have moved to France with his parents when very young and to have come with them to the United Kingdom when he was about 5 years old. His father died in October 1995 and JT lived thereafter with his mother.

6. From the time when he was 15 years old JT committed a number of criminal offences. The information available to the tribunal about those offences was relatively limited and is summarised in paras 47-48 of the determination under challenge (set out later in this judgment). The Secretary of State applied to this court to admit fresh evidence relating to JT's involvement in incidents of violence and the risk he presents to the community. It would, however, be wrong in principle to take such evidence into account in an appeal on a point of law against the tribunal's determination. Moreover the fresh evidence included a police statement containing a large amount of inadmissible material, together with a printout of JT's antecedents which cannot be reconciled with the information before the tribunal. For present purposes this court has to proceed on the version of the facts set out in the tribunal's decision.

7. In February 2008, shortly after his eighteenth birthday, JT was arrested on suspicion of having entered the United Kingdom illegally. He was detained pending removal. He applied for indefinite leave to remain under policy DP5/96 and on grounds of long presence in this country, but that application was refused and removal directions were set. He then applied for asylum, which led to the removal directions being cancelled. By letter dated 2 July 2008 his application for asylum was refused. His appeal to the Asylum and Immigration Tribunal was allowed by an immigration judge on human rights grounds. Reconsideration was ordered on the Secretary of State's application. At the first stage of reconsideration it was found that the first immigration judge had erred materially in law, and the matter was adjourned for a hearing *de novo* at the second stage. The further hearing took place before Designated Immigration Judge Woodcraft and Immigration Judge O'Keefe. By a determination dated 19 March 2009 they dismissed JT's appeal. JT now appeals against that determination, with permission granted on limited grounds by Elias LJ.

The Strasbourg case-law on deportation

8. The issues in both appeals relate to the application of article 8, which provides:

> "8.(1) Everyone has the right to respect for his private and family life ….
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others."

It is well established that, for an interference with a right protected under article 8(1) to be necessary in a democratic society, it must be proportionate to the legitimate aim pursued.

9. Although Mr Drabble took us to some earlier materials, an appropriate starting-point is the decision of the Grand Chamber of the European Court of Human Rights in *Űner v The Netherlands* (2007) 45 EHRR 14, which summarises as follows the principles applicable in a case of deportation on grounds of criminal offending:

"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 …. 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, insofar 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 ….

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 …. 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 …, 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 …. In the case of *Boultif* [*Boultif v Switzerland* (2001) 33 EHRR 1179] 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 … 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; and
- 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; and
- the solidity of social, cultural and family ties with the host country and the country of destination.

As to the first point, the Court notes that this is already reflected in existing case law … and is in line with the Committee of Ministers' Recommendation Rec(2002)4 on the legal status of persons admitted for family reunification ….

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 …. 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, their childhood in the host country, were brought up there and received their education there.

59. The Court considered itself called upon to establish 'guiding principles' in the *Boultif* case because it had 'only a limited number of decided cases where the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together and, in particular, for one of them and/or the

> children to live in the other's country of origin' …. It is to be noted, however, that the first three guiding principles do not, as such, relate to family life. This leads the Court to consider whether the '*Boultif* criteria' are sufficiently comprehensive to render them suitable for application in all cases concerning the expulsion and/or exclusion of settled migrants following a criminal conviction. It observes in this context that not all such migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy 'family life' there within the meaning of Art 8. However, as Art 8 also protects the right to establish and develop relationships with other human beings and the outside world … and can sometimes embrace aspects of an individual's social identity …, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of 'private life' within the meaning of Art 8. Regardless of the existence or otherwise of a 'family life', therefore, the Court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the 'family life' rather than the 'private life' aspect.
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> 60. In the light of the foregoing, the Court considers that all the above factors (see [57]-[59]) should be taken into account in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction."

10. I have quoted at length from the court's judgment in *Űner* because it lays down a clear set of principles that have been repeated and applied in subsequent cases. In *Űner* itself the applicant, a Turkish national in his twenties, had lived in the Netherlands since the age of 12 and had established family life there, but was deported to Turkey because of a conviction for manslaughter and assault. The court said that there was an interference with family life and with private life but that it would pay specific attention to family life. On the particular facts it found that the expulsion was proportionate.

11. In *Maslov v Austria* [2009] INLR 47, another Grand Chamber decision, the court repeated paras 54-55 and 57-58 of its judgment in *Űner* and added the following:

> "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 Art 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 Art 8 pursues, as a legitimate aim, the 'prevention of disorder or crime' …, 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 life 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;
- 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 ….

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(2001)15 and Rec(2002)4 ….

74. Although Art 8 provides no absolute protection against expulsion for any category of aliens (see *Üner* para 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, their childhood in the host country, were brought up there and received their education there (see *Üner* para 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."

12. The court went on to apply the relevant criteria to the facts of the case. The applicant had entered Austria lawfully at the age of 6. He had committed a large number of offences over a period of one year three months when he was between 14 and 15 years old, for which a total of two years nine months' imprisonment had been imposed. Although the court said that "the decisive feature of the present case is the young age at which the applicant committed the offences and, with one exception, their non-violent nature" (para 81), it looked in detail at all the relevant criteria before concluding that "the imposition of an exclusion order, even of limited duration, was disproportionate to the legitimate aim pursued, 'the prevention of disorder or crime'" (para 100).

13. *Grant v United Kingdom* (Application no. 10606/07, judgment of 8 January 2009) concerned a Jamaican national who had come to the United Kingdom at the age of 14 and had committed numerous criminal offences when an adult, leading ultimately to the making of a deportation order against him at the age of 46. The court quoted para 57 and the beginning of para 58 of the judgment in *Üner* as summarising the relevant criteria. In applying them to the facts of the case, the court said that none of the individual offences was at the more serious end of the spectrum of criminal activity but that it could not ignore the sheer number of convictions. It distinguished *Maslov* on the facts, in that, although Grant's offences were mostly non-violent, he had a much longer pattern of offending and the offences he committed were not "acts of juvenile delinquency". It examined the strength of his family life and of his ties to the United Kingdom and Jamaica. It concluded that a fair balance was struck by the decision and that the applicant's deportation was proportionate to the legitimate aim pursued.

14. *Onur v United Kingdom* (2009) 49 EHRR 38 concerned the deportation of a Turkish national who had come to the United Kingdom at the age of 11 and had later committed a series of criminal offences which included burglary at the age of 19 and robbery at the age of 22. The court again quoted para 57 and the beginning of para 58 of the judgment in *Üner* as summarising the relevant criteria. In applying those criteria, the court focused in practice on the applicant's family life: the applicant had formed a relationship with a British citizen by whom he had two children. In that respect, one of the factors it took into account was this (at para 60):

> "Although the Court would not wish to underestimate the practical difficulties entailed for the applicant or his partner in relocating to Turkey, no evidence has been adduced which would indicate that it would be either impossible or exceptionally difficult for them to do so."

It is clear from the context that the court was not thereby laying down a general *test* ("impossible or exceptionally difficult") to be applied in deportation cases, but was simply assessing the seriousness of the difficulties that the applicant and partner were likely to encounter in Turkey on the particular facts of the case. The overall conclusion reached was that expulsion was proportionate to the aim pursued.

15. *Omojudi v United Kingdom* (Application no. 1820/08, judgment of 24 November 2009; The Times, 14 December 2009) concerned a Nigerian national who entered the United Kingdom in 1982 at the age of 22. The following year he was joined by his partner and they subsequently married and had three children. In the late 1980s he

committed offences of deception and dishonesty and was threatened with deportation but remained in this country. In 2005 he was granted indefinite leave to remain. In 2006 he was convicted of a sexual assault for which he was sentenced to 15 months' imprisonment. He was then deported. Yet again the court quoted para 57 and the beginning of para 58 of the judgment in *Üner* as summarising the relevant criteria. It distinguished *Grant* on the facts, in particular because it considered the only relevant offence to be the sexual assault committed after the applicant was granted indefinite leave to remain. That offence was not at the most serious end of the spectrum of sexual offences. The court focused on the applicant's family life. In the course of its submissions on that aspect of the case, the British Government, citing para 60 of the judgment in *Onur*, had argued that there was no evidence to suggest that it would be "impossible or exceptionally difficult" for the applicant's wife and younger children to relocate with him. The court, however, avoided such language in its own discussion of the issue (which supports my view that the use of such language in *Onur* was not intended to lay down any general test). What the court said was this:

> "46. The Court attaches considerable weight to the solidity of the applicant's family ties in the United Kingdom and the difficulties that his family would face were they to return to Nigeria. The Court accepts that the applicant's wife was an adult when she left Nigeria and it is therefore likely that she would be able to re-adjust to life there if she were to return to live with the applicant. She has, however, lived in the United Kingdom for twenty-six years and her ties to the United Kingdom are strong. Her two youngest children were born in the United Kingdom and have lived there their whole lives. They are not of an adaptable age and would likely encounter significant difficulties if they were to relocate to Nigeria. It would be virtually impossible for the oldest child to relocate to Nigeria …."

In conclusion, having regard to the circumstances of the case, in particular the strength of the applicant's family ties to the United Kingdom, his length of residence, and the difficulty that his youngest children would face if they were to relocate to Nigeria, the court found that the applicant's deportation was not proportionate to the legitimate aim pursued.

16. Since the hearing of the present appeals the Strasbourg court has handed down judgment in a further deportation case, *A.W. Khan v United Kingdom* (Application no. 47486/06, judgment of 12 January 2010). The applicant had entered this country from Pakistan at the age of 3 and had been educated here and spent his formative years here. When aged about 27 he was convicted of an offence of importation of drugs for which he was sentenced to 7 years' imprisonment. Following his release the decision was taken to deport him. On the issue of proportionality the court yet again quoted para 57 and the beginning of para 58 of the judgment in *Üner*. It said that the severity of the offence must weigh heavily in the balance, but it also took account of the fact that the applicant had not previously committed any serious criminal offence and had committed no further offence following his release (which was relevant to the assessment of the risk he posed to society). The court concluded on the particular facts that deportation would not be proportionate, "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 re-offended following his release from prison …" (para 50).

General discussion

17. It is helpful to make some general observations concerning the Strasbourg cases before turning to consider the individual appeals before us.

18. First, the cases to which I have referred are all concerned with the deportation, on grounds of criminal offending, of aliens who were otherwise lawfully present in the host country. *Maslov* makes express reference to lawful presence (see para 75 of the judgment). In the other cases, it is either implicit or appears from the statement of facts.

19. The cases make clear that in considering whether deportation of such persons is proportionate to the legitimate aim of the prevention of disorder or crime, it is necessary to examine both family life and private life. The so-called *Boultif* criteria, as spelled out in the *Üner* judgment, are applicable in principle in all cases, but only some of them will be relevant in practice where the person to be deported has not established family life in the host country.

20. As to private life, it is emphasised at para 59 of the *Üner* judgment that settled immigrants will have ties with the community that constitute part of the concept of private life, which must therefore be considered even if the applicant has no family life in the host country. The importance of this can be seen from the discussion, at para 55 of the same judgment, of the Assembly's recommendation and the legislation enacted in some States to the effect that long-term immigrants *cannot* be expelled on the basis of their criminal record. The Strasbourg court rejected the concept of absolute protection, recognising that there is a balance to be struck under article 8; but the court has emphasised that it is a balance to be struck with a proper appreciation of the special situation of those who have been in the host country since childhood.

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.

22. There is only limited value in drawing comparisons with the outcome in other cases. All such cases are highly fact sensitive. The particular facts determine not only the conclusion but also the features picked out in the reasoning given in support of that conclusion. For example, the court said in *Maslov* that the decisive feature was the young age at which the applicant committed the offences, but it does not follow that the same feature will be decisive in all other cases where it exists.

23. It is also important to distinguish between the criteria themselves and phrases used in the course of applying them to particular facts. For example, I have already expressed the view that the court in *Onur*, in stating that it would not be "impossible or exceptionally difficult" for the applicant or his partner to relocate to Turkey, was not laying down a general test but was simply considering the application of the relevant criteria to the particular facts (see [14]-[15] above).

24. That point ties in with recent judgments of the Court of Appeal which have stressed that in considering the position of family members in deportation cases as well as in removal cases the material question is not whether there is an "insuperable obstacle" to their following the applicant to the country of removal but whether they "cannot reasonably be expected" to follow him there. Thus, in *VW (Uganda) and AB (Somalia) v Secretary of State for the Home Department* [2009] EWCA Civ 5, Sedley LJ said this (referring to *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41):

> "19. … But for the present, at least, the last word on the subject has now been said in *EB (Kosovo)*. While it is of course possible that the facts of any one case may disclose an insurmountable obstacle to removal, the inquiry into proportionality is not a search for such an obstacle and does not end with its elimination. It is a balanced judgment of what can reasonably be expected in the light of all the material facts.
>
> …
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> 24. *EB (Kosovo)* now confirms that the material question in gauging the proportionality of a removal or deportation which will or may break up a family unless the family itself decamps is not whether there is an insuperable obstacle to this happening but whether it is reasonable to expect the family to leave with the appellant …."

25. At the end of his judgment in *AF (Jamaica) v Secretary of State for the Home Department* [2009] EWCA Civ 240, itself a deportation case, Rix LJ, having referred to *EB (Kosovo)* and to *VW (Uganda) and AB (Somalia)*, continued:

> "42. … Albeit those cases all arose in the context of removals rather than deportations and did not raise the issue of proportionality against the background of the commission of a serious criminal offence, they each in their own way dethrone the significance of the test of 'insurmountable obstacles' or emphasise the importance of the test of whether it is reasonable to expect a spouse or child to depart with the family member being removed. The ultimate test remains that of proportionality …."

The relevant passages in *VW (Uganda) and AB (Somalia)* and in *AF (Jamaica)* were also referred to with apparent approval in *DS (India) v Secretary of State for the Home Department* [2009] EWCA Civ 544.

26. Concentration on whether family members can reasonably be expected to relocate with the applicant ensures that the seriousness of the difficulties which they are likely to encounter in the country to which the applicant is to be deported (the relevant criterion in the Strasbourg case-law) is properly assessed as a whole and is taken duly into account, together with all other relevant matters, in determining the proportionality of deportation. One must not *limit* the enquiry to whether there are "insurmountable obstacles" or whether (in the language of *Onur*) it is "impossible or exceptionally difficult" for the family to join the applicant: a broader assessment of the difficulties is called for. As it seems to me, however, the actual language used is not critical (and the Strasbourg court itself has used various expressions in describing the seriousness of the difficulties of relocation in individual cases), provided that it is clear that the matter has been looked at as a whole and that no limiting test has been applied.

27. It must also be borne in mind, of course, that even if the difficulties do make it unreasonable to expect family members to join the applicant in the country to which he is to be deported, that will not necessarily be a decisive feature in the overall assessment of proportionality. It is plainly an important consideration but it may not be determinative, since it is possible in a case of sufficiently serious offending that the factors in favour of deportation will be strong enough to render deportation proportionate even if does have the effect of severing established family relationships.

28. I have concentrated so far on deportation. Cases of ordinary administrative removal of persons unlawfully present in the country operate within the same legal framework and in my view require essentially the same approach. There, too, the essential question is whether, if expulsion would interfere with rights protected by article 8(1), such interference is proportionate to the legitimate aim pursued; and the answer to that question generally requires a judgment to be made on the basis of a careful and informed evaluation of the facts of the particular case.

29. There is, however, one material difference between the two types of case, in that they generally involve the pursuit of different *legitimate aims*: in deportation cases it is the prevention of disorder or crime, in ordinary removal cases it is the maintenance of effective immigration control. The difference in aim is potentially important because the factors in favour of expulsion are in my view capable of carrying greater weight in a deportation case than in a case of ordinary removal. The maintenance of effective immigration control is an important matter, but the protection of society against serious crime is even more important and can properly be given correspondingly greater weight in the balancing exercise. Thus I think it perfectly possible in principle for a given set of considerations of family life and/or private life to be sufficiently weighty to render expulsion disproportionate in an ordinary removal case, yet insufficient to render expulsion disproportionate in a deportation case because of the additional weight to be given to the criminal offending on which the deportation decision was based. I stress "in principle", because the *actual* weight to be placed on the criminal offending must of course depend on the seriousness of the offences and the other circumstances of the case.

30. Where the person to be removed is a person unlawfully present in this country who has also committed criminal offences, the decision to remove him may pursue a double aim, namely the prevention of disorder or crime as well as the maintenance of effective immigration control. If that is the case, it should be made clear in the

reasons for the decision, since it affects the way in which the criminal offending is factored into the analysis. Where the prevention of disorder or crime is an aim, the person's criminal offending can weigh positively in favour of removal, in the same way as in a deportation case. But if reliance is placed only on effective immigration control, it is difficult to see how the person's criminal offending would relate to that aim or, therefore, count as a factor positively favouring removal. On the other hand, it might still have a significant effect on the proportionality balance by reducing the weight to be placed on the person's family or private life: to take an obvious example, where a person has spent long periods in detention, his family ties and social ties are likely to be fewer or weaker than if he has been in the community throughout. Criminal offending can therefore remain relevant even if the maintenance of effective immigration control is the only aim of the removal decision; but careful account must be taken of how it bears on that decision.

31. The criteria in *Üner* are not directed in terms to an ordinary case of removal in pursuit of effective immigration control, but some of them have obvious relevance in that context too, both as regards family life and as regards private life. For example, what is said about ties arising from length of residence is obviously pertinent to an ordinary removal case: any difference in the extent or quality of ties established by a person present in this country unlawfully, as compared with those established by a lawfully settled immigrant, goes simply to weight. Similarly, the emphasis given to the position of a person who has been in the host country since childhood is relevant in the context of ordinary removal too. The first sentence of para 75 of the *Maslov* judgment ("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") does not apply in terms to the removal of a person who has spent his life in the host country unlawfully, but the fact that the person has been there since childhood is still a weighty consideration in the article 8 balancing exercise.

32. I turn to consider the individual appeals in the light of those general observations.

The appeal of JO (Uganda)

33. The tribunal's findings in the determination under challenge related first to JO's upbringing in this country. The tribunal found *inter alia* that "whilst the Appellant was still very young, he had been uprooted from his own country and had then lost both his parents before the age of 10" (para 67) and that "the Appellant has been in this country for almost 23 years and … according to him he regards this country as his only home and the only place where he has put down roots" (para 69). It went on to consider the evidence it had received from members of JO's family, concluding that "the Appellant certainly had blood relatives in this country but … with regard to family life this was tenuous and marginal" (para 76). As to his personal position, the tribunal concluded that "he was a young single man who had no partner or children in the UK" (para 77). Next, it examined his offending history, his conduct in prison, and an OASys report (a formal offender assessment) which identified him as posing a medium risk of causing serious harm to the public (paras 78-82). The tribunal then said this:

> "83. The Tribunal also noted that the Appellant had lived for all intents and purposes his life in the UK. He had come to the UK when he was 4 years old with his mother and was now 26 years

> of age. In his 22 years in the UK most of his family in the form of uncles, aunts, grandparents, cousins etc had come to the UK and that effectively he had no relatives left in Uganda. His education had been in the UK and what friends or family he had were also in this country. If he were to be returned to Uganda he would go alone, have no family and no real knowledge of the culture or indeed the language. He would however have had the benefits of an English education and have obtained some qualifications e.g. car mechanic, IT skills, English and maths at GCSE and would therefore not be without prospects of finding some form of employment. He is also young and healthy and would therefore not be in a position due to ill-health or incapacity from looking after himself or gaining a job. He would however be on his own."

34. The tribunal turned to consider the relevant legal issues, referring (at para 84) to a bundle of authorities provided by JO's counsel, including *Maslov v Austria*, and to two cases more recently decided by the Strasbourg court, namely *Grant v United Kingdom* and *Onur v United Kingdom* (though *Onur* was referred to by mistake as *Uner*). After dealing briefly with the general approach under article 8, the tribunal continued:

> "86. With regard to the Appellant's family life …. It follows therefore that on a practical level for the last nine to ten years the Appellant has not lived with his blood relatives for any sustained period of time and has either been on his own in the community, or has been held by either the criminal courts or the Immigration Service. Effectively therefore his claim to family life in this country is at best tenuous. In the true sense of the word the Appellant's family life effectively ended when he left his uncle Toya's home at 17/18 years of age. Nevertheless in view of the fact that the Appellant's relatives attended the Tribunal and gave evidence on his behalf it is clear that some family life still exists. It was however also clear that his family are becoming tired of dealing with the Appellant and his problems and having to deal with the issues that he raises. Nevertheless the Tribunal are prepared to accept that some form of family life however tenuous and weak does still exist.
>
> 87. … What is ultimately in issue is whether it is proportionate to remove the Appellant taking into account all his known circumstances …. [Reference was made again to the authorities provided by JO's counsel and to the cases of *Grant* and *Onur*, both of which were discussed.]
>
> 89. The Tribunal accepts that the Appellant has been in the UK for a longer period than the Appellant in the *Onur* case although less lengthy a period that in the *Joseph Grant* case. In both cases however the Appellant before the Tribunal came as a much younger child. However in both *Onur* and *Grant* the Appellants in those cases had gone on to father children, enter

> into significant relationships and indeed even had a grandchild in one case. Nevertheless the European Courts were clear that the Appellant could be returned to their home country ….
>
> 90. The Tribunal in this appeal have formed the opinion that the Appellant has committed two exceptionally serious criminal offences at a relatively young *[sic]* and that the terms of imprisonment imposed upon him clearly indicate the seriousness with which the criminal courts regard his behaviour. We do not accept that he is remorseful as he has claimed and note that he has expressed remorse in the past but has gone on to commit further serious offences. We also note that a second period in custody has not as the Appellant claims, made him rethink his position, and that in fact he was the subject of disciplinary proceedings at HM Prison Bullingdon for drugs related matters. Lastly the Tribunal views with concern the Oasys Report which clearly indicates that the Appellant commits criminal offences for financial gain and in order to pay his bills, and that he poses a medium risk of committing further offences against members of the public. Taking all these factors into account they regard the Secretary of State's decision to remove the Appellant from the UK as proportionate There is a real risk that if the Appellant remains in this country and is at liberty he will commit further offences.
>
> 91. With regard to the Appellant's private life the Tribunal in the cases of *Joseph Grant* for the reasons already noted, decided that the Appellant in that case could be returned to his own country and that although his network of friendships and acquaintances would differ from those he has in the UK, his private life would continue in all material respects."

35. The first and main ground of appeal advanced by Mr Drabble QC on behalf of JO is, in essence, that the tribunal missed the whole thrust of the Strasbourg case-law concerning the special situation of those who have come to the host country as young children, and attributed to the decisions in *Grant* and *Onur* (which were not dealing with applicants who had been in the United Kingdom since early childhood) a materiality they did not have. The tribunal treated this as a case where the likely determining factor was family life, and failed to give proper consideration to private life and in particular to the weight to be placed on private life where a person has spent almost the whole of his life in this country. Para 91 of the determination is the only place where private life is considered, and that paragraph is both obscure and inadequate in its treatment of the issue.

36. I agree that para 91 is highly unsatisfactory. In that paragraph the tribunal, having considered family life at paras 86-90, appears to turn specifically to the issue of private life but then deals only cursorily with the issue. In so far as it refers back to the decision in *Grant*, it fails to show how that decision, based as it was on materially different facts, justifies a finding that the interference with JO's private life would be proportionate. If the tribunal means that JO's own private life would be materially the same in Uganda notwithstanding differences in his network of friendships and

acquaintances, it is not clear why that would be so, and the point sits uneasily with the findings previously made, notably in para 83, about JO being on his own in Uganda.

37. Looking at the determination as a whole, however, I am satisfied that the tribunal directed itself correctly and had proper regard to the relevant criteria in reaching its overall conclusion as to the proportionality of deportation, and that the deficiencies in para 91 do not justify a finding of material error of law. It is clear that the tribunal had the relevant Strasbourg case-law well in mind. In its conclusions it referred expressly to *Maslov*, *Grant* and *Onur*, all of which repeated the criteria set out in *Üner*; and it did not blindly apply the decisions in *Grant* and *Onur* but took proper account of the factual differences between the various cases. Moreover its reference to the bundle of relevant authorities provided by counsel for JO takes one back to what it said in the course of its lengthy summary of the parties' submissions earlier in the determination. At para 46, in the course of referring to counsel's skeleton argument and to the authorities cited in it, including *Maslov*, the tribunal stated *inter alia*:

> "It was [counsel's] contention (supported by the authorities) that where a person was a settled migrant who had lawfully spent the major part of his or her childhood, youth and adulthood in the host country they then only in the most exceptional of cases should be removed …."

38. The references in the tribunal's findings to the length of time spent by JO in this country since his childhood, and its examination of the nature and extent of his ties with the United Kingdom and with Uganda, show that it was alert to the importance of such considerations. Although its main focus may have been on the issue of family life, it also looked in practice at the matters relevant to JO's private life in the United Kingdom and to his position in Uganda if he were deported there. Set against those various considerations were the fact that he had committed what the tribunal regarded as two exceptionally serious criminal offences, and its view that there was a real risk of his committing further offences if he remained in the United Kingdom and was at liberty. All those matters were taken into account in reaching the conclusion that the decision to deport him was proportionate.

39. Thus, although the tribunal did not express itself well in relation to the issue of private life, it gave proper consideration to the substance of the issue.

40. The tribunal did not have the benefit of the decisions of the Strasbourg court in *Omojudi* and *A.W. Khan*, which post-dated the tribunal's determination and in each of which the court found that deportation was not proportionate. Those decisions do not, however, cause me to doubt the correctness of the tribunal's approach or the reasonableness of the conclusion it reached in relation to JO. They are based on the same principles as were applied by the tribunal and they are distinguishable on their facts, in particular concerning the seriousness of the relevant criminal offending and the risk of further offending. In *Omojudi* the court considered there to be only one relevant offence, a sexual assault described as being not at the most serious end of the spectrum of sexual offences. In *A.W. Khan* there was a serious drugs offence, but it was a single serious offence and the court took into account, as relevant to risk, the fact that the applicant had committed no further offences following his release. In JO's case, by contrast, there was repeated serious offending (a serious drugs offence

followed by even more serious firearms offences committed after his release from custody for the earlier offence), together with a finding of a real risk that he would commit further offences.

41. I would therefore reject the first ground of appeal.

42. The only other ground in respect of which permission was granted can be dealt with shortly. Mr Drabble, whilst not abandoning it, did not pursue it actively in his oral submissions. The contention is that the tribunal fell into legal error in reopening the factual findings of the original panel. The original panel, at paras 20-21 of its determination, had "readily come to the conclusion that the appellant has established family life" between himself and his many relatives in the United Kingdom, and had "readily come to the conclusion that private life and home life also exists". At the second stage of reconsideration, giving rise to the determination under appeal, the tribunal treated the hearing as *de novo* and reached fresh findings, to which I have already referred, on the issues of family life and private life. It is submitted that this was contrary to the principles laid down in *DK (Serbia) v Secretary of State for the Home Department* [2006] EWCA Civ 1747 at [22] and was a material legal error.

43. The senior immigration judge who found at the first stage of reconsideration that there had been a material error of law in the original panel's determination was of the view that a further hearing was required, with the possibility of further evidence, for the purposes of a proper assessment of proportionality. He gave no indication that the tribunal at the second stage of reconsideration was to be bound by the findings of fact made by the original tribunal. In my judgment he was right not to do so, and the tribunal at the second stage of reconsideration was right to approach the matter as it did. It was both appropriate and necessary for the tribunal to make its own assessment of family life and private life as at the date of the reconsideration, and to reach a conclusion on proportionality in the light of that assessment. It was entitled to make up-to-date findings on the basis of all the evidence before it, which included evidence from completely different witnesses from those called before the original tribunal. In adopting that approach, the tribunal acted consistently with the principles in *DK (Serbia)* and committed no error of law. I regard this ground of appeal as lacking in substance.

44. For those reasons I would dismiss JO's appeal.

The appeal of JT (Ivory Coast)

45. In its determination in the case of JT, the tribunal first made a number of adverse credibility findings in respect of his claim to have a family life in this country, leading to the following conclusion on that issue:

> "44. The respondent accepted in the reasons for refusal letter that the appellant had been in the United Kingdom since 1995 and during that time must have enjoyed family life. His circumstances have however clearly changed. He no longer has any contact with his mother for whatever reason; he has not demonstrated that he enjoys family life with any of his siblings or relatives; his relationship with his girlfriend is not a long term or serious relationship; he has no other family ties.

> Considering the evidence before us as a whole, we find that the appellant has not demonstrated that he has established a family life in this country."

46. The tribunal also doubted whether it had been given a truthful picture of JT's current personal circumstances. It did, however, accept (in para 46) that as he had been in this country since 1995 and had attended school here he had established a private life.

47. In relation to JT's offending history and the risk of further offending, the tribunal said this:

> "47. The appellant has acquired an unenviable and unpleasant list of convictions for a young man. He did not dispute the extent of his convictions but said that none of them were gang related. From the reasons for refusal letter we glean that the appellant has convictions for offences against the person; theft and public order offences. These are described in the Pre Sentence Report (PSR) dated 4th July 2007 as a concerning pattern of convictions of a violent nature ….
>
> 48. On two separate occasions the appellant has been given custodial sentences. He also failed to comply with community orders and with the supervision element of a detention and training order. The appellant was clearly given some opportunity to mend his ways but continued offending. There are a number of issues raised in the PSR that give us grave cause for concern for the future ….
>
> 49. It was argued before us that the appellant had committed these offences when he was a very young man, that there was no evidence that he had committed any further offences and that he had shown some degree of change. It is correct that there was no evidence that the appellant had committed any further offences since his last custodial sentence. He had however been in immigration detention for a period of time since his release from custody and for all of the period since his release from immigration detention he had been under the threat of removal from the United Kingdom. Whilst that threat was hanging over his head there was every incentive for the appellant not to offend ….
>
> …
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> 51. … On balance we prefer the opinion of the PSR writer and find that the appellant is still at risk of reoffending and is therefore a high risk to the community."

48. In its conclusions the tribunal referred to the questions set out in *Razgar v Secretary of State for the Home Department* [2004] UKHL 27. It was satisfied that Article 8 was engaged by reason of the private life that JT had established in this country. It

then referred to a number of authorities. At para 56 it distinguished *Maslov* in this way:

> "In *Maslov* it was said, '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'. In this appeal the appellant did commit the offences on his record as a youth, but there is no evidence to show that the period of time that he spent in the country was lawful as there is no evidence to show the basis upon which he entered the United Kingdom."

49. The tribunal then referred to *Onur*, pointing out that the Strasbourg court in that case had distinguished *Maslov* on the facts and had held in the particular circumstances that deportation was not in breach of article 8. It continued:

> "58. In this appeal the appellant has committed offences of violence and dishonesty. He has also committed Public Order Act offences and in our finding remains at risk of re-offending at a risk to the public. We find that there is evidence to support the contention that his offending was gang related. The facts in this case are distinguishable from *Maslov* in that the appellant has not been here lawfully. We accept that the appellant has spent most of his formative years in this country albeit unlawfully. The appellant told us that he did not speak or understand any language other than English. His evidence was that although he had been at nursery in France and had lived there until he was four, at that stage he could not speak. We do not accept that assertion. In his school report for year six the appellant completed a self-assessment stating that he was not good at literacy because 'English is not my first language'. We are not satisfied that the appellant has never had any knowledge or understanding of the French language. Adopting the reasoning in *Onur*, although we would not wish to under-estimate the practical difficulties entailed for the appellant in relocating to the Ivory Coast, no evidence has been adduced which would indicate that it would be either impossible or exceptionally difficult for him to do so.
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> 59. We find therefore that the fourth test in *Razgar* [necessity of interference in private or family life] has been satisfied. In *SSHD v Huang* [2007] UKHL 11 it was held that 'the question to be answered was whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the appellant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8.' In this case, substituting private

> life for family life, we find that the answer to that question is in the negative ….
>
> 60. We are satisfied that taking full account of the individual rights of the appellant and balancing those against the right of the respondent in implementing and maintaining an effective immigration policy, the interference does not prejudice the appellant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. In other words the removal of the appellant is proportionate ….”

50. In his written skeleton argument, Mr Drabble approached the matter on the basis that the guidance of the Strasbourg court in the deportation cases was fully applicable to the present case. At the hearing of the appeal, however, he accepted that the case is materially different from one of deportation. It concerns the administrative removal of JT on the ground that he is an illegal entrant.

51. The Secretary of State’s decision letter did not make clear whether reliance was also being placed on the prevention of disorder or crime as an aim of the removal. It stated in para 27 that JT’s claim under article 8 had been considered “in the light of your criminal activity in the United Kingdom”, and in para 44 that “regard has been had to your criminal history” in the context of para 395C of the Immigration Rules. But the conclusion on article 8, as set out in para 33 of the letter, was that “any interference to your family and private life would be in pursuance of the permissible aim of maintaining effective immigration control”, without any reference to the prevention of disorder or crime. Similarly, although the tribunal’s consideration of JT’s criminal activity and the risk of his reoffending might suggest that it was looking at the prevention of disorder or crime as a relevant aim, its conclusion on article 8 referred only to “the right of the respondent in implementing and maintaining an effective immigration policy” (para 60 of the determination, quoted above). The lack of clarity about the aim of removal and how JT’s offending should be factored into the analysis is a troubling feature of the determination, but my concerns about the determination 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.

53. Moreover, the information available to the tribunal about JT’s offending was very limited and of doubtful accuracy. In the case of any offender, but particularly of such a young offender, the tribunal should in my view have informed itself more fully of the details of his criminality before placing such weight on it as was evidently done in this case. It is plain that the tribunal was not given the help it should have been given by the Secretary of State, whose decision letter is equally deficient in particulars about

JT's criminality. The additional material that the Secretary of State sought to place before this court (see [6] above) should have been made available to the tribunal, to the extent that it was agreed or could be provided in admissible form.

54. In those respects, in my judgment, the tribunal's determination is flawed by errors of law. Those errors are material: I am far from confident that the tribunal would have reached the same conclusion if it had approached the case correctly. On the other hand, I do not accept that the tribunal would necessarily have allowed JT's appeal if it had adopted the correct approach. It follows that the case should be remitted to the tribunal for further reconsideration.

Conclusion

55. I would therefore dismiss the appeal in JO (Uganda) but would allow the appeal in JT (Ivory Coast) and would remit that case to the tribunal.

Lord Justice Toulson :

56. I agree.

Lord Justice Mummery :

57. +I also agree.