OUTER HOUSE, COURT OF SESSION

[2010] CSOH 75

P172/10

OPINION OF LORD MALCOLM

in the petition of

J S (Assisted Person)

Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department to certify his decision to deport the Petitioner from the United Kingdom in terms of section 94 of the Nationality, Immigration and Asylum Act 2002

Petitioner: Caskie, advocate, Drummond Miller, LLP
Respondent: Lindsay; advocate, Office of the Solicitor to the Advocate General

23 June 2010

[1] The petitioner seeks judicial review of a decision of the Secretary of State for the Home Department ("the Secretary of State") taken on 21 January 2010. The respondent is the Advocate General for Scotland on behalf of the Secretary of State. The petitioner is a citizen of Jamaica who arrived in the UK in June 1998 when he was aged eight years. He arrived as a visitor accompanied by his older sister and step-sister. They were each granted leave to enter the United Kingdom for a period of six months. His mother had previously arrived in the United Kingdom. Neither the

petitioner nor his mother made contact with the immigration authorities thereafter and the petitioner attended both primary and secondary school in the United Kingdom. His father now also resides in the United Kingdom. The petitioner lived with his mother until 2006 in Birmingham when he moved to his uncle's home, also in Birmingham. On 23 October 2008 the petitioner was sentenced, in respect of possession of drugs with intent to supply, to a period of three years and three months imprisonment. In May and again October, both of 2009, the Secretary of State wrote to the petitioner asking that he state any reasons why he should not be deported. In the light of the responses, the Secretary of State considered that the information before him constituted a claim to remain in the United Kingdom on article 8 ECHR grounds. On 21 January 2010 the Secretary of State wrote to the petitioner explaining his reasons for rejecting the application. On the same date a deportation order was signed in respect of the petitioner and the Secretary of State certified the decision in terms of sub-sections (2) and (3) of section 94 of the Nationality, Immigration and Asylum Act 2002. The effect of those certificates was to remove the right which the petitioner would otherwise have had to appeal the Secretary of State's decision on the substantive matter to the Asylum and Immigration Tribunal whilst he remained in the United Kingdom. The petitioner now seeks reduction of the certification decisions so that before he is deported he might appeal to the Tribunal as to whether his removal from the United Kingdom would be in breach of his Convention rights.

[2] The petition explains that in both section 94(2) and (3) of the 2002 Act the test to be applied by the Secretary of State is whether the claim made is "clearly unfounded". Section 94(3) of the Act is colloquially known as the "white list". The purpose of the white list is to prevent asylum seekers from certain countries who in general, it is said, make unfounded claims for asylum, from appealing against the refusal of their claim

whilst in the United Kingdom. The provision may also be applied to persons who seek to remain on human rights grounds. It requires the Secretary of State to certify a claim to remain on human rights grounds (such as that made by the petitioner) by persons from certain countries as clearly unfounded unless satisfied that it is not clearly unfounded. Jamaica is listed as such a country. Section 94(2) permits the Secretary of State to certify a human rights claim as being clearly unfounded, regardless of country of origin. In the assessment of human rights claims in the United Kingdom the courts have defined such claims as either "foreign cases" or "domestic cases". The distinction is that in foreign cases the events that are said to constitute a breach of the person's rights are events that will occur overseas, for example that the person subject to removal will face torture, inhuman or degrading treatment on or after arrival abroad. In domestic cases the issue is whether the deportation gives rise to the alleged breach of human rights, for example because it is a disproportionate interference in the UK established family or private life of the claimant. In foreign cases the applicant has to establish a very grave state of affairs, amounting to a flagrant or fundamental breach, which in effect constitutes a complete denial of his rights. The petition continues by submitting, under reference to *KBO* v *Secretary of State for the Home Department* [2009] CSIH 30, that the test that requires to be met in respect of domestic cases is different and less stringent.

[3] The petitioner's claim is a domestic case. He claims that the family and private life which he has established in the United Kingdom will be interfered with in a disproportionate manner by his deportation. The petition continues by indicating that the process of certification under the white list is that a person from the specified countries should not be able to appeal whilst in the United Kingdom because, in general, such claims are "clearly unfounded". The petitioner avers that, whilst that

may be true in respect of foreign cases, in dealing with domestic cases, such as the present one, no such general conclusion can be drawn. The obligation upon the United Kingdom to show respect for the family and private life of foreign nationals is not altered by the state from which the person originates (except in the case of enemy aliens in time of war). The quality and extent of family and private life established in the United Kingdom of persons from states on the white list is unaffected by their state of origin. The petition avers that, in considering it appropriate to certify the petitioner's case, which is a domestic case, on the basis that the petitioner originates from a white list country, as described in section 94(3), the Secretary of State's decision was unreasonable and irrational. Nonetheless, if the Secretary of State was entitled to certify the petitioner's case in terms of section 94(2), it is accepted on behalf of the petitioner that the Secretary of State would also be obliged to certify under the other provision. However, the petitioner contends that the Secretary of State was not entitled to certify the petitioner's case in terms of section 94(2) and therefore the certification under both provisions was unlawful.

[4] In all of these circumstances it was a matter of agreement at the hearing before the court that the operative decision for present purposes is the Secretary of State's decision to certify under section 94(2). That section provides that:

> "A person may not bring an appeal to which this section applies in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in sub-section (1) is or are clearly unfounded. Section 92(4)(a) relates to appeals whilst the appellant remains in the United Kingdom and sub-section (1) refers to asylum and/or human rights claims."

The decision letter of 21 January 2010 set out the following conclusion:

> "You have failed to show that you have established or maintained any family life under article 8 of the ECHR. You are reminded that relationships between an adult applicant and adult siblings or wider family members are not accepted as amounting to family life, for the purposes of article 8, in the absence of any dependency beyond normal emotional ties. You have failed to demonstrate any such dependency. As your human rights claims have been certified as clearly unfounded, you may not appeal while in the United Kingdom. Therefore it is hereby certified under section 94(2) of the Nationality, Immigration and Asylum Act 2002 that your claims are clearly unfounded. The effect of this certificate is that an appeal under section 82(1) against this immigration decision may not be brought by you from within the United Kingdom."

[5] A flavour of the reasoning which preceded this decision can be gained from the following summary of earlier passages in the decision letter. It was stated that "the Secretary of State regards breaches of the United Kingdom's laws by a person subject to immigration control as extremely serious." It was noted that at the time of the petitioner's conviction the sentencing judge made the following comments:

> "Any degree of involvement in the supply of class A drugs, especially over a period of time, is something of which this court has to take a serious view. Without the willingness of people like you to co-operate life would be made very much harder for those at a higher level who are handling and dealing drugs."

In considering whether removal to Jamaica would result in a breach of the petitioner's rights under article 8 of the ECHR, consideration was given to whether he had established a family or private life in the United Kingdom; whether the decision to

deport would result in interference with his right to family or private life; and, if yes, whether that interference would be, amongst other things, proportionate in pursuit of the legitimate aim of removal from the United Kingdom. The petitioner was 19 years of age, single with no children, in good health and had been resident in the UK for 11 years and 5 months, of which 17 months had been spent in custody due to his conviction for possession of drugs with intent to supply. The Secretary of State continued that, for the purposes of article 8, "Relationships between an adult applicant and adult siblings or wider family members do not constitute family life without evidence of further elements of dependency beyond normal emotional ties." No evidence had been provided which demonstrated any elements of dependency between the claimant and his sisters, and it was noted that prior to the custodial sentence he was not residing with either of his sisters. Nonetheless it was accepted that, for the purposes of article 8, he had established a private life in the UK. He had established friendships with various people, however there were no reasons apparent which would prevent him from continuing these friendships from Jamaica through modern means of communication. Thus the UK Border Agency did not accept that any private life which might have been established disclosed any significant or compelling factors, or that it may not be continued following his return to Jamaica. Therefore it was not accepted that the decision to deport gave rise to any interference with his private life. It could not be said that, having arrived in the United Kingdom at the age of eight years, he had spent the major part of his childhood in this country. His first social relationships had been established in Jamaica. English is the national language of Jamaica, therefore he would have no difficulty in establishing himself in that country. There was no evidence to suggest that he was now estranged from his country of origin to the extent that re-integration into family or private life in that

country would amount to undue hardship. For these reasons the Secretary of State did not accept that the decision in question would give rise to any interference with the petitioner's private life, nor that he would be unable to establish and maintain a family life in his own right on return to his country of origin. Unlike the circumstances in the case of *Beoku-Betts* v *SSHD* [2008] UKHL 39, no evidence had been submitted from the petitioner's relatives in the United Kingdom to demonstrate any significant relationship with, or dependency upon the claimant, nor that his removal would impact upon them. Neither was there any indication that they were dependent upon him for their day to day health and wellbeing. In addition, unlike the circumstances in the case of *Sezen* v *Netherlands* (2006) 43 EHRR 30, it could not be found that the petitioner formed part of "a functioning family unit where the parents and children are living together."

[6] As indicated above, the petitioner's purpose in these proceedings is to challenge the decision to certify his claims as "clearly unfounded". The intention is to allow the petitioner to challenge the decision to remove him by way of an in-country appeal prior to any removal from the UK. At the first hearing of the application, there was much common ground as to the legal framework against which the Secretary of State's certification requires to be considered. On behalf of the petitioner, Mr Caskie drew attention to the decision of the Court of Appeal in *AK (Sri Lanka)* [2009] EWCA [Civ] 447, and in particular the judgment of Laws LJ at paragraphs 30/34. Mr Caskie submitted that in order to avoid a decision that his claim is "clearly unfounded", a more than fanciful prospect of success is sufficient for the petitioner. On behalf of the respondent, Mr Lindsay readily accepted that it is a low hurdle. In the petition, reference is made to case law which indicates that, before certification, the Secretary of State has to be satisfied that the claim is "so wholly lacking in substance that the

appeal would be bound to fail". In another case the Secretary of State was unsuccessful because he had failed to consider whether the petitioner's human rights claim was "hopeless". In the light of such decisions Mr Lindsay accepted that it was for him to satisfy the court that, on the known circumstances, the Secretary of State was right to conclude that any appeal by the petitioner in respect of his human rights claim was bound to fail. There was no room for traditional judicial review concepts such as "Wednesbury unreasonableness", nor for a margin of discretion or deference to be afforded to the Secretary of State as the decision maker. Rather Mr Lindsay invited the court to review the circumstances and ask whether it agreed with the Secretary of State's decision. The outcome of the application for judicial review would turn upon the answer to that question. If the court was not satisfied that the Secretary of State came to the correct conclusion on the "clearly unfounded" test, the certificates should be quashed.

[7] With that introduction Mr Lindsay turned to certain decisions upon article 8 of the ECHR which he submitted would demonstrate that the certification was lawful. His ultimate position was that the case law shows that the petitioner's claim is hopeless. Mr Lindsay addressed the court on the basis that, notwithstanding certain parts of the decision letter, removal would interfere with the petitioner's private life, but that it was quite clear that this would not amount to a violation of a Convention right.

[8] Mr Lindsay developed his submissions under three broad themes. Firstly, in the case of a foreign national criminal, the article 8 analysis is different because of the public interest in the prevention of crime. It is therefore necessary to be cautious when drawing any conclusions from case law which does not involve the deportation of a criminal. Secondly, the cases demonstrate that a single adult male is treated differently from a child or a married person with children. In such a case deportation

would be refused only in exceptional circumstances. Further, simply having been in the United Kingdom since the age of eight is not an exceptional circumstance. Thirdly, if the subject entered the host country illegally, then again, unless exceptional circumstances pertain, the deportee cannot rely upon a private or family life established on the basis of a precarious presence in the United Kingdom. While the petitioner entered the United Kingdom legally on a six months visitor visa, thereafter his presence has been unlawful.

[9] Counsel then examined the case law with a view to supporting the above general propositions. Firstly, he considered the judgement of a Chamber of the European Court of Human Rights in *Joseph Grant* v *The United Kingdom* (Application No 10606/07). Mr Lindsay submitted that Mr Grant's claim to resist deportation was stronger than that of the present petitioner. However on the strength of Mr Grant's criminal record, the court concluded that a fair balance had been struck and that his deportation from the United Kingdom was proportionate to the legitimate aim pursued, and therefore necessary in a democratic society.

[10] Counsel then discussed a judgment of a Chamber of the European Court of Human Rights in the case of *Darren Omoregie & Others* v *Norway* (Application No 265/07). At paragraph 57 the court noted that the state must strike a fair balance between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation. Having outlined some of the relevant factors, at paragraph 57 the court said

> "Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. ... Where this is the case the removal of

the non-national family member would be incompatible with article 8 only in exceptional circumstances."

Mr Lindsay submitted that this passage is very relevant in the present case. The petitioner's residence in the UK has been precarious. Furthermore no exceptional circumstances apply in his favour. Mr Lindsay appreciated that, having arrived on these shores as an eight year old child, the petitioner had no responsibility for finding himself in the UK. However, on reaching majority he should have attempted to regularise his residence in the UK, albeit there could be no guarantee that he would be granted permission to remain.

[11] Mr Lindsay then referred to *R (WJ) (China)* [2010] EWHC 776 (Admin), and in particular the judgment of Beatson J at paragraphs 42 and following, again in the context of the importance of the precarious nature of the petitioner's residence in the UK. Turning to *ZB (Pakistan)* [2009] EWCA Civ. 834, a decision of the Court of Appeal, counsel noted that, in the context of a claim based upon protection of family life under article 8, the Strasbourg jurisprudence places importance upon evidence of elements of dependency involving more than normal emotional ties. Counsel submitted that there was no evidence of anything of that nature in the present case.

[12] Under reference to *OH (Serbia)* [2008] EWCA Civ. 694, and in particular paragraphs 14 and 15 in the judgment of Wilson LJ, Mr Lindsay submitted that in the present case no weighty factors contradicted the implications arising from the serious crime committed by the petitioner when an illegal resident. Subsequent decisions in *DS (India)* [2009] EWCA Civ. 544 and *KD (Ivory Coast)* [2009] EWCA Civ. 934, confirmed this approach.

[13] In conclusion Mr Lindsay submitted that the petitioner's article 8 claim was clearly unfounded in that it was bound to fail, thus the certification process was lawful and should not be quashed.

[14] In reply to Mr Lindsay's submissions, for the petitioner Mr Caskie stressed that the present issue is not whether the petitioner's claim will succeed, but whether it has some merit; in other words, whether it might succeed. The essential task of balancing the public interest against the rights and interests of the person affected is extremely fact sensitive. In carrying out that assessment an immigration judge would weigh the factors on both sides of the scales. In the *Joseph Grant* case the key factor was a concern about continuing offending, however, that factor does not exist in the present case. In the Grand Chamber decision in *Üner* v *The Netherlands* (Application No 46410/99) the court stated that it would have regard to the special situation of aliens who had spent most of their childhood and received their education in the host country. There was recognition of the potential importance of a claimant's private life. In the present case the claimant relies particularly upon protection of the private life which he has established in this country. While it might be said that deportation for a ten year period is not disproportionate, the reality is that, if this petitioner is deported, he will never return. Mr Caskie submitted that it is unrealistic to place decisive importance upon the petitioner's failure to seek to regularise his position. The Immigration Rules expressly recognise long residence as a valuable asset.

[15] With reference to the various cases relied upon by counsel for the Secretary of State, Mr Caskie submitted that the present case would turn on issues of fact, not law, and so little can be determined from the outcome in other factual circumstances. For example, in *OH (Serbia*) the crime committed by the claimant was of a particularly horrific nature. Even so it was stressed that the adjudicator would require to exercise

his own independent judgment, and not simply reflect the views of the Secretary of State. The petitioner has been educated here, and all his family remain in the United Kingdom. He is a young man. There is no evidence that he has any links with Jamaica, where he would be alone and isolated. There is no evidence of any future risk of re-offending. In summary, the harshness in this case is such as to give rise to a more than fanciful prospect of a finding of a violation of his article 8 rights.

Discussion and Decision

[16] A review of the cited authorities indicates that the following general observations can be made. Firstly, in order to certify under section 94(2), the claim must, after anxious scrutiny, be so clearly lacking in substance that it is bound to fail. The matter must be clear cut. If an appeal might succeed, if there is any doubt on the point, there can be no certificate. Secondly, in many cases the key issue will be whether an interference with an article 8 right is proportionate to the legitimate public end sought to be achieved. (The present case was discussed by both counsel on this basis). This will involve an investigation of all the relevant facts, a careful weighing of many factors (often pointing in opposite directions), and ultimately a judgment as to whether a fair balance has been struck between a pressing public or social need and the private interests of the individuals most directly concerned. This exercise will always be sensitive to all the specific facts of the case. As Lord Bingham of Cornhill said in *EB (Kosovo)* [2008] EWLR 178 at paragraph 12, "The search for a hard-edged or bright line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires." Later in his opinion his Lordship said that "...consideration of an appeal under article 8 calls for a broad and informed judgment which is not constrained by a series of prescriptive rules"

(paragraph 21). It follows that a degree of caution is justified before concluding that an immigration judge would be bound to reject such a claim, not least since the authorities show that, even at the highest level, views on the same set of facts can differ quite dramatically. Thirdly, in a case of a settled migrant, and even leaving aside family life considerations, the totality of the social ties between him and a community constitutes part of his private life within the meaning of article 8. The court will have regard to the "special situation of aliens who have spent most of their childhood in the host country...." (*Üner*, paragraph 58). In the case of offenders, the sanction of expulsion should be applied only to particularly serious offences affecting state security (*Üner*, paragraph 58). Previous convictions can, and often will be taken into account, since they may point to criminal propensities. .

[17] The question which I must decide is whether the Secretary of State was correct to certify the petitioner's claims as clearly unfounded. The task entrusted to the Secretary of State by section 94(2) of the 2002 Act is, in many respects, a difficult and invidious exercise. It is invidious because, in effect, he is a judge in his own cause. He is carrying out a sifting exercise relating to appeal rights against his own decision. While directly a certificate prevents only an in-country appeal, in practice this makes any appeal very difficult to pursue, and as a result the whole matter calls for close judicial scrutiny (Sedley LJ in *QY (China),* [2009] EWCA Civ. 680, paragraph 12). The task is difficult because the question is not to consider whether the appeal is unlikely to succeed, but whether it is bound fail. I suspect that this is a distinction which is easy to state, but difficult to apply. Against the background of a claimant's resistance to the Secretary of State's own decision to remove him, it is expecting a lot of the Secretary of State and his officials always to distinguish between these separate questions and stay on the correct side of line. In the context of whether to certify under section

94(2), the Secretary of State must focus only on whether there is a more than fanciful chance that an immigration judge will reach a different decision. Since the Secretary of State will have decided that removal is the correct course, this will be easier said than done, and all the more so where, as here, the decision on certification is taken at the same time as the decision to remove, and by the same official (acting on behalf of the Secretary of State).

[18] In support of the Secretary of State's certification, Mr Lindsay relied upon the various decisions mentioned above for the proposition that the petitioner's claim of violation of his article 8 rights is totally without merit. It is therefore necessary to consider the authorities relied upon by Mr Lindsay. The first was the case of *Joseph Grant* v *The United Kingdom*, a recent decision of a Chamber of the European Court of Human Rights. Mr Lindsay submitted that, on the face, of it Mr Grant had a stronger claim than the present petitioner. However, the decision was that there had been no violation. It is certainly true that, having regard to the particular family and private life circumstances of Mr Grant, they displayed some positive features which are absent in the present case. However, on the other side of the scales lay his previous convictions. In submission the government stated that

> "Looked at as a whole the nature, number and timespan of the offences, which included those of violence, dishonesty and the possession and supply of drugs, demonstrated that the applicant had shown a prolonged and flagrant disregard for the criminal laws of the United Kingdom, giving rise to a compelling public interest in his deportation. Moreover, it was likely that if the petitioner remained in the United Kingdom, he would continue his pattern of re-offending. In reality, there was no prolonged period since 1985 during which the applicant had been out of prison and had not re-offended."

It is plain from the court's assessment that these considerations were influential in the ultimate decision. At paragraph 39 the court said that

> "It cannot, however, ignore either the sheer number of offences of which the applicant has been convicted, or the timespan during which the offences occurred. The applicant was warned in 1990 that if he again came to the adverse attention of the immigration authorities, he would be at risk of deportation. Nevertheless, he continued habitually to re-offend."

The court then distinguished the case from that of *Maslov* v *Austria*, where the court had found a violation of article 8. In *Maslov*, the applicant had convictions for burglary, extortion and assault, which he had committed during a 15 month period in order to finance his drug consumption. The decisive feature in *Maslov* was the young age at which the applicant committed the offences (he was still a minor) and the non-violent nature of the offences. The court continued,

> "In the present case, although (Mr Grant'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'".

In my opinion, this passage demonstrates the fact sensitive nature of the court's consideration in every case, and the dangers inherent in too readily drawing conclusions in one case based on the outcome in another.

[19] The next decision relied upon by Mr Lindsay was *Omoregie* v *Norway*, which, according to Mr Lindsay, points to the decisive nature of the precarious nature of the petitioner's residence in the United Kingdom. In that case the court took care to narrate the specific circumstances of the case, and again emphasised the need to strike a fair balance between the competing interests of the individual and of the community as a whole. In *Omoregie* the first applicant had arrived in Norway aged 22 years from

Nigeria. He had no previous links to the country. At the time of the decision he had lived in Norway for less than three years, parts of the time unlawfully, and after less than two years he had been warned of expulsion. The Norwegian High Court had concluded that his stay in Norway had been very short and could not have given him any legitimate expectation of being able to live there. This was not significantly altered by his marriage to the second applicant, which had been entered into shortly before the disputed decision and in breach of provisions on marriage. The High Court also found that the first applicant's links to Nigeria were particularly strong, and far more so than his links to Norway. He lived in Nigeria from the age of six months until the age of 22, had studied at University there for four years, and had three brothers with whom he was still in contact. At the time of the marriage both parties must have been aware of the uncertainty of the first applicant's stay in Norway. On 20 September 2006 the couple had a child, who became the third applicant. The Immigration Appeals Board concluded that the fact that the first and second applicants had had a child did not render prohibition of re-entry disproportionate.

[20] In my view, when one reads the court's assessment, and in particular the importance placed upon the precariousness of the first applicant's stay in Norway, all of this must be considered in the context of the above factual background. The court noted that the first applicant entered Norway on 25 August 2001, and as from 11 September 2002, when the Immigration Appeals Board rejected his appeal, he was under an obligation to leave the country, and was given until 30 September 2002 to do so. As from February 2003 the first applicant had applied for a right to stay in the country on a new ground, namely family reunification with the second applicant, but this request was also rejected and he was ordered to leave the country. The majority of the court determined that the impact of the impugned measures constituted an

interference with the applicants' rights to respect for a family life under article 8 of the Convention. However, it considered that an "important consideration" was

> "whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious... . Where this is the case the removal of the non-national family member would be incompatible with article 8 only in exceptional circumstances."

In paragraph 59 the court said this:

> "The first and second applicants met in October 2001 and started co-habiting in March 2002. Already from the beginning of their relationship it must have been clear to them both that their prospects of being able to settle as a couple in Norway were precarious. The first applicant's asylum request was rejected, first by the Directorate of Immigration on 22 May 2002, and then by the Immigration Appeals Board on 11 September 2002, giving him until 30 September 2002 to leave the country. No judicial appeal was lodged against these decisions, which became final. Nevertheless the first applicant opted to evade his duty to leave and stayed in Norway unlawfully."

For my part, I am not prepared to conclude that it is inevitable that a similar need for exceptional circumstances would arise in the present case, based upon the illegality of the bulk of the petitioner's residence in the United Kingdom. He arrived lawfully with members of his family from Jamaica when he was eight years old. He spent the rest of his childhood and adolescence in the UK with members of his family. He did not establish a family or private life in knowing and deliberate defiance of orders to leave the country. On the contrary, in the present case it would appear that the immigration authorities did nothing to enforce immigration controls against the petitioner or his

family until, as an 18 year old, the petitioner committed an offence. In the overall balancing exercise it can also be noted that at paragraph 66 in *Omoregie* the court said this:

> "It should be further noted that the first applicant had lived in Nigeria since he was six months old until he left the country at the age of 22, had studied at University for four years and had three brothers with whom he was still in contact. Whereas his links to Nigeria were particularly strong, his links to Norway were comparatively weak, apart from the family bonds he had formed there with the second and third applicants pending the proceedings."

Neither of these sentiments apply in the present case. Indeed it is more likely that the reverse is true, namely the petitioner having weak links with Jamaica, and strong links with the UK.

[21] It was with specific reference to all the particular facts of the case in *Omoregie* that the majority of the Chamber of the Strasbourg Court held that the domestic authorities had "struck a fair balance." I am not satisfied that it flows from this decision that, in the particular circumstances of the present case, a similar outcome is inevitable. Given that the petitioner did commit a serious crime, it may be a very real possibility, but that is a different matter.

[22] Before leaving *Omoregie*, the scope for divergence of view or judgment on these matters is amply demonstrated by the terms of the dissenting opinion of two judges who concluded that the competing interests should have resulted in the balance tipping towards granting the first applicant a residence permit entitling him to remain in Norway, and the concurring opinion of another judge, who would have held that the decision to expel the first applicant did not interfere with his right to respect for family life, thus there had been no interference with a protected article 8 right.

[23] The next case relied upon by Mr Lindsay was *R (WJ) (China)*. The claimant, a citizen of China, sought to challenge decisions of the Secretary of State to refuse to regard new representations as a fresh claim and to issue directions for her removal from the United Kingdom. She first arrived in the United Kingdom in 2001. She claimed asylum in September 2001, but on 4 February 2002 her application was refused on third country grounds because she had previously claimed asylum in France. On 12 February 2002 she was removed to France. She subsequently re-entered the United Kingdom illegally. She claimed to have done so in July 2008 concealed in a container. She did not come to the notice of the authorities until 29 July 2009 when she was arrested for shoplifting. She was detained, served with papers as an illegal entrant, and then released. She subsequently claimed asylum. She did not, at that time, claim that removal would breach her article 8 rights. In her asylum interview she claimed she had broken up with her boyfriend a couple of weeks before the interview. When detained she gave a false name, but fingerprint evidence revealed her true identity and her previous asylum claim. Her second asylum claim was refused on 28 August 2009. She did not appeal against that decision. Beatson J outlined the procedural history of the case, which he described as "curious and unsatisfactory". He stated that the claim had a number of features which suggested that it was ″prima facie abusive". In paragraph 47 Beatson J said:

> "The Secretary of State was entitled to take account of the claimant's appalling immigration history and the fact that effectively what the claimant and Mr Lei are doing is (adapting what was said in *Omoregie's* case) to confront the Secretary of State with the claimant's presence in the country as a *fait accompli* and asserting that removing her was disproportionate. In paragraph 64 of the judgment in *Omoregie's* case, the Strasbourg Court stated

> that an applicant is not entitled to expect that any right of residence would be conferred upon him in such circumstances. *Abdulaziz* v *United Kingdom* and *Omoregie* v *Norway*, and indeed the decision in *EB (Kosovo)* and other English decisions, take account of the fact that the relationship has been formed when the parties know that one of them is here without permission and illegally and that the persistence of family and private life in the United Kingdom was precarious."

Again, in my view this reasoning is to be seen and assessed in the context of the particular circumstances of the case, including the reliance upon the relationship with the second party. I am not persuaded that, in the very different circumstances of the petitioner's residence in the United Kingdom, concerns as to its illegal nature would necessarily have decisive importance against his article 8 claim.

[24] In *ZB (Pakistan)* the appellant was a 58 year old citizen of Pakistan. Her husband came to the UK prior to December 1966. *ZB* arrived in the UK for the first time on 24 July 1966. She and her husband married in the UK in December of that year. Their first child was born the following November. *ZB* returned to Pakistan. In October 1969 with entry clearance, she returned to the UK. The couple's son was born in the UK in December 1970. A second son was born in November 1971. In April 1973 *ZB* returned to Pakistan. Between then and 1985 she and her husband had four more children, all of whom were born in Pakistan. In 1985 she applied for entry clearance to join her husband in the UK, but was refused. In May 1988 a further son was born in Pakistan. In about 2002, one of *ZB's* daughters went to live in Pakistan to care for *ZB*. Thereafter she and *ZB* were supported financially by *ZB's* sons living in the UK. From 24 October 2002 one of *ZB's* sons, who was born in Pakistan in 1973, was granted an entry clearance to the UK as a spouse with leave to enter until 23 October 2003. On

22 September 2006, *ZB* was granted an entry clearance to the UK as a visitor, with leave to remain until 22 March 2007. She returned to Pakistan in January 2007. In September of that year she arrived in the UK under a visitor's visa with leave to stay until 30 January 2008. She was accompanied by the daughter who had moved to Pakistan to care for her, and since then *ZB* had lived with another daughter who is married and has 6 children. *ZB's* husband, all her children and her 19 grandchildren all live in the UK. Seven of her children and all of her grandchildren are citizens of the UK. The eighth child has indefinite leave to remain the UK. On 11 January 2008 *ZB* applied for indefinite leave to remain in the UK as the parent of a person present and settled in the UK. The application was refused by the Secretary of State on the basis that the application did not satisfy the requirements of the immigration rules for an application by a parent of a person present and settled in the UK. The refusal letter also stated that the Secretary of State was satisfied that the decision to refuse indefinite leave to remain did not represent a breach of *ZB's* article 8 rights. *ZB* appealed that decision. An immigration judge upheld the decision, but did not consider the article 8 issues. Reconsideration was ordered with regard to those issues. It was heard by a senior immigration judge and another immigration judge in October 2008. The tribunal said:

> "We therefore conclude that, even bearing in mind all the interests of the family in maintaining family life with the appellant to the extent to which they have one, her removal would not be disproportionate bearing in mind that to the extent of which there is any family life between her and any of them that it cannot be continued in the same way in which it has existed until September 2007 when she came to the United Kingdom most recently."

Permission was granted to appeal that decision to the court. It was considered that the appeal raised an interesting point as to the correct approach when someone who is a parent and grandparent claims that she relies on a daughter and her family in the UK because of her ill-health. The jurisprudence on that issue was of a limited nature.

[25] The court held that the tribunal erred in law in arriving at the conclusion that there was no family life for the purposes of article 8. That left the question as to whether interference in the family life of the appellant would be proportionate to the public end sought to be achieved by operating immigration controls which were in place for good administrative and legal reasons. The court considered that, on the facts before it, it was clear that the appellant's close family was in the UK. She was reliant on her daughter for care and depended on her sons in the UK for financial assistance. It was for the tribunal to consider this, and also whether it was realistic to consider that her husband, who suffered considerable ill-health, could visit her in Pakistan were she to be removed there. The tribunal did not ask whether it could reasonably be expected that the life of the family could be enjoyed elsewhere. Secondly, it did not weigh the answer to that question against all considerations in favour of removal, such as any failure to comply with immigration rules, possible deception on entry in 2007, and so forth. Thirdly, therefore, it could not properly come to a final conclusion on where the balance lay for the purposes of article 8. In those circumstances the appeal was allowed and the matter remitted to another tribunal for reconsideration.

[26] This case was relied on by Mr Lindsay principally for the observation that it turned upon a finding of dependency on the part of the appellant upon other family members living in the UK, and that this factor is not present in the present case. No doubt that is true, but in my opinion it by no means follows that, absent some similar

element of dependency, the present claim must fail. In *ZB* primarily the claim was based upon a right to family life, as opposed to private life, and, in the whole circumstances it was entirely understandable that so much emphasis was placed upon the element of dependency and the unsatisfactory consideration of the relevant factors by the tribunal. At the risk of undue repetition, each case must be given separate consideration based upon a careful weighing of its particular facts. No doubt it will be possible to identify many cases which succeed because of an element which does not arise in the present case. I am not prepared to proceed upon the basis that the present claim must fail in the absence of any similar element of dependency. I note that in the hearing before me counsel expressly accepted that the petitioner has a private life article 8 claim, and that the issue is whether interference with it would be proportionate in all the circumstances.

[27] The last three cases relied upon by Mr Lindsay all raised similar considerations. They each emphasised the need to carry out a balancing exercise which gives sufficient weight and prominence to the nature and seriousness of any crime or crimes committed by a claimant and, as held in *N (Kenya)* [2004] EWCA Civ. 1094, that:

> "Where a person who is not a British citizen commits a number of very serious crimes, the public interest side of the balance will include importantly, although not exclusively, the public policy need to deter and to express society's revulsion at the seriousness of the criminality."

Further, it was stressed that an adjudicator should take proper account of the Secretary of State's view of public interest, given his primary responsibility for the public good.

[28] In *N (Kenya)* the background was that *N* had perpetrated horrific crimes against a woman by abducting, threatening to kill her, falsely imprisoning her and raping her three times. He was sentenced to a term of 11 years imprisonment. In *OH (Serbia)*,

under reference to various passages in the decision of the court in *N (Kenya)*, Wilson LJ, at paragraph 15, set out the following propositions:

> "(a) the risk of re-offending is one facet of the public interest but, in the case of very serious crimes, not the most important facet;
>
> (b) another important facet is the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation;
>
> (c) a further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes;
>
> (d) given that primary responsibility for the public interest resides in the Secretary of State, his view of it is likely to be wider and better informed than that of a tribunal, and accordingly a tribunal hearing and appeal against the decision to deport should not only consider for itself all the facets of the public interest, but should weigh, as a linked but independent feature, the approach to them adopted by the respondent in the context of the facts of the case. Speaking for myself, I would not however described the tribunal's duty in this regard as being higher than 'to weigh' this feature."

The thrust of counsel for the Secretary of State's submission was that any immigration judge carrying out a proper balancing exercise, and giving sufficient weight to the petitioner's criminal conduct, would be bound to conclude that deportation did not violate his article 8 rights, and therefore the Secretary of State was correct to grant a certificate ruling that the claim was "clearly unfounded", and thereby prevent an in-country appeal. In this regard I note that in *OH (Serbia)*, Pill LJ at paragraph 33 said:

> "I am far from saying that *N (Kenya)* imposes a straightjacket upon a tribunal applying paragraph 364 where a serious criminal offence or criminal offences have been committed. The tribunal must, however, when striking a balance, demonstrate its recognition of the broader public interest considerations which arise from the consideration of a serious criminal offence or offences.

[29] *DS (India)* dealt with a 40 year old citizen of India. He arrived in the UK in 1998 and was given one year's leave to enter on the basis of his marriage to a British citizen whom he had married in India in October 1997. He was granted indefinite leave to remain. In August 2005 he attempted to rob a betting shop while armed with a knife. He pleaded guilty and was sentenced in the Crown Court to a term of imprisonment of four years, three months. In deciding to deport him the Secretary of State referred to seven further convictions for dishonesty (dating back to offences committed in 2003/5, before the robbery) for which on 14 March and 8 May 2006 *DS* received sentences of 12 months imprisonment concurrent both with each other and with the sentence he was already serving for robbery. His appeal to the Asylum and Immigration Tribunal was dismissed. His appeal to the court was likewise dismissed, the only judgment being delivered by Riggs LJ. At paragraph 30 he said:

> "A finding that it was unreasonable to expect a wife or family to accompany a deportee does not in itself answer the question of proportionality. Rather it sets up an important factor on the route to a conclusion about overall proportionality. If it would be reasonable for a wife to accompany her husband, then the interference in family life is that much the less. If it would be unreasonable, then the interference would be that much the more. However, where the scales ultimately fall will depend on the overall evaluation of every

> factor in the balance. In the present case, a critical factor is the serious offence of which *DS* was convicted."

In paragraph 31 his Lordship continued:

> "In the present case it seems to me that the tribunal were well aware that there was no option facing *DS* and his family or his wife and her family, which was without evil. Nevertheless, they had to evaluate the whole picture, including the fact that *DS* had, of his own choice, undertaken a serious crime, and that the Secretary of State was entitled to represent the public interest in the deterrence and prevention and abhorrence of such crime."

It is a common thread of this and similar decisions that the seriousness of any crime committed by a claimant, and its whole circumstances, are important factors to be taken into account in carrying out the necessary balancing exercise.

[30] With that review of the cases relied upon by counsel for the Secretary of State, I now turn to my decision in the present case. The question is whether I agree with the proposition that the Secretary of State was correct to certify the petitioner's claims as "clearly unfounded". I must apply my own mind to that issue, and if I disagree with the Secretary of State's decision then it falls to be quashed. The main factors relied upon by the petitioner in his agent's letter of 20 January 2010 to the Criminal Casework Directorate of the UK Border Agency (Production 6/3) were as follows: (1) his lawful arrival in the UK at eight years of age along with his two elder sisters; (2) his subsequent residence in the United Kingdom with his mother and then his uncle, during which period he received his formal schooling in the United Kingdom; (3) his regular contact with his two sisters and his mother, and more generally his close relationship with his extended family in the United Kingdom; (4) his lack of

family connections in Jamaica; (5) in short that he is an "integrated alien" to whom Jamaica is a foreign country.

[31] The reasoning of the Secretary of State in deciding to deport the petitioner and to certify his human rights claim to remain as clearly unfounded has been summarised earlier. On the certificate aspect, it is, I think, fair to comment that the Secretary of State's (or rather his official's) reasoning is less than satisfactory. The only specific factor relied upon under this heading is that "relationships between an adult applicant and adult siblings or wider family members are not accepted as amounting to family life, for the purposes of article 8, in the absence of any dependency beyond normal emotional ties", allied to the petitioner's failure to demonstrate any such dependency. It has been accepted on behalf of the Secretary of State that deportation would be an interference with the petitioner's private life established in the UK, a matter which is separate from his family life. However, it is reasonable to proceed upon the basis that, in certifying the claim as clearly unfounded, the Secretary of State was also having regard to all the factors relied upon in relation to the decision to deport. It can be noted that there is no express recognition of the very different test which must be applied when considering certification, as opposed to the substantive merits of the article 8 claim. That said, during the hearing before me counsel for the Secretary of State accepted that the "clearly unfounded" test presents a very low hurdle for the claimant to clear. The submission was that Secretary of State's decision to reject the claim was clearly correct, and that there is no prospect of a different decision from an immigration judge. In particular the petitioner's serious criminal conduct, his status as a single adult male, and the unlawful nature of his continued residence in the United Kingdom beyond the first six months, demonstrate that the petitioner's claim is hopeless.

[32] For the reasons discussed above, I am not persuaded that an analysis of the case law upon which Mr Lindsay relied vouches the proposition that any immigration judge would be bound to reject the petitioner's article 8 violation claim. Following the guidance laid down in *Üner,* the judge would require to have regard to and weigh in the balance numerous factors, including the nature and seriousness of the offence committed by the petitioner; the length of his stay in the United Kingdom; the time elapsed since the offence was committed and his conduct during that period; the applicant's family situation; and the solidity of social, cultural and family ties with the host country and with the country of destination. It seems to me that, in the case of a young man who has lived in this country since the age of eight, who was educated here, whose family is in the United Kingdom, and who is a stranger to his country of origin, it is not clear that he would necessarily be removed on the ground that it was justified by his offending behaviour and the lack of dependency in his family life. Further, for the reasons explained above, I do not regard the precarious nature of the bulk of his residence in the UK as having the decisive importance which it did in some of the cases cited by Mr Lindsay. This is not a case where the applicant chose to enter or remain in the UK unlawfully. He was brought here when he was very young. He has not chosen to develop a private or family life in flagrant disregard of orders requiring him to leave the United Kingdom. It is, however, beyond question that his offence was of a serious nature, and that it weighs heavily against him. In my view, the ultimate outcome of the present case depends on the balancing of that element against the other factors in his favour. Thus the Secretary of State's certificate can be valid only if the weight attaching to the petitioner's offending behaviour is clearly destructive of the petitioner's claim to a violation of his article 8 rights.

[33] The case law demonstrates that the Secretary of State, and anyone else charged with deciding matters such as these, is entitled to have regard not only to the circumstances of the offence itself, including any mitigatory factors, but also to the need to maintain public confidence in the system of immigration control and to deter others who might otherwise think that they can enter the UK illegally, breach its law and then remain here with impunity. It is perhaps unfortunate that, beyond the bald facts, I have little information as to the circumstances of the petitioner's conviction for possession of class A drugs with intent to supply, nor as to his behaviour in and subsequent to release from prison. It was a first offence, but the sentence itself, imposed on one so young, shows that the court took a serious view of the matter, as indeed was confirmed in the sentencing remarks quoted in the decision letter. I am persuaded that the serious nature of the petitioner's offence may well justify a decision to deport him, but that is not the issue. The issue before me is whether I agree that, when all the relevant factors have been weighed and balanced, it is clear beyond any real doubt that removal to Jamaica would be regarded by an immigration judge as a proportionate response, and thus not in violation of the petitioner's article 8 rights. In any consideration of such questions by an immigration judge, no doubt something might depend on whether there are other relevant facts and circumstances concerning the offence itself and the petitioner's subsequent behaviour. However, on the information before me, my opinion is that there is sufficient in the petitioner's favour to prevent a conclusion that his claim is hopeless. To put it in the words sometimes used, despite the serious nature of his offence, I am satisfied that his prospects of a successful appeal can be categorised as more than fanciful. Of course, it by no means follows that I consider that any appeal should succeed. I am only saying that the issue

should be addressed by the appropriate tribunal before the petitioner is removed from the UK. I express no view on the ultimate merits of the claim.

[34] In the light of the review and discussion of the case law set out above, and contrary to the submission of Mr Lindsay, I am satisfied that those decisions do not force me to a different conclusion. I would also comment that perhaps the Secretary of State's reasoning concentrates unduly on the absence of dependency in the petitioner's family life, to the prejudice of consideration of other factors which weigh in favour of the petitioner, such as the assertion that he is what is sometimes called "an integrated alien", who was brought to the United Kingdom at a young age, after which, apparently, the authorities took no steps, or at least no effective steps, to enforce immigration control in respect of him and others in his family. I am also uncertain that the comment as to deportation having "a demonstrable lack of impact" on the petitioner can, in the whole circumstances, be sustained. I would also expect that in any reconsideration there would be some focus on an assessment of the risks, if any, which the petitioner is likely to present to the public in the future. The Secretary of State concluded that it was a fact that he may represent a threat to national security, but it is unclear whether this was based simply upon the conviction, or on some more detailed assessment.

[35] For all these reasons I shall grant the application for judicial review and reduce the decisions of the Secretary of State dated 21 January 2010 to certify the petitioner's claim as clearly unfounded in terms of section 94(2) and (3) of the Nationality, Immigration and Asylum Act 2002. In the meantime I shall reserve the question of expenses.