Neutral Citation Number: [2009] EWCA Civ 544

Case No: C5/2008/1992

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM AND IMMIGRATION TRIBUNAL
SENIOR IMMIGRATION JUDGE PERKINS
IA/14217/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2009

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE RIX
and
LORD JUSTICE MOSES

- -

Between :

DS (INDIA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Anthony Vaughan (instructed by **Messrs Braitch Solicitors**) for the **Appellant**
Ms Carine Patry Hoskins (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing dates : Thursday 19 March 2009

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Judgment

Lord Justice Rix :

1. The appellant, DS, is a citizen of India. He was born on 14 August 1968 and is now 40 years old. He appeals the determination of the Asylum and Immigration Tribunal (the "AIT") promulgated on 16 May 2008, which dismissed his appeal against the decision of the respondent Secretary of State for the Home Department (the "Secretary of State") to deport him. The determination of the AIT was that of SIJ Perkins and Ms JA Endersby.

2. An earlier AIT appeal determination dated 24 October 2007 had been subject to error and so DS's appeal had been reconsidered.

3. The Secretary of State's decision was made on 24 August 2007. Her reasons set out the following matters. DS arrived in the United Kingdom on 2 May 1998 and was given one year's leave to enter on the basis of his marriage to a British citizen, Ms K, whom he had married in India on 5 October 1997. On 28 June 1999 he was granted indefinite leave to remain. On 13 August 2005 he attempted to rob a betting shop whilst armed with a knife. He pleaded guilty and on 2 December 2005 was sentenced in the Crown Court to a term of imprisonment of 4 years 3 months. HHJ Onions in his sentencing remarks said –

> "…it was you who developed this gambling habit. It was you who accrued this debt of £150,000 and this debt has cost you a lot. This habit has cost you a lot. It has cost you your wife, it has cost you your child for quite some time, and you have committed this very serious robbery…people who commit robberies like you have committed will go to prison for a long time…you have caused a lot of harm…this is a serious specified offence of violence…if you commit another offence like this in the future you will go to prison for life…"

4. DS's wife had divorced him in December 2006, but the current proceedings are on the basis that DS and his ex-wife are reconciled.

5. The Secretary of State's decision letter went on to refer 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.

6. The Secretary of State considered DS's case from the point of view of both article 8 of the ECHR and of paragraph 364 of the Immigration Rules. She concluded that in the light of the seriousness of his criminal offence (*sc* of robbery) his removal was necessary in a democratic society for the prevention of disorder and crime and for the protection of health and morals. There was no reason why his ex-wife and son would not be able to accompany him to India should they wish to do so. Alternatively, he could continue such relationships from overseas.

7. DS gave evidence to the AIT. He said that he had committed his offences out of desperation because of debts incurred as a compulsive gambler. Although he had always worked and paid tax, he had squandered his wages on his gambling. He said that he was reconciled with his ex-wife and that they intended to re-marry. She had visited him regularly in prison. His son, who was in fact the son of his ex-wife's brother, had adapted to life in the UK and would find it difficult to return to India. (The son's age at this point was not clear, but DS's ex-wife said that he had been born on 7 December 2003.) There were discussions with lawyers concerning his formal adoption. He was not on good terms with his family in India, who did not like his ex-wife and would give him no support if he returned to India. He said that on release he would attend rehabilitation classes for gamblers, and devote himself to charitable causes. He believed he was a reformed character.

8. His ex-wife also gave evidence. She had come to the UK in 1986. They had been happy until the gambling took hold of her husband. She threatened him with separation to try to stop his gambling, and divorced him when he went to prison in 2005. She believed he would not gamble any more and was reformed, and they were reconciled. She said, however, that she would not accompany him back to India. She was a full-time carer of her parents, both of whom had been living with her for ten years. They could not go back to India at their time of life. She also had four married sisters in the UK. As for the boy, he was the son of her brother and sister-in-law who lived in India. The sister-in-law had come for a family visit to the UK (apparently when pregnant) and the boy had been born here, and his mother returned to India the following month. The boy had been left in the care of DS and his wife ("They consented to us having him"), they regarded him as their son and he regarded them as his parents. She was unable to conceive. She could not give an illuminating answer as to how far adoption proceedings had progressed. She was diabetic and took insulin injections twice a day.

9. A Pre-Sentence Report confirmed the story of DS getting into trouble as a result of his gambling. There was a "medium risk of reconviction". A psychological report dated November 2005 recommended that DS enter into a gambling or addiction awareness programme. Prison records confirmed frequent visits from his ex-wife and son, and that he took prison courses.

The determination

10. The AIT made the following findings. They were satisfied that DS and his ex-wife intended to remarry, if that became possible. They were particularly influenced in this finding by the manner in which the ex-wife gave her evidence. They found that DS had been gainfully employed for most of his time in the UK and was an industrious man. The status of the boy was hard to determine, however. They thought that it was surprising that they had not seen his birth certificate. It was highly unlikely that he was a British citizen, but he was established here and had started school or pre-school; and he regarded DS and his ex-wife as his parents.

11. They accepted that DS and his ex-wife would not be supported by either's family in India. If they returned there, it would be to a country where they had no obvious support. However, they had no doubt that he would succeed in finding work there and in establishing himself there.

12. They accepted that DS was sincere in his intention to give up gambling, and that his ex-wife would help him to do so, but they could not say whether he would succeed.

13. As for his ex-wife's and son's position, they addressed this as follows:

> "129. The appellant's deportation will place Mrs K in an invidious position. Whilst she intends to re-marry the appellant she has responsibilities in the United Kingdom to her parents and to [the boy] who she clearly regards as her child. Life has not been kind to her. She has already suffered the disappointment of a failed marriage [to a previous husband] and that was mainly because of problems with her fertility. Those problems have continued in her present marriage which has been very unhappy for reasons that are clearly primarily the fault of the appellant. It is impossible not to feel considerable pity towards her. If she chooses to follow the appellant to India she will leave behind ageing parents for whom she feels responsible and she will deprive [the boy] of the British education and upbringing that she and others so want for him. However it is quite clear that there is no reason why she could not go to India.
>
> 130. We accept that Ms [K] is diabetic but not that this would stop her removing to India…

> 131. Similarly we find that [the boy] could go to India. This would no doubt diminish his standard of living and his educational opportunities but he is still very young and could be expected to adapt to life in a different country. His personal relationships are probably much more important to him than his living conditions and he undoubtedly has a very committed carer in Ms [K] and a well intended father figure in the appellant."

14. They then set out the five stage test in *R (Razgar) v. Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368 (this was at a time before the House of Lords decisions in *Beoku-Betts v. Secretary of State for the Home Department* [2008] UKHL 39, [2009] 1 AC 115) and continued:

> "133. We have no hesitation in saying that the appellant has established a protected private and family life in the United Kingdom for the purposes of Article 8(1)…[which] particularly focuses on his relationship with [the boy] and his former wife, Ms [K]. Interference would plainly be of such gravity as to engage the protection of article 8(1) but will be lawful in the sense that it will be done with proper authority and (article 8 aside) in accordance with the law. Further it will be for the proper purpose of enforcing immigration control in its broadest sense. It might be more sensible to revert to the phrase in the European Convention on Human Rights, the "prevention of disorder or crime". We do not say this because the appellant will necessarily re-offend. We accept that he is resolved not to re-offend. We simply do not know if he will be able to give effect to that resolution…
>
> 134. As is so often the case, the demanding question is "will removal be proportionate to the legitimate aim" [*Razgar*, question 5]…
>
> 135. We remind ourselves further that the scales used to measure the balancing exercise are not even. They are biased in favour of removal. As was made clear in *N (Kenya) v. SSHD* [2004] EWCA Civ 1094, the question of proportionality goes far beyond stopping re-offending but includes the "need to express revulsion at the seriousness of the criminality" (paragraph 64 of *N*).
>
> 136. Further, while it is too simple to say that there must be "insurmountable obstacles" in the path of removing a person to a different country before it can be said that removal is disproportionate to the proper purpose of enforcing immigration control in its broadest sense, a person seeking to rely on Article 8 has to satisfy a demanding test (see *VW and MO (Article 8 – Insurmountable Obstacles) Uganda* [2008] UKAIT 00021)…
>
> 138. We have considered carefully Mr Vaughan's skeleton argument. We are familiar with the case of *Uner v. The Netherlands* [2006] ECHR 873 and we are aware of the decision of the Court of Appeal in *AB (Jamaica) v. SSHD* [2007] EWCA Civ 1302, requiring us to look on the impact of deportation on other family members.

139. We have no hesitation in saying that the interference with the appellant's protected and family life inherent on his removal would be enormous and certainly of sufficient gravity to potentially engage the protection of the article. He will either have to return to India and establish himself on his own knowing that his partner and child in the United Kingdom will have to manage without him or he will have to establish himself as the head of a family in India knowing that he will have caused his partner and [the boy] enormous distress in insisting on their removal. Either of those factors is a very heavy burden. That is no more than the just consequence of his own wrong doing…

140. We accept as well, as far as it is open to us to say, that removal would be for very similar reasons an interference with the rights of Miss [K] and [the boy]. They would have to make an invidious choice. They would either have to establish themselves in a new country on their own and let down people in the United Kingdom and, in the case of [the boy], lose the opportunity of a British education, or they would have to lose, or at least greatly reduce contact with the appellant. This is all serious stuff and we have reflected upon it.

141. However there is no reason why they could not go to India if they were so minded. It would be difficult but there are no insurmountable obstacles or other compelling facts in the path of removal.

142. Mr Vaughan properly drew to our attention that the sentencing judge did not regard the appellant as a future risk to the public in the particular sense in which the judge used that phrase but this is missing the point. Obviously if there was a clearly established chance of the appellant reoffending the respondent's case would be all the stronger but in deciding whether something is conducive to the public good, the respondent is entitled to have regard to the undesirability of criminals who are foreign nationals continuing to live in British society. He has to consider the effect that has on the wider community. It is all part of his duty to supervise immigration control…

144. We have reflected on the appellant's circumstances and remember that he has been punished by the court, we have reflected on Miss [K's] circumstances and on [the boy's] circumstances. Removal will hurt but we are quite satisfied that [it] is proportionate to that proper purpose…

147. Further, although removal would be an interference with the private and family life of Ms [K] and of [the boy] that would engage the protection of article 8(1)…it would be lawful and necessary. Further we find that it would be proportionate. The problem here is not the oppressive governmental act but the appellant's decision to commit serious crime in a country that is not obliged to accommodate him and that is entitled to show him and others that his behaviour will not be tolerated. Ms [K] and [the boy] can cope without him and they can go with him. Their lives will change but they will not be ruined. The concern that any decent thinking person would have for them is not a "trump card" that allows the appellant to escape the consequences of his

actions. In short, removal is proportionate and the requirements of paragraph 364 of HC 395 add nothing."

Extension of time

15. In dealing on paper with DS's application for permission to appeal, Sedley LJ said that he was "minded" to grant permission, but adjourned the application to the full court for the Secretary of State "to show cause" why time should not be extended so as to validate the applicant's application. In effect, Sedley LJ was putting the burden of persuasion on the issue of time on to the respondent.

16. The essential facts on this aspect of the matter are that the AIT determination from which permission to appeal was sought was the AIT's refusal of permission to appeal dated 20 June 2008, written notice of which was deemed to have been received by the applicant's solicitors on 27 June 2008. Therefore, the applicant's notice of appeal had to have been filed within 14 days, by 12 July 2008. The applicant's solicitors submitted the notice of appeal and an appeal bundle to the civil appeals office on 9 July, and it was received by the office on 10 July 2008. It is submitted that that constituted the necessary "filing" for the purposes of CPR 52PD 21.7(2). However, it was not treated by the office as filed until 13 July, and thereafter the appeal papers were returned as being deficient on 23 and 28 July. However, DS submits that the allegedly missing documents had been provided. DS submits that his papers were either "filed" in time or applies for time to be extended on the ground inter alia that Sedley LJ had already indicated that on the merits the application had real prospects of success.

17. At the hearing, Ms Carine Hoskins on behalf of the Secretary of State made it clear at the outset that, while not formally conceding the point, she was not disposed to make any submissions to refute the application regarding time. In the circumstances, I would hold that, if it were necessary to do so, I would extend time as necessary to validate this appeal.

Grounds and submissions

18. On behalf of DS, Mr Anthony Vaughan presented the following grounds of appeal. First, that the AIT had placed insufficient weight and/or had failed adequately to consider the impact of DS's removal on the article 8 rights of Ms K, the boy, and of Ms K's dependent parents. Secondly, that the AIT had failed to

make findings concerning the boy's best interests. Thirdly, that the AIT had failed to take into account or had taken insufficient account of the fact that DS did not present any real risk of reoffending.

19. In support of these grounds, Mr Vaughan made the following submissions. As for the first ground, he referred to *Beoku-Betts, EB (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41, [2008] 3 WLR 178 and *VW (Uganda) and AB (Somalia) v. Secretary of State for the Home Department* [2009] EWCA Civ 5, each of which had been decided after the AIT determination. He did so for the proposition that those cases had emphasised that for the purposes of article 8, the tribunal had to take account of the interests not only of the appellant himself but also of other members of his family, as here of Ms K, her parents, and the boy. He submitted that the AIT had failed to do this, or had failed adequately to do this. In this connection, and as part and parcel of the same ground, Mr Vaughan relied on these recent authorities as demonstrating that the test involved in the issue of proportionality was not that of "insurmountable obstacles" (cf para 141 of the determination) but whether it is "reasonable to expect" the family members to accompany the appellant to India. He submitted that no real weight had been accorded to Ms K's dilemma; that no account whatsoever had been taken of her obligations to her parents or of their interests; and that it was insufficient for matters to be recited as part of the factual background unless they were properly taken into account in the decisive part of the determination's reasoning.

20. As for the second ground which concentrated on the position of the boy, Mr Vaughan submitted that the AIT had failed to do justice to the teaching of *Üner v. The Netherlands* (2006) EHHR 873 regarding the best interests and well-being of a child. He submitted that such considerations reflected the wider international law position to be found demonstrated in articles 3 and other articles of the Convention on the Rights of the Child ("the best interests of the child shall be a primary consideration"), as well as in preamble 12 of the Refugee Qualification Directive ("The best interests of the child should be a primary consideration…"). He pointed to the UK Border Agency Code of Practice for Keeping Children Safe from Harm, to which, pursuant to section 21 of the UK Borders Act 2007, from 6 January 2009 the UK Borders Agency (and he submits, the courts) must have regard (see for instance para 1.6: "The best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions about his or her future…").

21. His third ground of appeal focused on para 142 of the determination, where the AIT had said that allusion to the fact that DS was regarded by the sentencing judge as presenting a low risk of reoffending was "missing the point". Mr Vaughan submitted that the risk of reoffending was always relevant and had to enter into the balancing exercise. The greater the risk of reoffending the greater the public interest in deportation (see *N (Kenya)* [2004] INLR 612 at para 87), but

also vice versa. A failure to look at the risk of reoffending had been a ground of remission in *AM (Jamaica)* [2008] EWCA 1408 at para 3.

22. On the other hand, Ms Patry Hoskins submitted on behalf of the Secretary of State that the AIT had applied the right tests and had done so conscientiously and properly. Even in advance of *Beoku-Betts*, the tribunal had taken account of the family as a whole and the individual members in it, at least to the extent it had been asked to do so, applying the approach of this court in *AB (Jamaica)* [2008] 1 WLR 1893, which the House of Lords had approved in *Beoku-Betts* (see para 125 of the determination). Even in advance of *EB (Kosovo)* and *VW (Uganda) and AB (Somalia)*, the tribunal had adopted a more sophisticated balancing test than that of "insurmountable obstacles", as could be seen from those passages where it reviewed the "invidious position" and "invidious choice" of Ms K (at paras 129 and 140). The tribunal had therefore considered the boy's best interests (referring specifically to *Üner* at para 138). It had also taken account in the round of DS's criminal record, his reason for offending, and his risk of reoffending (see for instance para 133).

Ground 1: the interests of other members of the family.

23. In *AB (Jamaica)* the claimant, a woman, had married a British citizen. She had come on a visitor's visa, had overstayed and married. She sought leave to remain on the ground of her marriage. She succeeded in her appeal to this court on the basis that the AIT had not considered the matter from the point of view of the claimant's husband. Sedley LJ had said:

> "20. In substance, albeit not in form, Mr Brown was a party to the proceedings. It was as much his marriage as the claimant's which was in jeopardy, and it was the impact of removal on him rather than on her which, given the lapse of years since the marriage, was now critical. From Strasbourg's point of view, his Convention rights were as fully engaged as hers. He was entitled to something better than the cavalier treatment he received…It cannot be permissible to give less than detailed and anxious consideration to the situation of a British citizen who has lived here all his life before it is held reasonable and proportionate to expect him to emigrate to a foreign country in order to keep his marriage intact."

24. In *Beoku-Betts* at para 35 Lord Brown of Eaton-under-Heywood cited that passage from *AB (Jamaica)* with approval. The House of Lords approved the submission that, in determining whether an appellant's article 8 rights had been breached,

account had to be taken of the effect of his proposed removal upon all members of the family unit. If overall the removal would be disproportionate, all affected members were to be regarded as victims (see at para 20).

25. In my judgment, however, this is the approach which the AIT adopted in the present case. The decision of the House of Lords in *Beoku-Betts* of course at that time lay in the future. However, the AIT might have referred to the decision in this court, [2005] EWCA 828, which the House of Lords overruled, but it did not. Instead, it referred to *AB (Jamaica)*: see para 125, which began:

> "Mr Vaughan reminded us that, following *AB (Jamaica) v. SSHD* [2007] EWCA Civ 1302, we must take account of the rights of Miss [K] and of [the boy]."

That is exactly what the tribunal proceeded to do: at paras 125, 126, 129, 130, 131, 138, 140 and 141. I will return to the way in which the tribunal considered the position of the boy in dealing with ground 2 below. In general, however, it cannot be said that the tribunal gave other than anxious scrutiny to the interests of both Ms K and the boy. As the tribunal said, at para 140, "They would have to make an invidious choice."

26. Mr Vaughan submitted that in any event such consideration did not embrace the position of Ms K's elderly parents of whom she was the carer. It is true that the AIT did not specifically address their case in the passages to which I have referred above. That appears to me because their case as potential victims themselves does not seem to have been put to the tribunal: see the submission cited above, recorded in para 125, which is limited to Ms K and the boy. Even so, the tribunal does seem to have had their interests in mind. Thus, at para 31 the tribunal, in recording the evidence of DS, recorded that Ms K had strong ties in the UK, which included her 89 year old father and 82 year old mother: "They had indefinite leave to remain and his wife had obligations and duties to them". Similarly, when dealing with Ms K's evidence, the AIT recorded that her parents had lived with her for about ten years, and could not go to India at their time of life (at para 77). Albeit not expressly, the tribunal referred back to such considerations when they said (at para 140), in describing Ms K's invidious choice, that she would, if she left for India, "let down people in the United Kingdom". Therefore, it cannot be said that the tribunal did not have the parents in mind when they came to their decision on proportionality. Moreover, they would also have had in mind that, as they went out of their way to record earlier at para 77, Ms K had four married sisters living in the UK. Therefore it was unlikely that the parents would be left uncared for.

27. Mr Vaughan also made submissions, however, by reference to *EB (Kosovo)* and *VW (Uganda) and AB (Somalia),* decisions which also post-dated the determination. In *EB (Kosovo)* at para 12, Lord Bingham said this:

> "[The appellate immigration authority] will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child."

28. In *VW (Uganda) and AB (Somalia)* Sedley LJ referred to that passage in order to emphasise that the "insurmountable obstacles" test (see for instance *R(Mahmood) v. Home Secretary* [2001] 1 WLR 840 and *VW and MO (Article 8 – Insurmountable Obstacles Uganda* [2008] UKAIT 00021) had been misunderstood and that "the last word on the subject has now been said in *EB (Kosovo)*", adding (at para 19):

> "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."

See also *AF (Jamaica) v. Secretary of State for the Home Department* [2009] EWCA Civ 240 at paras 32/42.

29. Mr Vaughan therefore submitted that the tribunal had adopted the wrong test, for in para 141 of their determination they had concluded that "there are no insurmountable obstacles or other compelling facts in the path of removal". However, I do not consider that that would be a fair reading of the determination as a whole. At para 136 they had said that "it is too simple to say that there must be "insurmountable obstacles". Moreover, at paras 139/140, 144 and 147 it is quite plain that the tribunal are applying a much more sophisticated analysis of proportionality. The tribunal were entitled to say that there were no insurmountable obstacles, but that was not the end of the analysis. It seems to me that, although the test of what can reasonably be expected was not expressly considered, that test was effectively applied. Thus by speaking of Ms K's "invidious position" and "invidious choice" at paras 129 and 140 the tribunal were emphasising the seriousness of the factors which made *either* decision, to stay or to go, a consequence of evil. As they said: Ms K and the boy would either have to establish themselves in a new country and let down people in the UK and, in the case of the boy, lose the opportunity of a British education, or they would have to

lose, or at least suffer greatly reduced, contact with DS. This was a choice of evil, and, as they commented: "This is all serious stuff". In my judgment such passages are tantamount to a finding that it would be unreasonable to expect Ms K (and thus the boy, for he was only a few years old) to adopt either position. Both were evils. Although *VW (Uganda) and AB (Somalia)* lay in the future, the AIT were in the present case prophetic when their language anticipated, for instance, a passage in Sedley LJ's judgment in the later case where he said (at para 42) that –

> "it is the hardship of the dilemma itself which has to be recognised and evaluated."

30. That, however, as Mr Vaughan acknowledged, was not the end of the argument on proportionality. 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. No such factor arose in the cases of *EB (Kosovo), VW (Uganda)* or *AB (Somalia).*

31. 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 Ms K and her family, which was without evil. Nevertheless, they had to evaluate the whole picture, including the facts 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. As the tribunal stated (at para 144), they had reflected on DS's "circumstances", on Ms K's "circumstances" and on the boy's "circumstances", they knew that removal would hurt, but nevertheless they were satisfied that it was proportionate in the light of the Secretary of State's proper purpose. On that basis, it seems to me that it cannot be said that the tribunal have erred in law. They have made an evaluation of the many factors which went to make up those circumstances. That conclusion is of course subject, however, to Mr Vaughan's second and third grounds.

Ground 2: The best interests of the boy.

32. To a large extent the submissions made under this ground have already been discussed under ground 1: but under this heading Mr Vaughan has emphasised in particular the Strasbourg jurisprudence and international law background which speaks to the best interests of a child as being a matter of particular importance.

33. The leading Strasbourg authority in this respect is *Üner v. The Netherlands* (2006) EHHR 873. That concerned a Turkish national whom The Netherlands wished to deport following a conviction for manslaughter for which he was sentenced to seven years in prison. He had been living in The Netherlands since he was twelve years old, and had a partner and two young children. The European Court of Human Rights, Grand Chamber, referred to the *Boultif* criteria, which included reference to "the applicant's family situation…whether there are children of the marriage, and if so, their age" (*Boultif v. Switzerland*, ECHR 2001- IX) and added:

> "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…"

34. In the event, the Court rejected the applicant's claim. It said:

> "64. The Court concurs with the Chamber in its finding that at the time the exclusion order became final, the applicant's children were still very young – six and one and a half years old respectively – and thus of an adaptable age…Given that they have Dutch nationality, they would – if they followed their father to Turkey – be able to return to the Netherlands regularly to visit other family members residing there.
>
> Even though it would not wish to underestimate the practical difficulties entailed for his Dutch partner in following the applicant to Turkey, the Court considers that in the particular circumstances of the case, the family's interests were outweighed by the other considerations set out above…"

Those considerations were a mixture of the circumstances relating to the members of the family and the seriousness of the applicant's criminality.

35. In this connection, Mr Vaughan submits that other instruments which he cited speak of the best interests of the child being "a primary consideration". Indeed, he went so far as to submit that they amounted to *the* primary consideration. In my

judgment, however, there is no support for that approach in *Üner*. Of course, in other situations, the welfare of a child might be the paramount concern of a court. In the present situation, however, conflicting public interests have to be balanced. I would view the present case as raising a less pressing case in terms of the single child than in *Üner*. Moreover, I do not accept the submission that the tribunal paid other than the closest and most anxious consideration to the best interests of the boy, who is presently about five and a half years old. The tribunal made express reference to *Üner* (at para 138), described the consequence of DS's conduct leading to his deportation as causing "enormous distress" to Ms K and the boy, and referred specifically to the loss of the opportunity of a British education and to greatly reduced contact with DS (at paras 139/140).

36. I cannot find that the tribunal erred in law or in principle in addressing the presence in the family of the boy.

Ground 3: DS's future risk of re-offending

37. Mr Vaughan submitted that the tribunal ignored the fact that the sentencing judge appears to have treated DS as having a low risk of re-offending. It is not clear exactly how the judge addressed his remarks on that topic. The AIT accepted that DS had the best of intentions ("We accept that he is resolved not to re-offend", at para 133), but they added, realistically, that they "simply do not know if he will be able to give effect to that resolution" (*ibid*). In these circumstances, I do not read the passage on which Mr Vaughan relies (at para 142, "but this is missing the point"), as demonstrating that the tribunal simply put out of their mind DS's good intentions or the low risk that he may have presented. They had already specifically addressed that risk (at para 133). What they were saying was that, even if they could be sure that DS would not re-offend, even so the Secretary of State might be entitled to say that his removal from this country was in the public interest. The tribunal made that point both at para 133 and again at para 142 of their determination. In my judgment, when consideration is given to the manifold nature of that public interest (see *N (Kenya)* at para 87, *EO (Turkey)* [2008] EWCA Civ 671, [2008] INLR 295 at para 19 and *OH (Serbia) v. Secretary of State for the Home Department* [2008] EWCA Civ 694 at para 15), it cannot be said that the AIT erred in this respect. The public interest in deportation of those who commit serious crimes goes well beyond depriving the offender in question from the chance to re-offend in this country: it extends to deterring and preventing serious crime generally and to upholding public abhorrence of such offending.

Conclusion

38. For these reasons, I would dismiss this appeal.

Lord Justice Moses :

39. I agree.

Lord Justice Mummery :

40. I also agree.