Case No: C5/2007/2057

Neutral Citation Number: [2008] EWCA Civ 694
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRINBUNAL
[AIT No. IA/10103/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 30th April 2008

Before:

LORD JUSTICE PILL,
LORD JUSTICE MAURICE KAY
and
LORD JUSTICE WILSON

- -

Between:

OH (SERBIA) **Appellant**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

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Mr C Williams (instructed by Messrs Turpin & Miller) appeared on behalf of the **Appellant**.

Miss K Olley (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Wilson:

1. Mr OH appeals against a determination of the AIT dated 9 July 2007. The determination was the conclusion of the AIT's reconsideration of an appeal by the appellant against the decision of the Secretary of State for the Home Department, the respondent, to deport him to what we now recognise as the state of Kosovo, of which he is a national. The determination was that his appeal should be dismissed. Upon its initial consideration of the appeal, the tribunal's determination had been otherwise, namely that his appeal should be allowed. Later, however, the tribunal had ruled that there had been an error of law in the initial consideration in that the balance of factors mandated by paragraph 364 of the Immigration Rules (HC395) had not then been lawfully conducted and that a full reconsideration of the appeal should take place. The basis of the appellant's appeal to this court is that there was no error of law in the initial consideration, with the result that the tribunal had no right to conduct a reconsideration of the appeal and thus no right to reverse the determination made upon the initial consideration.

2. Paragraph 364 provides:

> "… in considering whether deportation is the right course on the merits, the public interest will be balanced against any compassionate circumstances of the case, while each case will be considered in the light of the particular circumstances. The aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects … Before a decision to deport is reached, the Secretary of State will take into account all relevant factors known to him, including 1) age; 2) length of residence in the United Kingdom; 3) strength of connections with the United Kingdom; 4) personal history, including character, conduct and employment record; 5) domestic circumstances; 6) previous criminal record and the nature of any offence of which the person has been convicted; 7) compassionate circumstances; 8) any representations received on the person's behalf."

   In setting out the relevant parts of the paragraph I ignore the amendments made to it with effect from 19 July 2006 because they do not apply to the decision made by the respondent in relation to the appellant prior thereto.

3. Those charged with making a decision about the appellant's deportation faced a difficult decision. On the one hand he had in 2002 committed a very serious offence of violence, in respect of which he had been sentenced to a term of four years imprisonment. That therefore gave rise to a need to consider various facets of the "public interest" referred to in the paragraph. On the

other hand there were compassionate circumstances of a striking character. The decision-makers were initially the respondents; then the immigration judges who conducted the initial consideration; and finally, but only if in so doing the latter had perpetrated an error of law, the immigration judges who conducted the reconsideration. Everything therefore turns on whether, at the first stage of the reconsideration, the immigration judge was right to have discerned an error of law in the exercise undertaken in the first consideration of the appeal. It follows that the reasons for the decision given at the conclusion of the second stage are irrelevant; and that the focus of this appeal is entirely upon the reasons given at the conclusion of the initial consideration and whether there was a legal flaw in the manner of its determination.

4. The appellant was born on 1 March 1983 and so is now aged 25. He entered the UK, hidden in a lorry, on 27 September 1999, i.e. when aged 16; and he claimed asylum. Although his claim was refused, he was, as an unaccompanied minor, granted exceptional leave to remain in the UK until March 2004. In 2000 his parents and two brothers joined him from Kosovo and were granted indefinite leave to remain. The family settled in Reading.

5. The appellant committed the offence on 13 June 2002 i.e. when aged 19. The appellant and a friend were accosted by two other youths in a street in Reading; and his friend was subjected to a brutal attack, in the course of which his assailant punched him, knocked him to the ground and stamped upon his head. When the assailant and his friend started to run away, the appellant followed and, armed with a razor knife which he had in his possession, he slashed the neck of his friend's assailant, inflicting a deep gash which ran one third of the way round the neck and which narrowly missed the jugular vein. Thereupon the appellant ran away and was seen on CCTV to be demonstrating to his friend what he had done. On arrest he denied possession of the knife but it was found upon him with the victim's blood upon it.

6. On 27 September 2002 the appellant pleaded guilty to a charge of wounding with intent to do grievous bodily harm contrary to s.18 of the Offences against the Person Act 1861. He came for sentence before HHJ Playford QC in the Reading Crown Court on 12 December 2002. To be set against the gravity of the offence were a number of factors: his plea of guilty; his remorse, which the judge found to be genuine as well as profound; his absence of previous convictions; and his experiences in Kosovo which were the factual premises for a psychiatric report to the effect that he was undoubtedly suffering post-traumatic stress disorder. In Kosovo he had seen one of his brothers blind himself in one eye by picking up a hand grenade; and he had seen Serbian troops shoot his grandfather in the head and kill him. One symptom of the disorder was his suffering flashbacks, triggered in particular by loud noises, which brought back memories of the extreme violence in Kosovo. It was the view of the psychiatrist that the emotional disturbance engendered in the appellant by his experiences had been a major factor in precipitating the assault. Nevertheless, in that his victim was running away and the appellant was chasing him, the judge had to proceed upon the basis

that the assault was committed in revenge, albeit no doubt under provocation, rather than by way of self-protection.

7. In the event the sentence was that the appellant be imprisoned for four years and that the period of his licence be extended for a further four years. He was released from prison on licence, which thus still subsists, on about 27 November 2004.

8. Shortly prior to his release the respondent invited the appellant to show cause why he should not be deported. The appellant had sought to show cause but to no avail. On 18 November 2004 the respondent communicated to him his decision to make an order for his deportation under s.3(5)(a) of the Immigration Act 1971. For reasons which have never been explained the respondent's reasons for the decision were communicated to the appellant only by letter dated 9 August 2006. Thereupon the appellant promptly appealed.

9. The appeal was heard by Immigration Judge Elvidge and Mrs Jordan. In his argument to us Mr Williams, who today appears on behalf of the appellant, stresses that early in their written determination the judges set out the relevant parts of paragraph 364 and thus must have had in the forefront of their mind that the public interest had to be balanced against any compassionate circumstances of the case. Mr Williams also stresses that they did not minimise the seriousness of the offence, the circumstances of which they set out in detail; and that they also addressed the contents of the respondent's letter of reasons dated 9 August 2006 and, in particular, his statements that he regarded offences of violence as particularly serious, that he had taken into account Judge Playford's view of the seriousness of the offence and that he had carefully balanced the compassionate circumstances against the seriousness of the crime "and the need to protect the wider community". Then IJ Elvidge and Mrs Jordan addressed the appellant's circumstances. They noted his experiences in Kosovo and the diagnosis of post-traumatic stress disorder at the time of the offence.

10. IJ Elvidge and Mrs Jordan then addressed what on any view was very powerful, affecting, evidence about the appellant's good conduct in prison and following his release: that in prison he had pursued a number of courses, gained a number of skills and obtained City and Guilds certificates in bricklaying, painting and decorating; that following his release he had obtained work both as a roofer during the day and as a cleaner during the evening and was by then the main breadwinner for the family of five; that in the view of a psychologist his symptoms of PTSD had subsided; that, according to his probation officer, he had fully complied with the terms of his licence and was not at significant risk of reoffending; that, according to Mrs Townsend, a member of a group which supports asylum seekers in Reading, the appellant had a huge sense of family responsibility, was deeply unhappy about the level of distress which he had caused to his family and had drawn upon his fundamental good nature and integrity in order to make an excellent return to society and that the family was held in high regard in Reading's Kosovan community; that, accordingly to a Baptist minister who gave oral evidence, the appellant, as a Muslim, participated in some

ecumenical facets of the church's activities and had on a voluntary basis maintained the garden of an elderly female member of the church. It appears that the hearing before IJ Elvidge and Mrs Jordan was attended by 20 friends and supporters of the appellant.

11. IJ Elvidge expressed the conclusions of himself and Mrs Jordan in the following two paragraphs:

> "24. There is no doubt that the offence for which the appellant was convicted was a very serious one and that was reflected in the sentence the judge passed on a plea of guilty of four years, firstly in youth custody and then in prison and with an extended licence for four years. The appellant pleaded guilty to wounding with intent, contrary to section 18 of the Offences against the Person Act 1861, and he had come within a few centimetres of killing his victim. However, the judge accepted that at the time he was suffering from PTSD and relied heavily upon a psychiatric report. The main issue of concern raised by the Home Office at the hearing was whether the appellant had done enough to address those concerns as the psychiatrist had indicated he must. We have set out above the salient features of those reports and our conclusion is that the appellant has addressed -- so far as he is able or is currently necessary -- the symptoms of that condition. The evidence shows that the concerns were repeated by his parole officer and that he was referred to, and did, go to the clinical psychologist on his release from prison, who found that the symptoms had subsided and were no longer a major concern. We find that there is a low risk of reoffending and it would only happen were some incident to occur which revived the feelings of trauma in him. He remains on licence. At the moment the appellant has done everything that he can to rehabilitate himself in society and to provide for his family. He has sought employment; he voluntarily worked for the church before he could get employment, and he is regarded within his home community as a stable and remorseful person. There is a very impressive wealth of support given to him by those who know him and his family, and it is impossible to ignore the strength of the local community's opinions of him.
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> 25. We have looked at the factors set out in paragraph 364 and looked at the overall position of

> the appellant. He has not committed any further criminal offence since this time and has done his best to rehabilitate himself in society. We accept that the crime is a one-off offence, caused by a particular incident when his friend was beaten in front of his eyes in broad daylight, which triggered off the trauma associated with PTSD. That trauma was caused by the events he witnessed as a child growing up in Kosovo and which lead the rest of his family to be granted ILR on arrival in the UK. The appellant has done his best since then to rehabilitate himself and, on balance, we feel that the Secretary of State erred in his application of paragraph 364 and did not give proper weight to the appellant's personal, compassionate circumstances and the other relevant factors set out under the Rules. We propose to allow his appeal under the Rules."

12. The respondent's appeal against the determination dated 19 December 2006 attracted, first, an order for reconsideration on the basis that the tribunal may have erred in failing to follow the judgments of this court in N (Kenya) v SSHD [2004] EWCA Civ 1094. The first stage of the reconsideration was conducted by Designated Immigration Judge Kekic on 3 May 2007. She set out her reasons as follows:

> "The respondent complains that the tribunal failed to properly consider the public policy perspective when allowing the appeal and that no reasons were given for finding that the compassionate and other factors of the appellant's case outweighed the public policy considerations. Having considered the material before me and the submissions made, I have come to the conclusion that the criticism is made out. The tribunal's conclusions are set out in just two paragraphs and it is clear from those and the rest of the determination that the balancing exercise has not been properly carried out. Although the panel did consider the risk of re-offending, there is no assessment whatsoever about other public policy considerations, and no reference was made to the guidance given in N. Although it may not have been specifically referred to at the hearing, it is a leading judgment in deportation cases and it should have been considered …
>
> The panel's failure to conduct a full balancing exercise, taking into account the factors set out in N, is a material error of law.

> The appeal is adjourned for a second stage reconsideration …"

13. It seems to me that today we have to decide for ourselves whether there was an error of law in the determination dated 19 December 2006 and that, accordingly, it is not of crucial importance for us to analyse the terms in which DIJ Kekic described the error of law which she perceived. There has, however, been considerable criticism on behalf of the appellant of her comments that "no reference was made to the guidance given in" N (Kenya) and that it was "a leading judgment in deportation cases…and should have been considered". It is common ground today that there is no obligation upon a tribunal or lower court to refer to any particular authority, whether of this court or otherwise, so long, of course, as relevant principles contained in binding authorities are duly applied. To be fair to DIJ Kekic, I am clear that the gist of her decision, quoted above, is that IJ Elvidge and his colleague failed to apply the *principles* which were enunciated in N (Kenya); but, insofar as she also discerned error of law in the failure to refer by name to the *authority itself*, it was, with respect, she herself who fell into error.

14. The facts in N (Kenya) were that N had perpetrated horrific crimes against a woman by abducting her, threatening to kill her, falsely imprisoning her and raping her three times. He was sentenced to a term of 11 years imprisonment. Thus Mr Williams today points out that, without understating the seriousness of the offence of the present appellant, that of N had been even worse. The respondent decided to deport him; an adjudicator allowed his appeal against the decision; the Immigration Appeal Tribunal, as it then was, allowed the respondent's appeal; and, by a majority, this court dismissed N's appeal to it. Dissent from the decision was entered by Sedley LJ but he stated that he agreed with the majority in their formulation of the relevant legal principles and disagreed with them only in their application of them to the facts of the case. The importance of the decision is in its analysis of the phrase "the public interest" in paragraph 364. In his decision in that case the adjudicator had accepted that it was necessary to decide "where the balance lies between those factors counting in favour of the appellant not being deported and those indicating that the appellant's presence would not be conducive to the public good." He had proceeded, however, to assess the risk of N's reoffending as "minimal" and had concluded that the balancing exercise yielded a conclusion that he should not be deported. The gist of this court's decision was that his analysis of the public interest had been inadequate. May LJ said as follows:

> "64…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. It is for the Adjudicator in the exercise of his discretion to weigh all relevant factors but an individual adjudicator is no better able to judge the critical public interest factor than is the court. In the first

> instance that is a matter for the Secretary of State. The adjudicator should then take proper account of the Secretary of State's public interest view.
>
> 65. The risk of reoffending is a factor in the balance but for very serious crimes a low risk of reoffending is not the most important public interest factor."

Judge LJ said as follows in [83]:

> "The public good and the public interest are wide-ranging but undefined concepts. In my judgment, whether expressly referred to in any decision letter or not, broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged. They include an element of deterrence to non-British citizens who are already here even if they are genuine refugees and to those minded to come so as to ensure that they clearly understand that, whatever the circumstances, one of the consequences of serious crime may well be deportation. The Secretary of State has a primary responsibility for this system. His decisions have a public importance beyond the personal impact on the individual or individuals who would be directly affected by them. The adjudicator must form his own independent judgment. Provided he is satisfied that he would exercise the discretion differently to the Secretary of State he must say so. Nevertheless in every case he should at least address the Secretary of State's prime responsibility for the public interest and the public good and the impact that these matters will properly have had on the exercise of his discretion."

15. From the above passages in N (Kenya) I collect the following propositions:
(a) The risk of reoffending 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) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal, resides in the respondent and accordingly a tribunal hearing an appeal against a 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 describe the tribunal's duty in this regard as being higher than "to weigh" this feature.

16. In my heart I would wish to propose that this appeal be allowed. The efforts of the appellant to rehabilitate himself and to make himself a useful member of our society are, in the light of his childhood experiences, almost heroic. But my work in the court is supposed to be ruled not by my heart but by my head. I am quite unable, notwithstanding numerous attempts, to wring out of the determination of IJ Elvidge and Mrs Jordan a lawful despatch of the appeal. In their concluding paragraphs there is, of course, a reference to the seriousness of the offence, and a finding, accepted to be amply founded, that there was a low risk of the appellant's reoffending. But such was only one facet of the public interest engaged by this street stabbing on the part of a teenager armed with a knife. There was there no reference in terms by IJ Elvidge and Mrs Jordan to the public interest even though such was the matter against which the compassionate circumstances fell to be balanced. There was no reference to the significance of a deportation order as a deterrent. There was no reference to its role as an expression of public revulsion or in the building of public confidence. I am unable to subscribe to the argument of Mr Williams today that, from the introductory paragraphs of the determination to which I have referred, we can infer that IJ Elvidge, experienced as he was, and Mrs Jordan took account of these matters; indeed not even there are they squarely addressed. I have paused for thought about the fact that, in his written reasons for deportation, the respondent had himself not referred specifically to those features. He had, however, referred to the need to protect the public from serious crime, of which the deterrence of persons other than the appellant is, as Mr Williams today concedes, an obvious component. A complaint often made is that in this court appeals can be determined upon points not made, or not clearly made, at trial. I am conscious of the fact that we do not know whether the presenting officer cast the respondent's case even in part by reference to these facets of the public interest; indeed, in the light of the summary by IJ Elvidge and Mrs Jordan of the presenting officer's submissions, it seems that he may well not have done so. But, as Miss Olley submits, such, however, cannot affect the existence or otherwise of an error of law in their determination. And it follows that, in the light of their failure to address those important facets of the public interest, IJ Elvidge and Mrs Jordan never proceeded to weigh the approach to them adopted by the respondent in the context of the facts of the case.

17. I should add that Mr Williams today supplements his argument by reference to the recent decision of the House of Lords in AH (Sudan) v SSHD, [2007] UKHL 49, [2007] 3 WLR 832, and of this court in AS (Libya) v SSHD, [2008] EWCA Civ 289. The focus of Mr Williams' argument is the proposition, most vividly expressed by Baroness Hale in [30] of her speech in AH (Sudan), albeit in effect accepted by the other members of that committee and now applied by this court in AS (Libya), that: "it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right… Their decisions should be respected unless it is quite clear that they have misdirected

themselves in law." Mr Williams also today attempts to build upon the comment of Lord Bingham, in his speech in AH (Sudan), at [11], (quoted by this court in its judgment in AS (Libya), at [17]) as follows:

> "I do not, however, think that the Court of Appeal was entitled to attribute to this experienced and well-qualified tribunal what would, if made, have been an egregious and inexplicable error."

18. These passages embolden Mr Williams to submit, first that, in that IJ Elvidge and Mrs Jordan constituted a specialist tribunal, DIJ Kekic should have proceeded on the basis that, in understanding and applying the law, they were likely to have got it right; and second that if, which Mr Williams denies, there was any error of law on the part of IJ Elvidge and Mrs Jordan it was not egregious and thus not a proper foundation for a full second-stage reconsideration.

19. But the preface to Baroness Hale's statements in [30] of AH (Sudan) was her suggestion that "the ordinary courts should approach appeals from them with an appropriate degree of caution". My view is that the context of her remarks in AH (Sudan), accepted as authoritative without qualification by this court in AS (Libya), is the interface between a non-specialist court and a specialist tribunal; and that, when the same tribunal is required to consider whether, by a different constitution, it has perpetrated an error of law, the remarks in AH (Sudan) have no application. Furthermore I have no doubt that Lord Bingham's reference to an egregious error is not a suggestion that errors of law perpetrated by specialist tribunals are now immaterial unless they are egregious but rather a comment specific to the facts of that case to the effect that, if there was error, which the House of Lords held that there was not, it would have been egregious and indeed inexplicable and thus for that reason alone was unlikely to have occurred. It seems to me that, when Mr Williams invokes the dicta in AH (Sudan) he grasps a two-edged sword: for it might as easily be said that we should proceed on the basis that, as the judge of a specialist tribunal, DIJ Kekic "will have got it right" as that IJ Elvidge and Mrs Jordan "will have got it right". In my view the best we can do for Mr Williams today is to say that the dicta have no application to the present case. Even had Mr Williams proposition about the degree of inhibition placed upon DIJ Kekic in finding an error of law on the part of IJ Elvidge and Mrs Jordan been valid, my view would have been that the legal deficits in their determination were so clear as to require the full reconsideration which she ordered.

20. So I would dismiss the appeal.

Lord Justice Maurice Kay:

21. I agree. I wish only to add this. By coincidence tomorrow there will be handed down in this court a judgment in the case OP (Jamaica) v SSHD in which this court was constituted by May LJ, Wall LJ and myself. The arguments in that case took place three weeks ago. The issues bear similarity with the present case, as indeed does the outcome. I am referring to it because a draft of the judgment has been released to counsel in the present case with the permission of the court that was seized of OP (Jamaica).

22. Reading that case and listening to the judgment of Wilson LJ just given in the present case I am satisfied that both are applications of the approach set out, particularly in the judgment of May LJ, in N (Kenya) and that neither constitutes a gloss upon it. The issue in OP (Jamaica), the present case and N (Kenya) is whether the adjudicator or immigration judge initially seized of the matter had taken proper account of the view of the public interest taken by the Secretary of State. In all three cases the adjudicator or immigration judge failed so to do and in that way fell into significant legal error. Any slight difference in language between the judgment just given by my Lord and the judgment of Wall LJ in OP (Jamaica), with which May LJ and I expressly agree, should not disguise the fact that both cases are simply applications of principles that a legally erroneous initial decision of the adjudicator or immigration judge is susceptible to correction by reference to public law criteria but not of course simply on the basis of a mere difference of evaluation.

Lord Justice Pill:

23. I also agree. By letter dated 9 August 2006 the Secretary of State decided, on an application of paragraph 364 of the Immigration Rules, that it was appropriate to deport the appellant to Kosovo. On a consideration of the same paragraph the Asylum and Immigration Tribunal, in a decision promulgated on 19 December 2006, stated at paragraph 25 that the Secretary of State:

> "did not give proper weight to the appellant's personal compassionate circumstances and the other relevant factors set out under the rules."

24. That decision was reversed by the Tribunal on 9 July 2007 following a reconsideration, the Tribunal finding that:

> "In all the circumstances his [the appellant's] removal to Kosovo would not be disproportionate."

25. Mr Williams on behalf of the appellant submits that the Tribunal erred on that occasion in finding that the Tribunal had, on 19 December 2006, erred in law in its application of paragraph 364. It is common ground that unless there was

such an error of law the Tribunal on the second occasion could not conduct the reconsideration of the facts it did.

26. Wilson LJ has summarised the submissions made on behalf of the appellant and has set out the two paragraphs of the decision of 19 December 2006, in which conclusions are stated. The Tribunal was, Mr Williams submits, entitled to strike the balance it did, having fully accepted the seriousness of the criminal offence committed by the appellant. Undoubtedly there were factors to be considered under paragraph 364 which were in the appellant's favour.

27. Neither the Tribunal on the second occasion nor this court should readily conclude that the Tribunal, a specialist tribunal, erred in law in December 2006. However, guidance has been given in this court to tribunals as to the proper approach to deportation cases where the person proposed to be deported has committed a serious criminal offence or criminal offences. That guidance is given in the majority decision in N (Kenya) [2004] EWCA Civ 1094. Wilson LJ has set out paragraph 64 of the judgment of May LJ, which was the leading judgment. Paragraph 65 provides:

> "The risk of reoffending is a factor in the balance but for very serious crimes a low risk of reoffending is not the most important public interest factor. In my view the adjudicator's decision was overinfluenced in the present case by his assessment of the risk of reoffending to the exclusion or near exclusion of the other more weighty public interest considerations characterised by the seriousness of the appellant's offences. This was an unbalanced decision and one which in my view was plainly wrong. There are, it is true, references to the offences and their seriousness but these are in the main incidental or part of the narrative. I consider that a proper reading of the determination as a whole does not support the submission that the adjudicator took properly into account the public interest considerations. If he had it is in my view plain that he would not have reversed the Secretary of State's decision as to deportation."

28. Agreeing with May LJ, Judge LJ stated at paragraph 94:

> "In my view the decision to differ from the Secretary of State's decision was not one which could reasonably have been reached by the adjudicator."

29. In making a decision under paragraph 364 the Tribunal must have regard to the "public interest", the expression used in the opening words of the paragraph. In doing so, a factor to be taken into account is the nature of the offence of which the person has been convicted. That is set out in paragraph 364 as a consideration to be taken into account. It is only one of a number of considerations spelt out in the paragraph but N (Kenya) makes clear that it is an important one. The decision makes clear that the Tribunal must have regard to the public interest and also must "take proper account of the Secretary of State's public interest view".

30. I respectfully agree with both those propositions, the second because of the Secretary of State's responsibilities in the administration of criminal justice. Expertise in that field is with the Secretary of State and with the members of the judiciary hearing criminal cases. The risk of reoffending is not the only relevant factor when assessing the consequence of a serious offence having been committed, as May LJ stated. Broader considerations are involved. The Tribunal is required to take proper account of the Secretary of State's public interest view and the views expressed by the sentencing judge or judges. The appellant, aged 19 when he committed the offence, was sentenced on a guilty plea to an extended sentence by which he was required to serve four years in a young offender institution with a further four years on license.

31. I see dangers in the Tribunal attempting, when applying paragraph 364, to reassess the gravity of criminal offending and what has caused that offending when views have been expressed by the sentencing judge and by the Secretary of State. In this case the Tribunal may have gone too far in that direction in its reassessment of the situation. The emphasis they placed in their determination on the offence and its causation may have distracted them from the overall task to be performed.

32. I accept that this court should itself have respect for the decision of the Tribunal in its fact-finding capacity and its capacity to strike a balance between the competing factors mentioned in paragraph 364. But it is for the Tribunal to demonstrate that it has applied the correct test when striking that balance. Whilst the Tribunal did refer to paragraph 364 (in paragraph 25 of its determination) and to the seriousness of the criminal offence (in paragraph 24) I am not satisfied that the correct test as indicated in N (Kenya) was applied. There is no reference in the paragraphs to the requirement, when applying paragraph 364, to the public interest factor prominent in the paragraph or to account being taken of the Secretary of State's public interest view.

33. I am far from saying that N (Kenya) imposes a straitjacket 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.

34. I agree that the appeal should be dismissed.

Order: Appeal dismissed