Neutral Citation Number: [2010] EWCA Civ 557

Case No: C5/2008/2989

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Asylum and Immigration Tribunal
The Immigration Tribunal
IA161182007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2010

Before :

LORD JUSTICE WALLER
Vice-President of the Court of Appeal, Civil Division

LORD JUSTICE DYSON
and
LORD JUSTICE LEVESON

- -

Between :

MJ (Angola)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Richard Drabble QC and Abigail Smith (instructed by **Messrs Wilson & Co**) for the **Appellant**
Eleanor Grey and Matthew Barnes (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date : 24th March 2010

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Judgment

Lord Justice Dyson :

Introduction

1. This is an appeal against the determination of the Asylum and Immigration Tribunal ("AIT") by which the appellant's appeal against the decision by the Secretary of State for the Home Department ("SSHD") pursuant to section 3(5)(a) of the Immigration Act 1971 ("the 1971 Act") to deport him to Angola (his country of origin) was dismissed. At the time of the decision to deport, the appellant was subject to an order for his admission to and detention in a hospital pursuant to section 37 and a restriction order pursuant to section 41 of the Mental Health Act 1983 ("MHA"). The principal issues that arise on this appeal are (i) whether the SSHD had jurisdiction to decide to deport the appellant while he was subject to the section 37 and section 41 orders ("the MHA issue"); and, if so, (ii) whether the appellant's right under article 8 of the European Convention on Human Rights ("the Convention") to respect for his private life in the UK was breached by the decision to deport him ("the Convention issue").

The facts

2. The appellant was born in Angola on 5 May 1982. On 6 January 1995 when he was 12 years old, he entered the UK to join his father who had been granted indefinite leave to remain as a refugee. He was granted leave to remain as a member of his father's family on 9 June 1997.

3. He has a history of mental illness. He was diagnosed as suffering from paranoid schizophrenia. He has a learning disability and an IQ of 58. Between 1998 and 2004, he was convicted of a number of offences. In 1998, he was convicted of 3 counts of robbery and sentenced to 3 years' detention in a young offenders' institution. On 20 July 2004, he was convicted at Wood Green Crown Court of attempted robbery and possession of a bladed article. It was for these latter offences that HH Judge Roberts imposed the orders under sections 37 and 41 of the MHA to which I have referred. The judge said that the appellant's antecedents were "very far from being the most serious I have seen particularly in the area of violence with which I am particularly concerned". Nevertheless, in view of the appellant's mental illness, he decided to make hospital and restriction orders.

4. On 19 February 2007, the Mental Health Review Tribunal ("MHRT") made an order pursuant to section 73(2) of the MHA directing the conditional discharge of the appellant. The conditions that it imposed included that he reside at a 24 hour staffed hostel approved by the registered medical officer ("RMO"), take such medication as was prescribed by the RMO, follow the care plan and engage with care professionals as directed by his social supervisor and RMO and submit to regular testing for illicit substance abuse. He was not in fact discharged from hospital until 8 October 2007.

5. Meanwhile, on 24 September 2007 the SSHD had made a decision to deport the appellant pursuant to section 3(5)(a) of the 1971 Act on the grounds that, in view of the convictions, he deemed the appellant's deportation to be conducive to the public good.

6. Within a few days of the appellant being released from hospital into the hostel, he went missing for at least one night. The Secretary of State for Justice ("SSJ") issued a

warrant for his recall to hospital. The appellant learnt of this and absconded. He was discovered by chance about one month later in a stolen vehicle in which firearms were found. The appellant was not charged with any further offences. But it was on the basis of this incident (as well as the other facts in the case) that the AIT, whose determination was promulgated on 3 April 2008, held at para 83 that they believed that "the appellant is highly likely to re-offend if released back into the community".

7. The appellant was recalled to the hospital on 20 December 2007 where he remains to this day. He has received fortnightly treatment by way of anti-psychotic depot injections.

8. He appealed to the AIT against the decision to deport him. It will be necessary to consider the AIT's determination in more detail later in this judgment. At this stage, it is sufficient to record that the appeal was put on the basis that deportation would be in breach of the appellant's rights under articles 3 and 8 of the Convention. As I have said, the appeal was dismissed.

9. The appellant applied to the High Court for a review of the AIT's determination. On 13 June 2008, Irwin J made an order for reconsideration in which he said:

> "…In normal circumstances there could be no question as to the propriety of removing a young man who had committed offences such as these, and whose responsiveness to authority has been poor. However, there is here a very serious combination of factors—serious mental illness; a total lack of family support in his country of origin; his total dependence on organised and regular medical care, including fortnightly depot injections essential to control his paranoid schizophrenia; his lack of the Portuguese language; his employment potential; the poverty, corruption and lack of mental health care in Angola, and in particular his very low IQ [at 58—well below mild impairment]: these taken together represent a very serious situation for the appellant if returned…in my view there may have been a failure, in this difficult case, to consider all these factors together rather than, in effect, serially…All these factors must be seen together in reaching a conclusion… "

10. There was a first stage re-consideration hearing on 26 September 2008 before SIJ Southern who dismissed the appeal in a decision promulgated on 13 October 2008. He concluded that the AIT had taken into account all the factors identified by Irwin J in his order and that there was no error of law in its decision.

The statutory framework

11. Section 37(1) of the MHA provides that where a person is convicted of an offence and the conditions mentioned in subsection (2) are satisfied, the court may by order authorise his admission to and detention in such hospital as is specified in the order. Section 37(2) provides that the conditions referred to in subsection (1) are that the court is satisfied that the offender is suffering from mental disorder and, inter alia, the mental disorder is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment.

12. Section 41 (1) provides that where a hospital order is made in respect of an offender by the Crown Court and it appears to the court that it is necessary for the protection of the public from serious harm so to do, the court may further order that the offender shall be subject to the special restrictions set out in section 41 (a "restriction order"). The special restrictions include that the patient shall continue to be liable to be detained by virtue of the relevant hospital order until he is duly discharged under Part II or absolutely discharged under section 42, 73, 84 or 75 of the MHA.

13. Section 42 provides:

> "(1) If the Secretary of state is satisfied that in the case of any patient a restriction order is no longer required for the protection of the public from serious harm, he may direct that the patient shall cease to be subject to the special restrictions set out in section 41(3) above; and where the Secretary of state so directs, the restriction order shall cease to have effect, and section 41(5) above shall apply accordingly.
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> (2) At any tine while a restriction order is in force in respect of a patient, the Secretary of State may, if he thinks fit, by warrant discharge the patient from hospital, either absolutely or subject to conditions; and where a person is absolutely discharged under this subsection, he shall thereupon cease to be liable to be detained by virtue of the relevant hospital order, and the restriction order shall cease to have effect accordingly."

14. Section 86 provides for the removal of a foreign national patient who is receiving treatment for mental disorder as an in-patient in a hospital in England and Wales and is detained pursuant to a hospital order under section 37. Subsection (2) provides that if it appears to the Secretary of State that proper arrangements have been made for the removal from the UK of a patient to whom section 86 applies and that it is in the interests of the patient to remove him, the Secretary of State may authorise his removal from the place where he is receiving treatment.

The MHA issue

15. The submission of Mr Drabble QC in summary is that the SSHD was not entitled to make a decision to deport the appellant while he was subject to the orders made under section 37 and 41 of the MHA. He contends that the SSHD was not entitled to decide to deport the appellant until he was absolutely discharged from detention either by the SSJ under section 42(2) or the MHRT (now the First Tier Tribunal (Mental Health)) under section 73(1) of the MHA, or at least until it was clear that the appellant would be absolutely discharged within a reasonable time.

16. Miss Grey takes a threshold point. She submits (rightly) that the MHA issue was not raised before the AIT (either in the application for reconsideration or before SIJ Southern) and was not "obvious" in the sense explained by this court in R v Secretary of State for the Home Department, ex p Robinson [1998] QB 929. There is a good deal of force in this submission. On a strict application of Robinson, I do not consider that this court should entertain the MHA issue. The arguments advanced by Mr Drabble to which I shall come shortly were not obvious. They were not raised by Ms

Smith, counsel instructed on behalf of the appellant both before the AIT at the original hearing and before SIJ Southern. Nevertheless, the issue (a pure point of law of some general importance) has been the subject of full written skeleton arguments by Mr Drabble and Miss Grey and we heard detailed oral argument on it too. In these circumstances, it seems to me that we ought to take an exceptional course and deal with it. I would not, however, wish this exceptional course to be regarded as undermining or casting any doubt on the principles stated in Robinson.

17. Evidence has been placed before us as to the manner in which, in practice, the SSHD exercises his powers of removal in a case involving a person detained in a hospital under the MHA. In 2006, the United Kingdom Borders Agency ("UKBA") introduced new procedures and guidance for dealing with mentally disordered offenders who are subject to restriction orders. These require consideration of all foreign national patients for deportation before they become free from restrictions under section 41 of the MHA. The Mental Health Casework Section of the Public Protection and Mental Health Group ("PPMHG"), which was previously known as the Mental Health Unit ("MHU"), was part of the Home Office at that time. Since 1 October 2007, PPMHG has been part of the Ministry of Justice. On 1 October 2007, chapter 19 of the MHU Caseworker Manual, which is entitled "foreign nationals, repatriation and deportation", was introduced. It included new processes to ensure that UKBA were made aware of any restricted patient who was, or might be, a foreign national. The "key points" mentioned on the first page of the document include "if [the British Immigration Agency] decide in favour of deportation, this will not take place until the patient is ready to be discharged into the community. In the interim, MHU must take the deportation decision into account in considering any leave requests by that patient". The document also provides:

> "19.3 Notwithstanding this intention to deport it will be appropriate to consider whether it would be in the best interests of the patients to be returned to their home country (or to a third party country) by process of repatriation, either voluntarily or forcibly under section 86 of the Mental Health Act 1983. Patients may feel happier being treated in their own country or a third party country where they have right of residence. Equally if their knowledge of English is less than fluent any treatment may be disadvantaged by remaining in this country.
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> ……..
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> 19.5 Section 86 of the Act deals specifically with the "removal of alien patients" but the enforced repatriation facilitated by this section should be seen as a last resort. It may well be feasible to arrange repatriation with the agreement of the patient but, if that does not prove possible, the basic tenet that should inform any consideration for repatriation is that it should be in the patient's best interests even if they are opposed to it.
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> …….

> 19.17 When BIA has considered each case it will decide whether or not to pursue deportation. Often they (sic) will decide that they will not proceed with deportation and will inform MHU of such a decision.
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> ……..
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> 19.21 BIA will only arrange the deportation of a detained restricted patient when he or she is ready to be discharged into the community. They will ascertain this position through liaison with the RMO. When they are advised that the patient is fit to fly and could be discharged into the community they will contact MHU to arrange conditional discharge by the Secretary of State. The special discharge warrant (MH3(a)) should be used which will authorise discharge subject to the single condition that the patient "shall go immediately under escort to a place of embarkation for conveyance to…..[country of destination]". The warrant is issued once the date of embarkation is known."

18. There are witness statements from Nigel Shackelford (who is Head of Policy and Practice in the PPMHG) and Nicholas Hearn (who is Deputy Director in the Criminal Casework Directorate of the UKBA). Mr Shackelford says:

> "5. UKBA considers in a particular case whether or not to pursue deportation action and if so, issues a notice of liability to deport or a deportation notice. If a patient is detained, UKBA will send the appropriate notice to the RC [Responsible Clinician] within the hospital for onward transmission to the patient. In the event that UKBA make a decision to deport, the RC will be involved in the assessment of an individual's fitness for discharge and PPMHG are involved in the process of discharging the individual.
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> 6. It is for UKBA to obtain from the RC an opinion as to whether the patient is sufficiently fit to be discharged and therefore deported, and that any appropriate arrangements for the patient's escort are in place. This process will be completed before a patient's discharge from hospital is ordered under section 42 of the Mental Health Act 1983.
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> 7. When UKBA are advised by the RC that the patient is fit to be discharged into the community, they will contact PPMHG to arrange conditional discharge by the Secretary of State for Justice pursuant to section 42 of the Mental Health Act 1983. The warrant of discharge will be timed to coincide with the patient's transfer to the custody of UKBA and a special discharge warrant is used which authorises discharge subject to the single condition that the patient "shall go immediately under escort to a place of

> embarkation for conveyance to [the country of destination]."
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> 8. PPMHG are satisfied that in the course of this process there is no risk of a patient being discharged against current medical opinion nor of a patient being forced to proceed to travel if they suffer a relapse which casts doubt on their fitness to travel."

19. Mr Hearn's evidence is to similar effect. He says that where the responsible clinician recommends discharge or there is good reason otherwise to believe that a conditional or absolute discharge is likely, the case is passed to a caseworker to commence "initial deportation action" (para 5). The consideration process begins in section 37 and 41 cases where there is a realistic prospect of discharge within 3 to 6 months or where they are notified that a MHRT review is approaching and the person is likely to be discharged (para 6).

20. Mr Hearn continues:

> "9. Removal of a person is unlikely to be actively pursued where the subject is in hospital or prison with no realistic prospect of being discharged. In some cases, such as the present appeal, the deportation process, in particular the duration of the person pursuing their right of appeal, is such that a person's mental health deteriorates after a decision to deport is made and a person has in the interim been recalled under their hospital order. In such cases, consideration will be given as to whether to and when to pursue removal of a person. In the present case, it is likely that given the length of time and change of circumstances since the decision to deport, that even if successful in the appeal, UKBA will not take steps to actually remove the Appellant until he is again in a position that he is fit to be conditionally discharged. In any event, if there is a material change of circumstances after a Deportation Order is signed, it is always open to a person to apply to the Secretary of State for the Home Department for a revocation of his Deportation order.

21. Mr Drabble submits that the purpose of the discretion conferred by section 42(2) of the MHA is the protection of the public and, crucially, the furtherance of the best interests of the patient. The use of the section 42(2) power subject to the single condition requiring an escort to the place of embarkation frustrates the purpose of the underlying hospital order. As Mr Drabble puts it, it ensures that treatment is denied rather than secured. In short, it is an improper use of the power conferred by section 42(2) for the SSJ to discharge a patient, either conditionally or absolutely, solely in order to facilitate deportation in circumstances where that step cannot be justified clinically.

22. Mr Drabble submits that, if there is no practical possibility that the appellant's condition will improve to the extent that, within a reasonable time-scale, he can be discharged absolutely, either there is no jurisdiction to deport him or it is irrational to commence and continue with the deportation process.

23. Miss Grey submits that the power of discharge from hospital conferred on the SSJ by section 42(2) is unfettered. It is a broad power limited only by the words "if he thinks fit". Thus, she submits, it would be lawful for the SSJ to discharge a patient by warrant, for the purposes of enforced removal from the UK at any time. It is not necessary for him to wait for a particular stage in the patient's recovery.

24. She submits that the decision of the SSJ to discharge a patient under section 42 of the MHA is legally distinct from the decision of the SSHD to deport under section 3 of the 1971 Act. The exercise of powers under the MHA are not amongst the appealable "immigration decisions" listed in section 82(2) of the Nationality, Immigration and Asylum Act 2002. There is no express restriction in the MHA on the use of powers under the 1971 Act or vice versa.

25. Miss Grey submits that the question of whether powers of removal under the 1971 Act can be exercised in respect of a patient who is subject to compulsory detention under section 37 of the MHA or a restriction order under section 41 was determined by the Court of Appeal in R (on the application of X) v Secretary of State for the Home Department [2001] 1 WLR 740. In that case, the applicant's applications for leave to enter and remain in the UK were refused. Because of his mental condition, the Secretary of State made a transfer direction under section 48 of the MHA for his detention in a hospital for medical treatment. The applicant's appeals against the refusal of his asylum application and of his application for exceptional leave to enter were dismissed. The Secretary of State then made an order for his removal to his country of origin. His application for judicial review of that decision was dismissed. It was held by this court that, notwithstanding that the Secretary of State could only exercise his powers of removal under section 86 of the MHA if it appeared to him to be in the patient's interests and with the approval of the MHT, the use of his powers under the 1971 Act were not expressly circumscribed in relation to persons detained under the MHA.

26. It was submitted on behalf of the applicant that someone who is subject to the MHA regime cannot be forced to leave that regime save by the mechanisms provided by that regime. Thus a person who meets the section 86 criteria can only be removed if the section 86(2) conditions are satisfied. Schiemann LJ (who gave the judgment of the court) rejected that submission. He said at [22] that the 1971 Act and the MHA deal with different categories of persons: the mentally ill and immigrants. He continued:

> "23. Parliament when enacting the Immigration Act 1971 had section 90 of the Mental Health Act 1959, the predecessor of section 86 of the 1983 Act, in mind: see section 30 of the 1971 Act which extended existing statutory powers for the removal of *aliens* receiving in-patient treatment for mental illness to *all persons subject to immigration control.*
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> 24. Similarly Parliament when enacting the Mental Health Act 1983 had the Immigration Act 1971 in mind. Section 86(1) of the 1983 Act specifically refers to it and paragraph 30 of Schedule 4 and Schedule 6 to the 1983 Act expressly amended section 30 of the 1971 Act to which we have just referred.

> 25. The interaction of these two Acts is something to which Parliament has adverted its attention yet what Parliament clearly did not do expressly was to circumscribe the Home Secretary in the use of his Immigration Act powers in the case of Mental Health Act patients.
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> 26. Parliament could have made special provision for those who fell into both categories, perhaps by providing a special regime for them, perhaps by providing that the Immigration Act regime was to prevail and be the only one, perhaps by providing that the Mental Health Act regime should be the only one. It did not do so. It left in existence two sets of powers either of which could be used subject to the conditions prescribed for the use of that power.
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> ……..
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> 28. There appears to us no reason why the two regimes should not run in parallel in the case of a person who is both an immigrant and mentally ill. Clearly if the Home Secretary proposes to use his Immigration Act powers in relation to a mentally ill person that illness will be a factor which he must take into account. It is not suggested in the instant case that he has failed to do so."

27. Mr Drabble submits that the present case is distinguishable from X. In that case, no exercise of a statutory discretion to discharge was required. The transfer direction in question ceased to have effect on removal, because at that point in time X would have ceased to be liable to detention under the immigration legislation. On the other hand, in the present case, the only way that the hospital/restriction order can come to an end is by the use of powers under the MHA.

28. It may be that the decision in X does not, as a matter of strict ratio decidendi, determine this appeal. The MHA powers in play in that case (the power to give a transfer direction under section 48 and its ceasing to have effect under section 53(1)) are not the same as the powers in play in the present case (the power in the courts to make hospital and restriction orders under sections 37 and 41 and the power in the SSJ to discharge patients who are subject to restriction orders under section 42). But in my judgment the reasoning that led the court to its conclusion in X is strongly supportive of Miss Grey's submissions. The fundamental point is that the MHA regime and the 1971 Act regime run in parallel in relation to a person who is both an immigrant and mentally ill. Thus the court rejected the submission that the SSHD cannot exercise his power to deport an immigrant under section 3 of the 1971 Act where to do so would cut across the careful provisions of section 86 of the MHA. It is true that no section 86 issue arises in the present case. But the decision in X shows the extent to which the SSHD can exercise his 1971 Act powers without regard to the careful and detailed provisions of the MHA. That is not to say that, as was recognised in X, in exercising those powers, the SSHD may disregard a potential deportee's mental illness. The SSHD must have regard to the patient's mental illness and any barriers to securing proper care and treatment in the country of destination.

29. If Mr Drabble is right, the SSJ cannot exercise the apparently untrammelled discretion conferred by section 42(2) of the MHA in order to facilitate deportation unless the patient is already suitable for an absolute discharge or will be so within a reasonable time; and the SSHD cannot exercise the power to deport where the criteria for deportation are satisfied if the discretion conferred by section 42(2) of the MHA cannot be exercised.

30. Routinely, a detained patient is conditionally discharged before he is granted an absolute discharge. Typical conditions are ones as to residence, the taking of medication and so on. If Mr Drabble is right, the state cannot deport an immigrant who has been convicted of a (possibly very serious) criminal offence and whose presence in the UK is judged by the SSHD not to be conducive to the public good until there is no need to impose any conditions on his discharge for his clinical well-being. This is clearly inconsistent with the decision in X. It would also mean that a patient who continues to need treatment, which he wishes to obtain in his country of origin, cannot be discharged under section 42 because he still needs the treatment. Such a conclusion makes no sense and I would not accept an interpretation of section 42(2) which has this effect unless compelled to do so. There is no need to gloss section 42(2) in the way for which Mr Drabble contends. There is no express statutory limitation on the SSJ's discretionary power to discharge and, in my judgment, there is no warrant for holding that such a limitation exists by necessary implication. The protection for the patient lies in the fact that the power must be exercised rationally and in such a way as will not breach his Convention rights.

31. In particular, the SSJ must respect the patient's rights under article 3 and 8 of the Convention. If the discharge by the SSJ of a patient for the sole purpose of his being escorted to the place of embarkation from where he will be deported will injure his mental health, the discharge is likely to violate the patient's Convention rights. By the same token, a decision by the SSHD to deport a person who is detained in a hospital is also likely to be in breach of those rights if his deportation will injure his health. The SSJ implicitly recognises this: see the evidence to which I have referred above. Of particular importance is the fact that the Responsible Clinician is involved in the assessment of the patient's fitness to be discharged and deported.

32. The timing of the decision to deport in the present case is consistent with the SSHD's policy to which I have referred. The decision was made on 24 September 2007, only a few days before the appellant was granted a conditional discharge by the MHRT on 8 October 2007. The appeal against the decision to deport continued even after the appellant was recalled to hospital on 20 December 2007 (where he has since remained). It is apparent from the statement of Mr Hearn (para 9) that, even if the SSHD is successful in resisting this appeal, further consideration will now be given by the SSHD to the appellant's case, given the length of time and change of circumstances since the decision to deport was made. Furthermore, even if a deportation order is eventually made, the appellant may apply for the order to be revoked. Any refusal to revoke attracts a right of appeal: see BA (Nigeria) v SSHD [2009] UKSC 7.

33. For the reasons that I have given, I accept the submissions of Miss Grey and would hold that the SSHD was entitled to decide to deport the appellant notwithstanding that he was still subject to orders under sections 37 and 41 of the MHA; and it was not irrational to commence and continue with the deportation process. The question

whether the decision to deport was contrary to the Convention calls for separate consideration.

The Convention issue

34. Mr Drabble makes two points. The first is that the AIT did not take account of the cumulative effect of the factors identified by Irwin J: see [9] above. The second is that the AIT failed properly to apply the relevant Strasbourg jurisprudence in relation to the right to respect for private life of a person who has spent all or most of his childhood and adolescence in the host country. The most recent Strasbourg decision to which our attention has been drawn is the decision of the Grand Chamber in Maslov v Austria 1638/03 [2008] ECHR 546.

35. I am inclined to think that SIJ Southern was right to reject the first point. But in view of the decision that I have reached on the second point, I do not need to deal with the first and I propose to say no more about it.

36. In Maslov, the applicant had entered Austria lawfully at the age of 6. He had committed a large number of offences when he was 14 and 15 years of age and had been sentenced to a total of 2 years 9 months' imprisonment. The court said this:

> "70. The Court would stress that while the criteria which emerge from its case-law and are spelled out in the *Boultif and Üner* judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Moreover, it has to be borne in mind that where, as in the present case, the interference with the applicant's rights under Article 8 pursues, as a legitimate aim, the "prevention of disorder or crime" (see paragraph 67 above), the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities.
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> 71. In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family of his own, the relevant criteria are:
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> - the nature and seriousness of the offence committed by the applicant;
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> - the length of the applicant's stay in the country from which he or she is to be expelled;
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> - the time elapsed since the offence was committed and the applicant's conduct during that period;

> - the solidity of social, cultural and family ties with the host country and with the country of destination.
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> 72. The Court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult (see, for instance, *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A no.193, p.19, § 44, and *Radovanovic v. Austria,* no. 42703/98, § 35, 22 April 2004).
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> 73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Minister Recommendations Rec (2001)15 and Rec (2002)4 (see paragraphs 34-35 above).
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> 74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see *Üner*, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there (*see Üner*, § 58 *in fine*).
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> 75. In short, the Court considered that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

37. A similar approach was adopted in the Grand Chamber decision in Uner v The Netherlands (2007) 45 EHRR 14 at [54] to [58]. As Richards LJ said in JO (Uganda) and JT (Ivory Coast) v SSHD [2010] EWCA Civ 10 at [21], Maslov at [72] to]75] underlines the importance of age in the analysis, including the age at which the offending occurred and the age at which the person came to the host country. For a

settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion; and this is all the more so where the person concerned committed the relevant offences as a juvenile.

38. The AIT dealt with the article 8 issue in considerable detail between paras 63 and 86 of their determination. They said:

> "63. Under Article 8 we are required to consider whether the appellant has a private, including family, life in the United Kingdom. We accept that the appellant has a private life having resided in the United Kingdom since the age of 13. Whilst he spent his youth in Angola he spent the majority of his adolescence here and has remained as an adult. The appellant has adapted to the way of life in the United Kingdom and purely by virtue of the length of his lawful residence here, having come to join his father in 1995, the appellant can be said to enjoy a private life. His private life largely concerns his involvement with Social Services (as a child and young person when he lived in local authority care) and his contact with the Criminal Justice and Medical Services on account of his offending and mental health. The appellant stated at the hearing that he has a number of supportive friends but none of them attended the hearing before us or before the earlier panel in February 2007. The detailed report from Dr A Acosta-Armas and the reports from nurses at Chase Farm confirm that the appellant's contact with his father has been extremely limited and difficult since the appellant has been in hospital. We do not accept that the appellant enjoys family life in the United Kingdom. He is effectively estranged from his family here and in any event is now an adult. There was no evidence, despite the appellant's mental health problems, of any dependency between the appellant and his family members and we do not find that he enjoys family life. We note that the appellant also has a right to physical and moral integrity which is guaranteed by the ECHR and which is protected in the United Kingdom.
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> 64. We accept that there will be some interference with the appellant's private life if he were to be removed to Angola. He would be separated from the medical practitioners with whom he has established relationships and who are presently treating him. He would be removed from the United Kingdom where he has resided for the past thirteen years and placed in an environment where it would be difficult for him to fend for himself and obtain the medical treatment which he currently receives. His removal would be lawful and we now turn to consider proportionality.
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> 65. In considering proportionality we must conduct a balancing exercise between the appellant's right to a private life

> and physical and moral integrity which is guaranteed to him by the United Kingdom Government under Article 8 of the ECHR with the countervailing factors set out in Article 8(2). In considering whether any interference with the appellant's Article 8 rights is proportionate we must consider whether "it is necessary in the interests of national security, public safety or the economic well being of the country, for the protection of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." As far as these factors are concerned the main considerations before us are those of public safety, the prevention of crime and the protection of the rights and freedoms of others.
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> 66. We have found the balancing exercise in this case very difficult. Although the substance of the appellant's private life is mainly comprised [in] his contact with mental health and criminal justice services, the appellant has also resided in the United Kingdom for a lengthy period and arrived as an adolescent. He has serious mental health problems and learning difficulties. It was argued that the United Kingdom has taken responsibility for the appellant as he was in care shortly after his arrival here and has been incarcerated in youth offending units, prison and received treatment in various mental health units. However, he has no family life and there was no evidence of any close relationships with persons settled here or in the community generally. Against any interference with the appellant's private life we must consider issues of public safety, the prevention of crime and protection of the rights and freedoms of others. The overwhelming conclusion we reach from reading the psychiatric reports and reports of the nurses who have been caring for the appellant, as well as his record of previous convictions and the circumstances in which he was recently recalled to hospital, is that the risk of re-offending is extremely high."

39. They referred to the appellant's criminal record for offences which were "prevalent and of great concern to the public" (para 70) and his mental illness. They then described his conduct in hospital and following his conditional discharge to the hostel. At para 82, they said that his behaviour when released and arguably in the period immediately preceding this indicated that he was "nothing short of a liability to the public". At para 83, they said that the appellant was "highly likely to re-offend if released back into the community". They concluded their consideration of the private life issue in these terms:

> "84. It was suggested that the appellant should not be held responsible for his behaviour given his psychiatric illness and learning disabilities. We have considered that submission but note that the appellant has never been found unfit to plead and prison sentences have been imposed in the past. There is some evidence that his psychiatric problems, learning disabilities and

> drug problems all contribute to his offending and his behaviour generally. However, we are not charged with the duty of considering the appellant's culpability in any criminal proceedings. The issue before us is whether it would be proportionate to permit the appellant to remain so that he may continue exercising his article 8 rights here (to a private life and to physical and moral integrity) having regard to the need for public safety, the prevention of crime and the protection of the rights and freedoms of others.
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> 85. Ms Smith urged us to consider that the appellant's condition would be worse in Angola and he would be more of a risk to himself and others without adequate medical treatment. Unfortunately that may be the case but our role here is not to protect the public in Angola but to determine whether it would be proportionate for the appellant to remain in the United Kingdom and have his private life protected given the risk he poses to the public. There is likely to be some interference with the appellant's physical and moral integrity having regard to economic conditions and the mental health provision in Angola. However, these matters do not amount to a breach of article 3 and under article 8 any such interference must be balanced against factors such as risk to the public, the prevention of crime and the protection of the rights and freedoms of others. Having regard to all those matters we find that his return would not be disproportionate. In reaching that conclusion we have had regard to the nature of the appellant's private life, including the lack of any close relationships, including with his family. Having regard to all the evidence in the round we are satisfied that the appellant's removal would not occasion any breach of Article 8 of the ECHR."

40. Despite the obvious care with which the AIT considered whether the deportation of the appellant would be a disproportionate interference with his right to respect for his private life, in my opinion their determination of this issue was flawed. The appellant had lawfully entered the UK when he was 12 years of age. He spent his adolescence and the whole of adult life here. Much of his offending was committed when he was under the age of 21. In these circumstances, very serious reasons were required to justify his deportation: see Maslov at [75].

41. Miss Grey does not dispute this. She points out that the AIT set out all the relevant facts, including the appellant's age when he entered the UK, the fact that he has ties with this country and that most of his offending was committed when he was young. She submits that, in substance, at paras 66, 84 and 85, the AIT did provide the "very serious reasons" that were necessary to justify the deportation.

42. I do not agree. What the AIT did was to balance the appellant's right to respect for his private life against the rights of others to be protected from the risk of his re-offending and to conclude that the former was outweighed by the latter. In performing the balancing exercise, which they found "very difficult", they undoubtedly took into account the fact that the appellant had resided in the UK for a

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

43. On this narrow, but important, ground I would allow this appeal and invite submissions from counsel as to the form of order that we should make.

Lord Justice Leveson :

44. I agree.

Lord Justice Waller :

45. I also agree.