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The Deportation of ‘Virtual National’ Offenders: The Impact of the ECHR and EU Law

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At a glance

The right of criminal offenders to respect for their family and personal lives is often in conflict with the right of the public to be protected against their criminal behaviour. When those offenders are foreign nationals, their rights are liable to be affected not only by imprisonment, but by subsequent deportation to their country of nationality.

This article first discusses the current level of ECHR and EU law protection¹ against deportation of ‘virtual nationals’², that is to say non-nationals who were born or raised in the host State. While foreign nationals born in the host State are easily identified, those regarded as raised there have not been precisely defined by any of the authorities discussed below, and it would perhaps be unnecessary and unwise to do so given that such an assessment must turn on the facts. However, such persons will generally have immigrated before the age of 16 and spent a significant proportion of their life in the host State at the time that deportation is considered. This discussion demonstrates that the law lacks proportionality and certainty in this area, and discriminates against offenders who are virtual nationals.

Second, the possibility of greater protection for these virtual national offenders is examined. Finally, it is argued that greater protection would address the criticisms of the current law, and have a number of significant advantages.

1 The protection currently afforded by human rights law

Article 8 ECHR provides, inter alia, that everyone within the jurisdiction of a Contracting State to the ECHR, regardless of his nationality, has the right to respect for his private and family life. This may not be interfered with except as is in accordance with the law and necessary in a democratic society in the interests of one of the legitimate aims set out in art 8(2). The Court of Human Rights held in *Boutif v Switzerland*³ that a balance must be struck

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¹ As to those whose rights to reside derive from their refugee status, see the 1951 Refugee Convention and E Lauterpacht and D Bethlehem ‘The scope and content of the principle of *non-refoulement*: Opinion’, Part 2, 2.1, p 87, in E Feller, V Türk and F Nicholson (eds) *UNCHR’s Global Consultations on International Protection* (Cambridge, CUP, 2003) available at www.unhcr.org/publ/PUBL/419c75ce4.pdf (accessed 30 October 2008).

² The term ‘virtual national’ is adapted from the description by Judges Costa and Tulkens of the applicant in *Baghli v France* (2001) 33 EHRR 32 as ‘virtually a French national’ because he had come to France with his family at the age of two and had lived there ever since.

³ (2001) 33 EHRR 1179.

between an applicant's Article 8 rights and the legitimate interests of the State in assessing the proportionality of expulsion. This balance must take into account factors indicating the risk posed by the applicant – the nature and seriousness of the offence committed, and the period which had elapsed since the commission of the offence and his conduct during that period; and factors indicating his integration in the host State – the duration of his stay there, his family circumstances, the nationality of the various persons concerned, and the seriousness of the difficulties which any spouse or children would face in the country of origin.

However, while these factors may allow virtual nationals to demonstrate a strong case against expulsion on release from prison, they do not provide absolute protection. Three particular areas of the Court's jurisprudence militate against permitting virtual national offenders to remain in the host State, and will now be considered.

a) The relationship between adult offenders and their families

First, it is clear from the Court's ruling in *Advic v UK*⁴ that only exceptionally will the right to family life under art 8 be engaged by a relationship between an adult and a parent or adult siblings. An example of such an exceptional case is *Chindamo v SSHD*⁵, a case involving the attempted deportation of an Italian national who had lived in the UK since childhood and who had been convicted and imprisoned for the murder of the headteacher Phillip Lawrence. The tribunal held that the impact of Chindamo's long term imprisonment from his teenage years onwards had prevented him leading an independent life when he turned 18, so that his family ties remained 'fundamentally important to his private and social existence beyond his eighteenth birthday' and therefore art 8 was engaged.

However, the application of *Advic* will generally result in the impact of deportation on the family life of a virtual national being underestimated. Deportation will consequently be judged proportionate to the interference with family life when, in reality, it is not. Virtual national offenders will thus be discriminated against when compared to offenders with similar ties to the host State but who happen to be its own nationals.

b) The seriousness of the threat posed by the offender

Second, determination of the proportionality of deportation requires an assessment of the seriousness of the threat posed by the offender on release from prison. Thus, in *Moustaquim v Belgium*⁶ the Court noted that Moustaquim's numerous offences of theft were committed during adolescence and none had been committed during the nearly two years between his release from detention and his deportation. In *Boultif*⁷ it noted that Boultif presented only a comparatively limited danger to public order. However, in many cases, it bases its judgment on the nature of the offence(s) and the length of the sentence, rather than the actual threat posed by the applicant on release. For example, in *Boughanemi v France*⁸ it noted '[a]bove all' that Boughanemi had been sentenced to almost four years imprisonment for serious offences, and did not analyse the risk he actually posed on release⁹. This approach could result in the

4 [1995] 20 EHRR CD 125.

5 IA/13107/2006, judgment of 17 August 2007.

6 (1991) 13 EHRR 802.

7 *Op. cit.* note 3.

8 (1996) 22 EHRR 228.

9 See also *Baghli v France op. cit.* note 2, *Bouchelkia v France* (1998) 25 EHRR 686 and *Boujlifa v France* (2000) 30 EHRR 419.

The Deportation of 'Virtual National' Offenders: The Impact of the ECHR and EU Law

deportation of a virtual national being judged proportionate to the crime when in fact it is disproportionate to the actual risk posed. The inconsistency in the jurisprudence in this area also diminishes legal certainty.

c) The balance between family and personal life

Third, although art 8 refers both to private and family life, the Court does not always take into account the full extent or absence of both of these factors in each of the host and receiving States, tending to focus on family life in the host State and potential personal life in the receiving State. In some cases, this is nonetheless sufficient to protect virtual nationals. For example, the Court concluded in *Moustaquim*¹⁰ that deportation was a disproportionate breach of Moustaquim's family life, given that he had lived in Belgium since the age of two, with or near his family, and had only returned to Morocco for a couple of holidays. In *Nasri v France*¹¹ it held that the deportation of an Algerian who had lived in France since the age of five would breach his right to a family life. Although he had committed a variety of serious offences, including rape, he was deaf and mute and therefore 'capable of achieving a minimum psychological and social equilibrium only within his family', the majority of whom were French with no close ties to Algeria.

However, for many virtual national offenders this approach presents a misleading picture of their situation and can result in a deportation which has a disproportionate impact on their private and family life taken as whole. For example, in *Boughanemi*¹² the Court held that although Boughanemi had lived in France from the age of eight and his parents and siblings lived there, as did his child, there was no evidence of a close relationship with his parents or siblings, or of any relationship with his child. However, he had kept his Tunisian nationality, spoke Arabic, had other ties with Tunisia and had returned there after deportation, although he subsequently returned illegally to France. His deportation was therefore judged proportionate. While it is clearly legitimate for the Court to take account of the fact that he had little family life in France and could (perhaps) establish a personal life in Tunisia, it is submitted that his limited family life in France should have been set against its complete absence in Tunisia, and the possibility of a personal life in Tunisia should have been weighed against his actual personal ties in France¹³.

The Court's approach denies the reality that virtual nationals of the deporting State will have both a personal and a (possibly limited) family life there, which should be fully considered in relation to art 8. Indeed, a number of its own judges have criticised this aspect of its jurisprudence. For example, Judge Morenilla has deprecated the 'formalistic' approach of the Court in focussing on interference with family rather than private life, 'a general concept of which family life is one element'¹⁴. Judge Wildhaber has argued that the Court's reliance only on family life is 'somewhat artificial', and that it would be 'more realistic to look at the whole social fabric which is important to the applicant, and the family as only one part of the entire context'¹⁵. As Judge Martens has argued, private life comprises the totality of all social ties, and

¹⁰ *Op. cit.* note 6.

¹¹ (1996) 21 EHRR 458.

¹² *Op. cit.* note 8.

¹³ See also *Bouchelkia op cit.* note 9 and *El Boujaïdi v France* (2000) 30 EHRR 223.

¹⁴ Partly Dissenting Opinion in *Nasri, op. cit.* note 11.

¹⁵ Concurring Opinion in *Nasri, op. cit.* note 11.

although not all integrated aliens have a family life, all have a private life, and full consideration of personal as well as family life would be in the interests of legal certainty¹⁶. This approach also lacks transparency, since neither the Court of Human Rights nor the domestic courts have made it explicit, and it is not justified by the text of art 8 itself. It is therefore unfortunate, both for individual applicants and for the clarity and certainty of the law, that the Court has not adopted a consistent approach across the cases.

2 The protection currently afforded by EU law

Directive 2004/38¹⁷ ('the Directive') provides that EU citizens and certain family members have the right to reside in another Member State. By way of derogation, they may be expelled on grounds of public policy, public security or public health. However, under art 16, those who 'have resided legally for a continuous period of five years in the host Member State' have the right of permanent residence and may not be expelled except on 'serious grounds of public policy or public security' while, under art 28, an EU citizen who has resided in the host Member State for the previous ten years may not be expelled except on 'imperative grounds of public security'. Where reliance is placed on public policy, expulsion must be proportionate to the threat and based solely on the personal conduct of the individual, previous criminal convictions 'shall not in themselves constitute grounds', the personal conduct of the individual must represent a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'¹⁸, and justification unrelated to the facts of the case or which relates to considerations of general prevention cannot be accepted. The host State must also take into account factors relevant to integration; the person's age, state of health, family and economic situation, length of residence, social and cultural integration, and links with his country of origin¹⁹, factors which broadly reflect the *Boultif* criteria²⁰. The Directive is further subject to the Court of Justice's recognition that the right to respect for private and family life is protected by EU law²¹.

There are a number of potential gaps in the protection offered by EU law to virtual national offenders. First, and most obviously, it only applies to EU nationals and their family members, and other integrated immigrants do not benefit from its protection. Second, although there are three levels of protection against expulsion, none are absolute. Third, none take direct account of whether the person was born or raised in the host State. Fourth, those convicted of criminal offences are likely to have spent time in prison, and it is unclear whether such time can count towards the residence periods that give rise to greater protection against deportation. Fifth, at least one domestic court has implied a temporal restriction into the Directive and the domestic legislation transposing it, introducing a further hurdle for applicants seeking protection against expulsion. These latter two issues will be considered in more detail.

a) The impact of imprisonment

In the absence of a ruling from the Court of Justice, it is not clear whether time in prison counts towards the five or ten years' residence which give rise to greater rights under the Directive. In

16 Concurring Opinion in *Beljoudi v France* (1992) 14 EHRR 801 and Dissenting Opinion in *Bouhenami*, *op. cit.* note 8. [2004] OJ L158/77.

18 Article 27 of the Directive.

19 Article 28 of the Directive.

20 *Op. cit.* note 3.

21 See, for example *Carpenter v Secretary of State for the Home Department* C-60/00[2002] ECR I-6279 and *Secretary of State for the Home Department v Akrich* C-109/01 [2003] ECR I-9607.

The Deportation of 'Virtual National' Offenders: The Impact of the ECHR and EU Law

*MG and VC (EEA Regulations 2006; 'conductive' deportation) Ireland v SSHD*²² the tribunal ruled that it did, and in *HB v SSHD*²³ and *LG (Italy) v SSHD*²⁴ the government accepted this. However, in *Chindamo*²⁵ the tribunal held that time in prison could not count towards the calculation of residence under the Directive, and in *HB*²⁶ the Court of Appeal doubted the correctness of the government's concession that it could, although neither court put forward wider justifications for this view beyond the technical interpretation of EU law.

It is submitted that, as a matter of law, time in prison should count towards such residence. First, it is sufficient that the offender remains physically resident in the Member State. Indeed, the Directive does not exclude imprisonment from the calculation of residence.

Second, if physical presence alone is insufficient, it may be argued that an offender exercises Treaty rights to reside while in prison. For example, an offender under the age of 21 has the right of residence if either parent is an EU national, and older offenders have the right of residence if they remain dependant on an EU national parent²⁷. It has been made clear by the Court of Justice in *Centre Public d'Aide Sociale de Courcelles v Lebon*²⁸ that it is the fact of dependency which is essential, not the reasons for it. Indeed, as mentioned above, in *Chindamo*²⁹ the applicant was held to be dependant on his mother precisely because his imprisonment at a young age had prevented him establishing other personal ties.

It is also possible, although unlikely, that a prisoner could be held to be exercising Treaty rights by being a worker while in prison. In *Betray v Staatssecretaris van Justitie*³⁰ the Court of Justice ruled that activities merely designed to rehabilitate or reintegrate a person would not be regarded as a genuine economic activity so as to render him a worker within the test laid down in *Lawrie-Blum v Land Baden-Württemberg*³¹, requiring the performance of services for or at the direction of another in return for remuneration. However, in *Trojani v Centre Public d'Aide Sociale de Bruxelles*³² it confined *Betray* to its facts. It stated that the issue was whether the paid activity in question (employment for 30 hours per week by a charity as part of a personal reintegration programme in return for benefits in kind and pocket money) was real and genuine. However, this appears unlikely to be sufficient to include a prisoner, at least in the view of the English courts. In *OA (Prisoner – not a qualified worker) Nigeria v Secretary of State for the Home Department*³³ a non-EU national spouse of a EU national was held not to be entitled to a residence permit because the latter was serving a prison sentence and was therefore not a worker for the purposes of EU law. *Trojani* was not cited, but the tribunal noted *Betray* and stated that there were other differences in the nature of prison work, in addition to its rehabilitative function. These included lack of entitlement to remuneration, employment protection rights or the minimum wage, lack of any right to work or to choose the location or the opportunities to work, the inapplicability of PAYE and NI contributions, and the invidiousness of drawing any distinction between different types of work in prison according to

22 [2006] UKAIT 53, [2006] Imm AR 619.

23 [2008] EWCA Civ 806, [2008] 3 CMLR 24.

24 [2008] EWCA Civ 190, 2008 WL 678050.

25 *Op. cit.* note 5.

26 *Op. cit.* note 23.

27 See, for example *Chindamo*, *op. cit.* note 5.

28 Case 316/85 [1987] ECR 2811.

29 *Op. cit.* note 5.

30 Case 344/87 [1989] ECR 1621.

31 Case 66/85 [1986] ECR 2121.

32 C-456/02 [2004] ECR I-7573.

33 [2006] UKAIT 66, [2007] Imm AR 96.

whether it resulted in output which was sold outside the prison for profit or not. It concluded 'We do not consider that any serving prisoner is a worker'³⁴.

Third, it is possible for previously acquired Treaty rights to be retained while in prison, and it is submitted that this indicates that this period can count towards the calculation of residence. In *Orfanopoulos and Oliveri*³⁵ the Court of Justice held that a prisoner who was previously employed did not cease to be a member of the workforce simply because he was not available for employment during imprisonment, provided that he found another job within a reasonable time after release. A similar approach has been taken in relation to the rights of Turkish workers under the corresponding legislation, Decision 1/80 of the Association Council on the development of the Association between the European Community and Turkey³⁶.

Furthermore, it is not only worker status that can be retained despite imprisonment. In *Orfanopoulos and Oliveri*³⁷ the Court of Justice held that although Oliveri's economic status was unclear, he had as a minimum the right to move and reside freely within the Member States as a result of his EU citizenship, and had retained that status during imprisonment. In *Aydinli*³⁸ it held that a family member of a Turkish worker, who had acquired rights under Decision 1/80 because he had resided legally in Germany for five years and undertaken vocational training there, had not forfeited them as a result of prolonged absence from the labour market due to imprisonment, even for a period of several years followed by long-term drug treatment.

Furthermore, if the argument of the tribunals in *Chindamo* and *OA* prevails, there would be a further consequence, presumably unintended and certainly disproportionate. This is that those detained pending trial, but against whom charges are dropped or who are acquitted or given a non-custodial sentence, would suffer the loss of their rights in the same way as those given a custodial sentence by order of a court.

b) Temporal restrictions on the acquisition of residence rights

A European Commission official has confirmed that 'the Directive does not provide for the condition that the five year residence has to be "on the basis of the Directive"' and that requiring persons to wait for five years after entry into force of the Directive 'would be an additional condition not foreseen in the text'³⁹. Similarly, the European Commission states that 'all you need is five years of continuous legal residence in the host Member State' and that the right is also acquired by 'family members who have legally resided with you', without any requirement that this residence take place after entry into force of the Directive⁴⁰.

Despite this, in *Chindamo*⁴¹ the tribunal held that paragraph 17 of the Preamble to the Directive, which refers to residence in the host Member State 'in compliance with the conditions laid down in this Directive', meant that the five years' residence had to be acquired

34 *Op. cit.* note 33 at para 32.

35 C-482/01 and C-493/01 [2004] ECR I-5257.

36 19 September 1980, unpublished. See, for example *Nazli and others v Stadt Numberg* C-340/97 [2000] ECR I-957 and *Bozkurt v Staatssecretaris van Justitie* C-434/93 [1995] ECR I-1475.

37 *Op. cit.* note 34.

38 C-737/03 [2005] ECR I-6181.

39 *Chindamo*, *op. cit.* note 5 at para 56.

40 The Directorate-General Justice, Freedom and Security European Commission 'Right of Union citizens and their family members to move and reside freely within the Union: Guide on how to make the best out of Directive 2004/38/EC' http://ec.europa.eu/commission_barroso/frattini/archive/guide_2004_38_ec_en.pdf at p16.

41 *Op. cit.* note 5.

The Deportation of 'Virtual National' Offenders: The Impact of the ECHR and EU Law

subsequent to its coming into force in 2004. However, although a Preamble can be used to interpret the operative part of a Directive, the Court of Justice has held that it 'has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the [Directive]⁴²'. It is submitted that it should therefore be treated with considerable caution where it appears to say something that the provisions of the Directive do not.

The tribunal in *Chindamo* noted that the Immigration (European Economic Area) Regulations 2006⁴³ transpose the Directive with the qualification that permanent residence is acquired only if the person has resided in the UK 'in accordance with these Regulations for a continuous period of five years'.⁴⁴ However, the Court of Justice has made it clear that national law may not make EU rights subject to the fulfilment of additional obligations⁴⁵, and therefore no restrictions on residence can be imposed which do not appear in the Directive.

Furthermore, the right not to be expelled after ten years' residence except on imperative grounds of public security is not made subject by the Regulations to any equivalent requirement. Not only is there no reason why the extra qualification is read into the five year provision but not the ten year provision, it would have the nonsensical result that a person not regarded as having five years' continuous legal residence, and thus unable to require the State to prove serious grounds of public policy or public security in order to expel him, could simultaneously be regarded as a person with ten years' residence, able to resist expulsion except on imperative grounds of public security.

2 Greater rights for virtual national offenders

In the light of the uncertainties and gaps in the current protection against deportation afforded to virtual national offenders, there may be both moral and practical reasons for considering them to be a distinct category of applicants who should benefit from greater protection against deportation. However, before examining the advantages of greater protection, the extent to which it can actually be provided must be discussed.

At present, a virtual national's integration will weigh against expulsion when consideration is given to the factors mandated by *Boultif*⁴⁶ (duration of stay, family circumstances, nationalities concerned and the difficulties which the family would encounter in the country of origin) or art 28 of the Directive (age, health, family and economic situation). The length of residence, if it reaches five or ten years, may bestow additional protection under EU law. However, none of these provisions take direct account of the fact that an applicant is a virtual national. Greater rights could be provided either by granting this category of persons absolute protection against expulsion or by improving the protection currently on offer to them.

a) Absolute protection

Absolute protection against the expulsion of virtual national offenders would be the simplest approach, provide the maximum protection and make the greatest contribution to fairness and consistency in the application of the law (discussed below). It has been advocated by the

42 *Criminal Proceedings against Nilsson and others* C-162/97 [1998] I-7477.

43 SI 2006/1003. See also the European Casework Instructions – Free Movement of Persons Directive (2004/38/EC) available at <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/> January 11 2008 version.

44 Articles 15 and 21 of the 2006 Regulations, *op. cit.* note 43.

45 *Dekker v Stichting VJV* C-177/88 [1990] ECR I-3941.

46 *Op. cit.* note 3.

Parliamentary Assembly of the Council of Europe (PACE), which has recommended the drafting of a Protocol to guarantee that those born or brought up in the host State cannot be expelled under any circumstances⁴⁷. It argues that long-term immigrants are ‘no longer humanly or sociologically foreigners’, so that expulsion would be disproportionate and discriminatory. A similar view is taken by the European United Left/Nordic Green Left Group in the EU Parliament (GUE/NGL), which argues for ‘civic citizenship’ based on residence rather than nationality⁴⁸. However, the Court of Human Rights recently stated in *Üner v Netherlands*⁴⁹ that no absolute right not to be expelled could be derived from art 8, given the derogations available in art 8(2), and that a State was entitled to control the entry and residence of aliens into its territory ‘regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there’. As a matter of EU law, as discussed above, the Directive expressly permits the expulsion of those with permanent residence rights and even of those who have resided in the host State for ten years.

The current political climate must also be recognised. In 2006, British Home Secretary Charles Clarke was sacked after it emerged that over a thousand foreign offenders had been released from prison without being considered for deportation⁵⁰. The judgment in *Chindamo*⁵¹, that an Italian national convicted of a high profile murder as a teenager should not be deported after serving his sentence, was greeted with considerable public hostility, reflecting wider concerns with teenage violence⁵² and immigrant criminality⁵³. The reaction to such protection may also reflect a degree of hostility in some quarters to the obligations attaching to UK membership of the EU⁵⁴, and those arising from the Human Rights Act 1998 incorporating the ECHR⁵⁵.

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- 47 Recommendation 1504 (2001) on Non-expulsion of long term immigrants, Text adopted by the Standing Committee, acting on behalf of the Assembly, on 14 Mar 2001, <http://assembly.coe.int/Documents/AdoptedText/ta01/EREC1504.htm>). The Committee of Ministers of the Council of Europe rejected the proposal for a new Protocol (Reply of the Committee of Ministers adopted at the 820th meeting of the Ministers’ Deputies (4 December 2002) to Parliamentary Assembly Recommendation 1504 (2001) on non-expulsion of long-term immigrants <https://wcd.coe.int/ViewDoc.jsp?id=327675&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>; see also Council of Europe Committee of Ministers Recommendation Rec (2000) 15 of the Committee of Ministers to member states concerning the security of residence of long-term migrants (Adopted by the Committee of Ministers on 13 September 2000 at the 720th meeting of the Ministers’ Deputies) <https://wcd.coe.int/ViewDoc.jsp?id=371475&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>).
- 48 GUE/NGL ‘Towards a Europe of mixed identities: our proposals to counter EU hypocrisies on immigration’ January 2008.
- 49 (2007) 45 EHRR 14.
- 50 See further the BBC ‘Clarke is fired in Cabinet purge’, 5 May 2006, http://news.bbc.co.uk/1/hi/uk_politics/4975938.stm and ‘How the deportation story emerged’, 9 October 2006, http://news.bbc.co.uk/1/hi/uk_politics/4945922.stm.
- 51 *Op. cit.* note 5.
- 52 See, for example, R Allen ‘“There Must be Some Way of Dealing with Kids”: Young Offenders, Public Attitudes and Policy Change’ (2002) 2 Youth Justice 3 <http://yjj.sagepub.com/cgi/content/abstract/2/1/3> and ‘Youth Crime and Justice’, B Goldson and J Muncie eds, 2006, Sage Publications, London.
- 53 See for example, PACE Recommendation 1504 (2001) *op. cit.* note 47 and Human Rights Watch ‘In the Name of Prevention: Insufficient Safeguards in National Security Removals’ June 2007, Vol 19, No 3 (D).
- 54 Public concern is not limited to the UK; see, for example, JA Dent ‘Research Paper on the Social and Economic Rights of Non-Nationals in Europe’ commissioned by the European Council on Refugees and Exiles, November 1998 and C Fraser ‘Italy crackdown on foreign crime’ 1 November 2007 <http://news.bbc.co.uk/1/hi/world/europe/7073873.stm>.
- 55 See, for example, P Hitchens ‘It’s your lot who helped Chindamo, Dave’ The Mail on Sunday 25 August 2007, The Sun Says ‘Scrap the Act’ The Sun 21 August 2001 and ‘Lowest of the low’ The Sun 26 July 2006, and Stewart Jackson MP who asserted during a debate on the UK Borders Bill that the Human Rights Act 1998 ‘will be used, or abused, by those who should not use it’ HC Deb, 5 February 2007, vol 456, col 636.

The Deportation of 'Virtual National' Offenders: The Impact of the ECHR and EU Law

The widow of Chindamo's victim said 'We've always been given the impression that he would be deported'⁵⁶ and Jack Straw, Justice Secretary, admitted 'She is entirely right to say that was her expectation – it was mine too'⁵⁷. This was despite the fact that Chindamo had at least an arguable case under the ECHR and EU law to remain in the UK, and s33 of the UK Borders Act 2007 provides that the automatic deportation of non-British citizens convicted of a serious criminal offence cannot apply where deportation would breach the person's EU law rights or the ECHR⁵⁸.

b) Improved protection

Even if absolute protection were to be unacceptable at present, it would still be possible to improve the protection of virtual national offenders against deportation by addressing the criticisms of the ECHR and EU law outlined above. However, in order to provide further protection, it is submitted that a presumption should operate against deportation of virtual nationals, to be displaced only where the threat which they pose to public security on release from prison is so great that it outweighs the significant infringement of their personal and family life which expulsion from their only real home will entail. Such an approach has been suggested by a number of judges of the Court of Human Rights. In his Dissenting Opinion in *Boughenami*, Judge Martens advocated a general acceptance that expulsion of integrated aliens interfered with their private life, and could be justified only exceptionally, where the alien was convicted of 'very serious crimes, such as serious crimes against the State, political or religious terrorism or holding a leading position in a drug trafficking organisation'⁵⁹. In their Joint Dissenting Opinion in *Baghli v France*⁶⁰, Judges Costa and Tulkens concluded that exclusion orders should only be imposed 'with caution and for a very good reason' on virtual nationals. Similarly, in her Dissenting Opinion in *Bouchelkia v France*⁶¹, Judge Palm argued that 'As a rule, second-generation migrants ought to be treated in the same way as nationals', despite criminal behaviour. This approach would also be consistent with the Directive, which permits the expulsion of the most integrated EU nationals only on imperative grounds of public security⁶².

Both the Court of Human Rights and the Court of Justice have accepted the principle that integrated aliens should be afforded greater rights than other aliens, as have the EU legislature and the UK Home Office⁶³. The Court of Human Rights has confirmed that the

56 'Transcript: interview with murdered headmaster's widow' *The Times*, 21 August 2007.

57 A Fresco and R Ford 'Appeal against Lawrence killer deportation ruling "hopeless"' *The Times*, 21 August 2007.

58 See D Lawson 'If we respect the law, then we must also respect Learco Chindamo's right to be free' *The Independent*, 24 August 2007, A Harvey 'Expulsion and Exclusion' (2007) Vol 21, No 3 *IANL* 208, S Chakrabarti 'Shami Chakrabarti on the Chindamo case and human rights' *New Statesman*, 24 August 2007 and A Fresco and R Ford 'Appeal against Lawrence killer deportation ruling "hopeless"' *The Times*, 21 August 2007.

59 *Op. cit.* note 8.

60 *Op. cit.* note 2.

61 *Op. cit.* note 9.

62 Even refugees can be deported if they constitute a danger to security or, having been convicted of a particularly serious crime, to the community (art 33 of the 1951 Refugee Convention); see further E Lauterpacht and D Bethlehem, *op. cit.* note 1.

63 The Home Office has recognised the significance to be attached to a person's formative years having been spent in the UK and his being resident there since then in rebutting the presumption towards deportation of an EEA national or family member who constitutes a sufficiently serious threat to public policy or security (Home Office Operational Enforcement Manual <http://www.bia.homeoffice.gov.uk/policyandlaw/guidance/oem/> Ch 69 at 69.3). Commentators in the US have also proposed that criminals who entered the country as children be given greater protection from deportation (M H Taylor and T A Aleinikoff 'Deportation of Criminal Aliens: A Geopolitical Perspective' *Inter-American Dialogue*, June 1998).

Immigration, Asylum and Nationality Law, Vol 23, No 1, 2009

ECHR is a 'living instrument'⁶⁴ and although a majority of Contracting Parties permit the deportation of second generation immigrants convicted of a criminal offence, at least eight now provide protection against this, of which six provide protection also to those raised but not born there⁶⁵. It has also explicitly recognised the significance of the applicant having lived in the host State since birth or early childhood in determining the proportionality of deportation. For example, in both *C v Belgium*⁶⁶ and *Dalia v France*⁶⁷ it commented that the deportation of the applicants, who had arrived in the host States at the ages of eleven and 17 or 18 respectively, was 'not so drastic' as it would be for applicants born there or who had first gone there as young children. In *Mokrani v France*⁶⁸, in relation to an applicant born in France who had lived there for most of his life, had all his schooling there, and whose parents and siblings lived there, it noted that

'the particular ties which these immigrants have forged with the host country in which they have lived most of their lives must also be taken into account. They have received their education there and have made most of their social ties there and have therefore developed their own identities there. Born or having arrived in the host country as a result of their parents' immigration, their closest family ties are often there. The only link some of these immigrants have maintained with the country of their birth is their nationality'.

Some judges have gone even further; Judges De Meyer⁶⁹ and Morenilla⁷⁰ have argued that deportation of an integrated alien would constitute inhuman treatment contrary to art 3 ECHR⁷¹.

The principle that integrated immigrants should receive greater protection against deportation is also established in EU law. In *Orfanopoulos and Oliveri*⁷² the Court of Justice noted that deportation of an EU national from a country where members of his close family were living could disproportionately breach his right to a family life and that, in assessing the proportionality of deportation, account must be taken of the applicant's general integration into the host State. As discussed above, art 28 of the Directive requires any decision on expulsion to be preceded by examination of a number of factors indicating integration. Paragraph 23 of the Preamble notes that 'Expulsion ... can seriously harm persons who ... have become genuinely integrated into the host Member State' and para 24 provides that 'Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be'. Similarly, Directive 2003/109⁷³ mandates the grant of long-term resident status to third-country nationals who have resided

64 See, for example *Tyrer v UK* (1978) 2 EHRR 1 and *Mamatkulov and Abdurasulovic v Turkey* (1999) 11 EHRR 439.

65 *Üner v Netherlands*, *op. cit.* note 49. See also the Report of the Committee on Migration, Refugees and Demography of the PACE 'Non-expulsion of long-term immigrants' Doc 8986 17 February 2001 <http://assembly.coe.int/Documents/WorkingDocs/doc01EDOC8986.htm>.

66 (2001) 32 EHRR 2.

67 (2001) 33 EHRR 26.

68 (2005) 40 EHRR 228.

69 Separate Opinion in *Beljoudi*, *op. cit.* note 16 and Partly Dissenting Opinion in *Nasri*, *op. cit.* note 11.

70 Partly Dissenting Opinion in *Nasri*, *op. cit.* note 11.

71 An applicant may, in appropriate circumstances, also seek to resist expulsion from a Contracting State to the ECHR, on the grounds that his treatment in the receiving State would infringe one of his ECHR rights (see, for example, *Chahal v UK* (1997) 23 EHRR 413, *Soering v UK* (1989) 11 EHRR 439 and *D v UK* (1997) 24 EHRR 423 and see further E Berry 'The extraterritorial reach of the ECHR' (2006) Vol 12, No 4 *EPL* 629).

72 *Op. cit.* note 35.

73 OJ 2004 L16/44.

The Deportation of 'Virtual National' Offenders: The Impact of the ECHR and EU Law

legally and continuously in a Member State, and notes that long-term residence 'is a key element in providing economic and social cohesion, a fundamental objective of the Community'.

3 Advantages of greater protection

Greater protection of virtual nationals would have four key advantages. First, it would result in a significant reduction in the number of disproportionate deportations. Second, it would reduce the discrimination suffered by virtual national offenders compared to domestic offenders, since they would no longer be subject to the additional penalty of deportation. Third, it would improve legal certainty. Fourth, it would take account of the rehabilitation of offenders and the unacceptability of simply exporting the threat which they might pose.

a) Proportionality

As argued above, the Court of Human Rights frequently fails to take full account of a virtual national offender's integration into the host State and lack of ties with the receiving State, or of the threat which he actually poses on release. This results in deportations which are in truth disproportionate being judged proportionate. The lack of clarity in EU law as to the impact of imprisonment on residence rights could have similar results. Providing virtual national offenders with great protection against deportation would reduce significantly, if not completely abolish, instances of disproportionate deportation.

b) Non-discrimination

It is submitted that, as Judge Morenilla has argued, the treatment of offenders 'should not ... differ according to the national origin of the parents in a way which – through deportation – makes the sanction more severe in a clearly discriminatory manner'⁷⁴. Judge Martens has stated that, 'mere nationality does not constitute an objective and reasonable justification for the existence of a difference as regards expulsion'⁷⁵. He pointed out that the principle had been accepted in art 12(4) of the International Covenant on Civil and Political Rights (ICCPR)⁷⁶ that 'No-one shall be arbitrarily deprived of the right to enter his own country' and that the drafting history indicated that this implied a ban on excluding integrated aliens as well as nationals. The Human Rights Committee of the UN has also noted that art 12(4) does not distinguish between nationals and aliens but protects 'close and enduring connections between a person and a country'⁷⁷. It argues that:

'the scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, that acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien'⁷⁸.

⁷⁴ Partly Dissenting Opinion in *Nasri*, *op. cit.* note 11. See also Judge Baka, Dissenting Opinion in *Boughanemi*, *op. cit.* note 8.

⁷⁵ Concurring Opinion in *Beljoudi*, *op. cit.* note 16. See also his Dissenting Opinion in *Boughanemi*, *op. cit.* note 8.

⁷⁶ Adopted December 16, 1996, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1996), 999 UNTS 171, entered into force 23 March 1976.

⁷⁷ See further JA Dent, *op. cit.* note 57.

⁷⁸ UN Human Rights Committee, General Comment No 27 on freedom of movement, 2 November 1999, CCPR/C/21/Rev.1/Add.9.

The Steering Committee for Human Rights of the Council of Europe considers that treating long term immigrants differently from nationals is not discriminatory because they are fundamentally in different situations, the latter having a right to abode and the former not⁷⁹. However, it is submitted that, as Judge Martens has argued, virtual nationals and nationals are in substance in the same position, since they all have very close links to the host State where they have been born or raised and where their families are established⁸⁰.

c) Legal certainty

The difficulty of predicting the outcome in a given case is evident from the divergent outcomes in factually similar cases such as those discussed above, for example *Moustaquim*⁸¹, *Boultif*⁸², *Nasri*⁸³ and *Boughanemi*.⁸⁴ As Judge Martens has noted, the case by case approach to expulsion of integrated aliens has resulted in 'a lottery for national authorities and a source of embarrassment for the Court' and outcomes are 'tainted with arbitrariness'⁸⁵. The Committee on Migration, Refugees and Demography of the PACE has made similar comments⁸⁶. A presumption against the deportation of virtual national offenders except in the most extreme circumstances, such as those outlined by Judge Martens in his Dissenting Opinion in *Boughenami*⁸⁷ discussed above, would increase legal certainty and consistency.

d) Rehabilitation of offenders

Rehabilitation is important not only to the individual offender, but also to the State. It has the potential to impact on both its criminal justice policy and, in the case of foreign offenders, its relations with other States. As Judge Morenilla argued in his Partly Dissenting Opinion in *Nasri*⁸⁸, a host State is responsible for the social integration of immigrants and their children who it has accepted 'for reasons of [economic] convenience', and

'Where such social integration fails, and the result is anti-social or criminal behaviour, the State is also under a duty to make provision for their social rehabilitation instead of sending them back to their country of origin, which has no responsibility for the behaviour in question and where the possibilities of rehabilitation in a foreign social environment are virtually non-existent'.

A study has concluded that 'Because of the immense obstacles to their successful reintegration ... foreign-born offenders who immigrated as children may be more of a destabilising element

79 Opinion on Recommendation 1504 (2001) of the Parliamentary Assembly on non-expulsion of long-term immigrants annexed to the Reply of the Committee of Ministers *op. cit.* note 47. A similar argument was used to provide protection to non-nationals against detention contrary to art 5 ECHR where nationals were not similarly detained (*A (FC) and others (FC) v Secretary of State for the Home Department* [2004] HRLR 1).

80 Dissenting Opinion in *Beljoudi*, *op. cit.* note 16.

81 *Op. cit.* note 6.

82 *Op. cit.* note 3.

83 *Op. cit.* note 11.

84 *Op. cit.* note 8.

85 Dissenting Opinion in *Boughenami*, *op. cit.* note 8.

86 Report on Non-expulsion of long-term immigrants, *op. cit.* note 65.

87 *Op. cit.* note 8.

88 *Op. cit.* note 11.

The Deportation of 'Virtual National' Offenders: The Impact of the ECHR and EU Law

in their countries of origin than other criminal deportees⁸⁹, and that recidivism among deported offenders constitutes a significant problem for a number of receiving countries. It is submitted that the comity of nations should prevent a State from simply exporting the threat posed by such offenders⁹⁰.

It is possible to consider rehabilitation indirectly, when assessing the proportionality of deportation to the offender's integration according to the factors listed in *Boutif*⁹¹ or art 28 of the Directive. However, greater protection against deportation would make it more likely that virtual nationals convicted of a crime would remain where their rehabilitation is best carried out, in the host State.

4 Conclusion

It appears that there is little likelihood of virtual nationals convicted of crimes being given absolute protection against expulsion. Yet is evident that the current state of the law results in unfairness and unpredictability, as well as militating against the rehabilitation of offenders. The position could be improved were the courts to consider more carefully the actual threat posed by the offender on release, and their personal and family ties in the host State, including those with parents and adult siblings. It should also be made clear that time in prison must be taken into account when calculating the length of residence in the host State for the purposes of EU law. However, in order to achieve the maximum degree of fairness and certainty possible in the prevailing climate, it is submitted that virtual nationals should be treated as just that – virtually immune from expulsion save in the most extreme circumstances, such as those envisaged by Judge Martens in *Boughanemi*⁹²; serious crimes against the State, terrorism or a leading role in a drug trafficking organisation.

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89 MH Taylor and TA Aleinikoff, *op. cit.* note 63.

90 See S Leith 'Chindamo is a product of this country, not Italy' The Daily Telegraph 25 August 2007 and H Mitchell 'Migration Watch UK Briefing paper 8.20 Legal: The Chindamo Case' http://www.migrationwatchuk.com/Briefingpapers/legal/8_20_Chindamo.asp, 29 August 2007.

91 *Op. cit.* note 3.

92 *Op. cit.* note 8.