Deportation of foreign criminals and Article 8 of the European Convention on Human Rights: What does the Strasbourg Court really say?

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I. Introduction

The past months have seen the debate on the use of Article 8 of the European Convention on Human Rights (ECHR) by foreign criminals convicted for serious offences to avoid deportation growing after the publication of various articles in the UK newspapers. This debate has now been retaken by the Conservatives as one of their key arguments to repel the Human Rights Act and withdraw from the ECHR.

This article will examine what Article 8 and its interpretation by the judges of the Strasbourg Court really say on the deportation of foreign criminals. The purpose is to demonstrate that the right to a private and family life has never been interpreted by the European Court of Human Rights as to allow dangerous foreign criminals to avoid deportation. Conversely, the case-law supports the deportation of foreign criminals convicted for serious offences and allows foreigners convicted for criminal offences to stay in their host countries only in very limited and specific circumstances.

II. Background: Article 8 of the ECHR and its use by foreign criminals to avoid deportation from UK

This Article has been used with great success by foreigners convicted for a broad range of offences to avoid deportation from the UK. According to the figures released by the Home Office in January 2014, between April 2008 and March 2013, Article 8 was used by convicted foreign criminals to avoid deportation in 53.7% of the successful appeals against deportation. Of the 1,418 cases where the foreign criminals effectively avoided deportation relying Article 8, three were convicted for attempted murder, five for attempted rape, two for murder, nineteen for rape, three for death caused by dangerous driving and five for manslaughter, among other offences.

These figures are not just shocking but also surprising because Article 8 appears to be a “magic” argument used by foreign criminals to avoid deportation from the UK after serving their sentence.
III. Case studies: The case-law of the European Court of Human Rights to decide whether or not Article 8 has been violated by a deportation order issued against a foreign criminal

The case-law developed and constantly reaffirmed by the Strasbourg Court supports the deportation of dangerous criminals.

**Case 1. The strict criteria set out by the Strasbourg Court in deportation cases**

The Court has developed an exhaustive list of the circumstances which must be assessed by the national judges when deciding whether or not the right to a private and family life of a foreign criminal has been violated by a deportation order issued against him. The UK judges should know these criteria as they were clearly summarised in 2012, in the case *Balogun v. the United Kingdom*.

The list set out by the Strasbourg judges encompasses ten specific circumstances. Among them: the seriousness of the offence committed; the time the foreigner spent in the country willing to expel him; the family situation of the foreigner (is the foreigner married, if so, for how long, and any other circumstances relevant to prove the existence of a private and family life); whether the spouse will face serious difficulties if he or she has to follow his or her deported partner; the best interest and well-being of the children and the solidity of social, cultural and family ties with the country of destination and with the country willing to expel the foreign criminal.

According to this interpretation, the right to a private and family life is not absolute and its interpretation cannot be seen as a blank cheque for national judges in charge of applying the provisions of the ECHR in cases of deportation of foreign criminals. Conversely, their margin of interpretation left to their appreciation is significantly reduced and framed by the strict criteria set out by the European Court of Human Rights.

**Case 2. Bagolun v. The United Kingdom: the deportation of a foreigner convicted of repeated drug related offence does not violate Article 8.**

In the case of *Balogun v. the United Kingdom*, the Court found that the deportation of a Nigerian national would not amount to a violation of Article 8, due to his “history of repeated, drugs-related offending and the fact that the majority of his offending was committed when he was an adult.” This finding was made despite the fact Mr Balogun’s “deportation to Nigeria will have a very serious impact on his private life” as he arrived in the UK at the age and that “his social and cultural ties to his host country [were] undoubtedly stronger than those to Nigeria, given his length of residence in the United Kingdom, the fact that he has both studied and worked there and his relationship, now of several years’ duration, with his girlfriend.”

**Case 3. Bouchelkia v. France: The ECHR supports the deportation of very dangerous foreign criminals such as rapists**

In the case *Bouchelkia v. France*, the Court “attache[d] great importance to the nature of the offence which gave rise to the deportation order” issued against an Algerian national who came to France aged of two. The Court noted that even if Mr Bouchelkia was minor when he committed the crime of aggravated rape, this did not affect the “seriousness and gravity of such a crime.” For this reason, despite the fact that Mr Bouchelkia has spent his
whole life in France, since the age of two, did not speak or read Arabic and had longer had any close relatives in Algeria because they were living in France, the Court found that “[t]he authorities could legitimately consider that the applicant’s deportation was, at that time, necessary for the prevention of disorder or crime” and considered that there was no violation of Article 8.xiii

Case 4. The Kilic cases: The right to a private and family life does not enable murderers to avoid deportation.

In the cases Ferhat Kilicxiv and Hizir Kilic v. Denmark,xv the applicants were cousins and Turkish nationals. When they were both minor they inflicted injuries to a tourist in Denmark which resulted in the victim’s death. They both had been previously convicted for less serious offences (assaults and robberies). In the case of Ferhat, the Court did not doubt that he had strong ties with Denmark” but was “convinced that the applicant also had strong ties with Turkey.” Similar findings were drawn in the case of his cousin, Hizir. The Court then insisted on the gravity of the offence committed by the applicants which was “of a very serious nature” and stated that “taking his previous convictions into account, it does not appear unreasonable if the Danish courts concluded that the applicant displayed consistent and extreme violent propensities.” In these circumstances, the Court found that the deportation orders issued against the Kilic cousins did not amount in a violation of Article 8.


As stated on various occasions by the Strasbourg Court, “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.”xvi

In this regard, in the case Maslov v. Austria, the Court found that a deportation of a Bulgarian national, entered in Austria at the age of six and convicted by the Vienna Juvenile Court on twenty-two counts of aggravated gang burglary, attempted aggravated gang burglary to eighteen months’ imprisonmentxvii violated Article 8. For the Court “a decisive feature” was the fact that he committed the offences “with one exception, their non-violent nature” when still minor.xviii

In the case Beldjoudi v France of 1992,xix the Court found the deportation on an Algerian citizen who had been sentenced five times for different offences for a total of more than eleven years of imprisonmentxx violated his right to a private and family life. The Court relied on very specific circumstances, namely: the fact that until 1963, Mr Beldjoudi was a French citizen and has spent his whole life in France, did not speak Arabic and had no tie with Algeria except his nationality and was married since over 20 years to a French woman. In the Court’s opinion, the deportation order might “imperil the unity or even the very existence of the marriage” and therefore, violates Article 8 of the ECHR.xxx

In the case Samsonnikov v. Estonia,xxi the European Court of Human Rights found that the deportation to Russia of a well settled migrant did not violate Article 8, despite the fact that he had strong ties with Estonia. Mr Samsonnikov, was born and settled in Estonia with his relatives and partner. Later, he was convicted in Estonia to more than three years’
imprisonment for hooliganism and theft and convicted in Sweden to two years and four months’ imprisonment for theft. The Court highlighted the fact that Mr Samsonnikov spoke Russian as his mother tongue, had applied and had been granted Russian citizenship when he never applied for Estonian citizenship and that Russia is geographically close to Estonia. Due to these circumstances and the fact he had been convicted for criminal offences on four occasions, twice for offences involving violence and once for an offence related to narcotic drugs, the Court estimated that Mr Samsonnikov “did not face insurmountable difficulties in settling in Russia” and that the deportation order did not infringe his right to a private and family life.

**Conclusion:** If foreign criminals often manage to avoid deportation, it is not due to the human rights standards set out by the European Court of Human Rights regarding Article 8 of the ECHR.

The analysis of the case-law of the European Court of Human Rights on Article 8 and the deportation of foreign criminals demonstrated that the Court has set out very strict criteria to determine whether or not the issuance of a deportation order against a foreign criminal violates Article 8. According to the application of these criteria, a great significance is given to the nature and seriousness of the offence committed by the foreigner. The Court had always supported the deportation of dangerous criminals, due to the violence or extreme gravity of their crimes. The case-law of the Strasbourg Court does support the deportation of foreign criminals and UK judges should know these criteria and case-law as they were summarised recently in the case of *Balogun v. the United Kingdom*.

If dangerous foreign criminals are allowed to walk freely in the streets of the UK, the right to a private and family life enshrined in the Article 8 as interpreted by the European Court of Human Rights cannot be blamed. The responsibility lies with the UK judges who are not applying the criteria and the case-law set out by the Strasbourg Court. The solution to the deportation of foreign criminals regarding does not reside in the withdrawing from the ECHR or the repealing of the Human Rights Act. In fact, the contrary applies: in order to solve the problem the UK judges in charge of applying the provision of the ECHR should follow scrupulously the case-law developed by the Strasbourg judges. In this sense, European Human Rights are more a protection for the UK citizens against foreign criminals than a threat. Article 8 of the ECHR exhibits a balance between the right of every individual to a private and family life and the right of States to protect public order and prevent crime.
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."


ii Recently, Theresa May, insisted that, in order to deport dangerous foreign criminals, Britain must pull out of the ECHR. See The Daily Mail, *We must pull out of Euro Human Rights rules, May tells the PM: it’s the only way we can get rid of foreign criminals, she says*, 11 August 2014. Two of the Government’s biggest defenders of the court and convention – former Attorney General Dominic Grieve and veteran Cabinet minister Kenneth Clarke – were sacked in the Prime Minister’s reshuffle of mid-July this summer. See The Guardian, *Ken Clarke resigns from cabinet with parting warning to Cameron over EU*, 14 July 2014 and The Guardian, *Dominic Grieve warns against UK withdrawal from human rights courts*, 15 July 2014.


iv ECHR, Fourth section, case of *Balogun v. the United Kingdom* (Application no. 60286/09), 10 April 2012.

v ECHR, Fourth section, case of *Balogun v. the United Kingdom*, par. 44 and case of *Üner v. The Netherlands*, par. 57-58. These ten criteria are: (i) the seriousness of the offence committed; (ii) the time the foreigner spent in the country willing to expel him; (iii) the time elapsed since the offence which led to the conviction was committed and the foreigner’s conduct during that period; (iv) the nationality of the people challenging the deportation; (v) the family situation of the foreign (is the foreign married, if so, for how long, and any other circumstances relevant to prove the existence of a private and family life; (vi) whether the spouse knew about the offence when he or she entered into a family relationship; (vii) whether the foreign criminal has children and if, their age- whether there are children of the marriage, and if so, their age; (viii) whether the spouse will face serious difficulties if he or she has to follow his or her deported partner; (ix) the best interests and well-being of the children (specifically, whether it will be difficult for them to follow their deported father or mother) and; (x) the solidity of social, cultural and family ties with the country of destination and with the country willing to expel the foreign criminal.

vi ECHR, Fourth section, case of *Balogun v. the United Kingdom*, op.cit.v, par.53.

vii Ibid.

viii Ibid, par. 51.

ix Ibid, par. 51.

xi Ibid, par.51
xii Ibid.

xiv ECtHR, Fifth section, Decision as to the admissibility of Application no. 20730/05, Ferhat Kilic v. Denmark, 22 January 2007.

xv ECtHR, Fifth section, Decision as to the admissibility of Application no. 20277/05, Hizir Kilic v. Denmark, 22 January 2007.

xvi ECtHR, Grand Chamber, case of Maslov v. Austria (Application no. 1638/03), 23 June 2008, par. 75. See also Bagolun v the United Kingdom, op. cit., par. 53.

xvii ECtHR, Grand Chamber, case of Maslov v. Austria, par.11.17.

xviii Ibid, par.81.

xix ECtHR, Chamber, Beldjoudi v France (Application no. 12083/86), judgement of the 26 March 1992.

xx Ibid, par.12.

xxi Ibid, par.78.

xxii ECtHR, First section, case of Samsonnikov v. Estonia (Application 52718/10), 3 July 2012.

xxiii Ibid, par. 89-90.

xxiv Ibid, par.88.